2019 IL App (2d) 170864-U
No. 2-17-0864
Order filed September 25, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellant,	)	
v.	)	No. 05-CF-535
SALVADOR RUBIO,	)	Honorable Fernando L. Engelsma,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justice Schostok concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's postconviction petition, as defense counsel was not ineffective for pursuing an all-or-nothing strategy on first-degree murder (and thus for not seeking an instruction on second-degree murder or involuntary manslaughter): counsel's strategy was not based on a misapprehension of the law, as the record showed that counsel knew that an instruction on second-degree murder was legally available and that there was no evidence that defendant acted recklessly.

¶ 2 Defendant, Salvador Rubio, was charged with knowing murder (720 ILCS 5/9-1(a)(2) (West 2004)) and felony murder (*id.* § 9-1(a)(3)).[1] In a general verdict form, the jury found defendant guilty of first-degree murder and that he had personally discharged the gun that killed Welch. The court sentenced him to 60 years' imprisonment, which consisted of a 30-year sentence plus a 30-year add-on. After defendant's conviction and sentence were affirmed on direct appeal (see *People v. Rubio*, No. 2-07-0320 (2010) (unpublished order under Illinois Supreme Court Rule 23), he petitioned *pro se* for postconviction relief, arguing that his trial attorney, Steven Lee, was ineffective for unilaterally deciding not to tender a second-degree murder instruction and verdict form. The trial court summarily dismissed the petition, defendant appealed, and this court reversed the trial court's judgment and remanded the cause for further proceedings. *People v. Rubio*, 2012 IL App (2d) 101200-U (*Rubio II*). On remand, defendant filed an amended postconviction petition, claiming that Lee was ineffective for failing to request instructions and verdict forms for second-degree murder and involuntary manslaughter. The trial court advanced defendant's petition to the third stage of postconviction proceedings, and following a hearing, the court granted defendant's petition, vacated defendant's conviction and sentence, and ordered a new trial. The State timely appeals (see Ill. S. Ct. R. 651(a) (eff. July 1, 2017); see also *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 3), arguing that the record did not support the conclusion that Lee was ineffective. For the reasons that follow, we agree, and thus we reverse.

[1] Before defendant's jury trial began, the State informed defendant that it intended to prove that he personally discharged the gun that killed the victim, Russell Welch, thus qualifying defendant for a mandatory add-on of 25 years to life. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004).

¶ 3 I. BACKGROUND

¶ 4 A. Trial

¶ 5 Before defendant's trial began, he was represented by someone other than Lee. Defendant fired that attorney, advising the court that he "[was] not happy with [that attorney] because [the attorney] wasn't doing what [defendant] wanted and [defendant] disagree[d] with [that attorney's] decisions." Subsequently, defendant retained Lee.

¶ 6 Evidence presented at trial revealed that, on Super Bowl Sunday 2005, defendant, who was 17 years old, and his teenaged friend, Zachary Sanders, were walking in the area of the Two Wheel Inn, a bar. Sanders, who had defendant's rusty old handgun in his pocket, attempted to retrieve his lighter to light a cigarette. When he did so, the lighter fell in a puddle. Sanders, who saw a lighter in an unlocked car parked at the Two Wheel Inn, rummaged through the inside of that car while defendant stood outside of it. Sanders saw loose change inside of the car and decided to take that money.

¶ 7 While Sanders was stealing the change in the car, the owner of the car, Welch, exited the bar with his girlfriend. They saw what was happening, and Welch, an adult, ran to his car. Welch jumped on Sanders and began struggling with him outside of the car. Welch then began choking Sanders, Sanders tried to remove Welch's hands from around his neck, and defendant retrieved his gun from Sanders' pocket. After Sanders freed himself from Welch, he ran away and heard a gunshot. Welch, who was shot in the chest, subsequently died.

¶ 8 Although defendant did not testify at trial, the statements he gave the police were admitted. In those statements, defendant asserted that he intervened in the fight between Sanders and Welch because he did not want Sanders to be injured. More specifically, defendant said that, as he was standing by watching Welch and Sanders, he saw Sanders trying to grab the gun, of

which Welch was aware. Once defendant joined the fight, Welch began swearing at defendant, threatening to kill him, and beating him up too. Defendant asserted that he " 'grab[bed] the gun' " because, if he did not, " '[he] would've been the one dead.' " Defendant told the police that the gun simply fired when he retrieved it from Sanders. However, he also said that he pulled the gun from Sanders' pocket, he pointed it toward Welch, and the gun fired.

¶ 9 Throughout his discussions with the police, defendant persistently maintained that he never intended to shoot Welch.

¶ 10 Although Lee and the court discussed the possibility of defendant tendering a self-defense instruction, no instruction was submitted, and Lee never sought to tender a second-degree murder or involuntary manslaughter instruction. At the conclusion of the jury instruction conference, defendant assured the court that he agreed with Lee's instructions.

¶ 11 During closing arguments, Lee, who argued that defendant was not guilty of knowing murder or felony murder, claimed that resolving the case came down to answering two questions: whether defendant purposely shot Welch and knowingly participated in the burglary. In addressing those questions, Lee conceded that, although defendant was not "faultless" or "blameless," he was not guilty of first-degree murder. Lee stressed that what defendant had done was stupid. However, he argued that "there's a difference between doing something stupid and sharing fault even when it results in somebody's death. There's a difference between that and being guilty of first-degree murder." Although Lee mentioned words like fault, blame, and stupid a few times, he repeatedly argued that the incident was an accident.

¶ 12 B. Amended Postconviction Petition

¶ 13 In his amended petition, defendant claimed that Lee was ineffective for unilaterally deciding not to tender second-degree murder and involuntary manslaughter instructions and

verdict forms. In making this argument, defendant recognized that neither instruction is available to a defendant charged with only felony murder. However, as the jury returned a general verdict form and made no finding concerning whether defendant was accountable for Sanders burglarizing Welch's car, defendant contended that the mere fact that he was charged with felony murder should not have precluded Lee from tendering either instruction. Defendant then claimed that the evidence presented would have supported a finding that Welch was the initial aggressor and that defendant shot Welch because he mistakenly believed that he needed to defend himself or Sanders (second-degree murder) or that defendant acted recklessly when the gun fired and Welch was killed (involuntary manslaughter). Attached to his petition were the affidavits of defendant's father, Salvador Rubio Sr., and defendant's sister, Rosa Salinas. They, like defendant, asserted that Lee told them that it was legally impossible to request a second-degree murder instruction in this case, as defendant did not qualify for such an instruction.

¶ 14 The State conceded that defendant was entitled to an evidentiary hearing because the issues defendant raised involved making factual findings and credibility determinations.

¶ 15 At that hearing, the trial court determined that the only issue before it with regard to the second-degree murder instruction and verdict form was whether Lee's failure to tender those constituted deficient performance. That is, the trial court concluded that this court had already decided in defendant's appeal from the summary dismissal of his petition that defendant was prejudiced by Lee's actions.

¶ 16 Defendant, his sister, his father, and Lee testified at the hearing. According to Salinas, she and her father spoke with Lee three or four times before trial. Lee gave them a verbal list of things that needed to be considered in the case. That list included felony murder, second-degree murder, self-defense, and, perhaps, involuntary manslaughter. Lee said that he was "very

confident about felony murder," and because of that charge, defendant did not qualify for the other things on the list unless things changed. Lee never explained what "unless something changes" meant, and defendant's family never asked. As defendant's case progressed, Salinas continually inquired about whether defendant was eligible for, among other things, second-degree murder and involuntary manslaughter, and Lee stated that he was not. Right before the end of the trial, defendant's family asked Lee why he was not pursuing second-degree murder. Lee again stated that "[defendant] doesn't qualify" and that "it's all or nothing." As Salinas was not a lawyer, she had no reason to question Lee's opinion.

¶ 17 Defendant's father, who testified consistently with Salinas, stated that Lee repeatedly told him that there was not much he could do given the felony-murder charge. Lee never explained to them that second-degree murder and involuntary manslaughter would apply to the knowing-murder charge. Because defendant's father knew nothing about the law, he, too, had no reason to doubt Lee.

¶ 18 Lee, who admitted that he could not remember precisely what was discussed in this case, testified that he and defendant decided to argue that Welch's death was an accident and thus defendant never intended to kill him. This approach was taken based on the statements defendant made to the police, which Lee believed presented a good argument for accident. If defendant decided to testify, which defendant was afraid to do, Lee would have presented self-defense or second-degree murder instructions, as defendant's testimony would have contradicted some of the things he told the police and bolstered those approaches. However, Lee never told defendant that if he did not testify Lee could not tender a second-degree murder instruction. In addition to a second-degree murder instruction, Lee also thought about tendering an involuntary manslaughter instruction, but he decided not to do so because he believed that grabbing the gun

out of Sanders' pocket, pulling away, and then having the gun fire was not a reckless act. That is, defendant would have had to establish that he "willfully, consciously" pointed the gun at Welch.

¶ 19 When asked why he did not pursue accident in addition to second-degree murder and involuntary manslaughter, Lee stated that he did not know, but he believed that he and defendant decided to keep the case "clean and concise" and present a "clear narrative" that this was an accident, especially because they were "deathly afraid" of the "looming backdrop of felony murder." Presenting a second-degree murder or involuntary manslaughter defense would have been, Lee believed, somewhat at odds with a theory that Welch's death was an accident, as defendant would have had to testify that, rather than the gun accidentally firing when he pulled it out of Sanders' pocket, he acted the way he did because he was afraid for his life. Lee testified that he never believed that a second-degree murder or involuntary manslaughter instruction could not be presented simply because defendant was charged with felony murder in addition to knowing murder, and Lee asserted that he did not unilaterally decide not to tender those instructions. In fact, Lee stated that he would have requested those instructions had defendant wanted Lee to do so. Lee indicated that defendant, who was "extremely agreeable" and relied on Lee's judgment, never demanded that Lee present them.

¶ 20 In addition to discussing the case with defendant, Lee also talked to defendant's family. Lee discussed with the family the felony-murder and knowing-murder charges and what defenses were available for each. During these discussions, Lee never told the family that instructions for second-degree murder and involuntary manslaughter were unavailable to defendant simply because he was charged with felony murder. Rather, Lee told them that second-degree murder

was unavailable on the felony-murder charge. That discussion was never had on the knowing-murder charge.

¶ 21 Lee admitted that, after trial, he might have admitted to another attorney, "yeah, we blew this." Lee clarified that what he meant was that what was done did not work and that he and defendant should have proceeded differently.

¶ 22 Defendant, who was not very knowledgeable about the law, testified that he remembered having three discussions with Lee about jury instructions. Those occurred before trial, during trial, and after the jury instruction conference. Defendant repeatedly asked Lee if they could raise second-degree murder, and when he did, Lee would ask him if he was going to testify. Defendant told Lee that he did not want to testify, and Lee told defendant that they could not raise second-degree murder given the felony-murder charge, but he did not go into detail why that was. Defendant did not recall Lee talking with him about both murder charges, and he could not remember any conversation they had about involuntary manslaughter, noting at one point that they never talked about that. After trial, Lee told defendant that he had made a mistake and wished that they had tendered a second-degree murder instruction. Defendant told the judge after the jury instruction conference that he was okay with the instructions because he relied on Lee's advice and expertise and was afraid to tell the judge anything else.

¶ 23 The trial court granted defendant's amended postconviction petition. In doing so, the court found defendant credible and noted that Lee admittedly "[did not] have a great recollection" of the conversations he had with defendant regarding lesser-offense instructions. The court also found that there was nothing in the record to suggest that defendant agreed with the decision not to tender such instructions. Because the conflicting statements defendant gave the police were presented to the jury and supported second-degree murder and involuntary

manslaughter instructions, in addition to the fact that Lee asked the jury to find some fault on defendant's part, the court determined that Lee's failure to tender those instructions was deficient. The court also noted that, even though this court had already decided prejudice at least as to the second-degree murder issue, and thus that finding was the law of the case, it was probable that the result of the case would have been different had counsel tendered the lesser-offense instructions. The court did not elaborate on this portion of its ruling.

¶ 24 II. ANALYSIS

¶ 25 At issue in this appeal is whether defendant's amended postconviction petition should have been granted following the evidentiary hearing. "At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. English*, 406 Ill. App. 3d 943, 951 (2010). We will not reverse a trial court's judgment at this stage that is based on fact-finding and credibility determinations unless that judgment is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. "'Manifestly erroneous means arbitrary, unreasonable and not based on the evidence.'" *People v. Ceja*, 204 Ill. 2d 332, 347 (2003) (quoting *People v. Wells*, 182 Ill. 2d 471, 481 (1998)).

¶ 26 Defendant claimed in his amended petition that Lee was ineffective for unilaterally deciding not to tender second-degree murder and involuntary manslaughter instructions and verdict forms. Analyzing whether Lee was ineffective requires this court to consider the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Under *Strickland*, a defendant who alleges that his counsel was ineffective must establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Wendt*, 283 Ill. App. 3d 947, 951 (1996).

¶ 27 Under the first prong, a defendant must prove that his counsel's performance was so inadequate that counsel failed to function as the counsel guaranteed by the sixth amendment. *People v. Nunez*, 325 Ill. App. 3d 35, 42 (2001). That is, a defendant must show that no reasonably effective attorney, when confronted with the circumstances of the defendant's trial, would have engaged in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002). In doing so, "the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Smith*, 195 Ill. 2d 179, 188 (2000). "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.*

¶ 28 Under the second prong, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v. Manning*, 241 Ill. 2d 319, 326 (2011). A "'reasonable probability'" is "defined as a showing sufficient to undermine confidence in the outcome, rendering the result unreliable or fundamentally unfair." *People v. Patterson*, 2014 IL 115102, ¶ 81 (citing *People v. Evans*, 209 Ill. 2d 194, 220 (2004)).

¶ 29 With regard to jury instructions, " '[c]ounsel's decision as to what jury instructions to tender is one of several determinations widely recognized as matters of trial strategy that are generally immune from ineffective assistance claims.'" *People v. Lemke*, 384 Ill. App. 3d 437, 450 (2008) (quoting *People v. Douglas*, 362 Ill. App. 3d 65, 75 (2005)). However, "it should be [the] defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence." *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). A lesser charge in this context means a lesser-included offense. *People v. Wilmington*, 2013 IL 112938, ¶ 48.

¶ 30 All of that said, a defendant is entitled to reasonable, not perfect, representation. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. In recognition of the variety of factors that go into determinations of trial strategy, claims of ineffective assistance of counsel must be judged on a circumstance-specific basis viewed at the time of counsel's conduct, not in hindsight. *Id.*

¶ 31 Defendant contends that he was entitled to a second-degree murder instruction, because some evidence indicated that he shot Welch to protect himself and/or Sanders. Moreover, he contends that Lee should have tendered an involuntary manslaughter instruction because he argued to the jury that defendant acted stupidly, which defendant claims can be equated with recklessness. Although we understand defendant's position, Lee's trial strategy was to present a "clean and concise" "clear narrative" to the jury that Welch was accidentally killed. Essentially, Lee decided that an "all-or-nothing" approach was better than providing the jury with options whereby it could find defendant guilty on some middle ground.

¶ 32 Courts have "repeatedly recognized that the decision to pursue an all-or-nothing defense is a 'valid trial strategy.'" *People v. Jackson*, 2018 IL App (1st) 150487, ¶ 29 (quoting *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007)). "'[T]he mere fact that an 'all-or-nothing' strategy proved unsuccessful does not mean counsel performed unreasonably and rendered ineffective assistance.' " *Id.* (quoting *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 28). Rather, "an 'all or nothing' strategy may be unreasonable only if it (1) was 'based upon counsel's misapprehension of the law' [citation] or (2) was the functional equivalent of withdrawing a lesser-included offense instruction." *Id.*

¶ 33 With these principles in mind, we turn to the facts presented here.

¶ 34 A. Second-Degree Murder Instruction and Verdict Form

¶ 35 We cannot conclude that Lee's failure to pursue second-degree murder was either (1) based on a misapprehension of the law or (2) the functional equivalent of withdrawing a lesser-included offense instruction. *Id.* First, although it is true that a defendant who is charged with felony murder in addition to knowing murder may have the jury instructed on second-degree murder if the evidence so warrants (*People v. Luckett*, 339 Ill. App. 3d 93, 97 (2003)), nothing indicated that Lee failed to tender a second-degree murder instruction and verdict form because he mistakenly believed that he could not. Rather, Lee specifically stated that he never believed that a second-degree murder instruction could not be presented simply because defendant was charged with felony murder in addition to knowing murder. Even though defendant, whom the trial court found credible, claimed that Lee did not know the law, the record supports the conclusion that Lee did. Given the exchange between Lee and the trial court about tendering a self-defense instruction, Lee obviously knew that he could ask for the jury to be instructed on defendant's justifiable use of force, which likewise is unavailable to a defendant charged only with felony murder. See *People v. Moore*, 95 Ill. 2d 404, 411 (1983). To say that Lee thus believed that defendant could ask for a second-degree murder instruction is not a great leap to make.

¶ 36 Second, we cannot conclude that Lee's decision not to pursue second-degree murder was the functional equivalent of withdrawing a lesser-included offense instruction. Not only was no second-degree murder instruction presented that Lee could have "withdrawn" during closing argument (see *People v. Shamlodhiya*, 2013 IL App (2d) 120065, ¶ 20), but it is well settled that second-degree murder is not a lesser-included offense of first-degree murder. See *Wilmington*, 2013 IL 112938, ¶ 48. Because it is not, the decision not to pursue second-degree murder can never amount to withdrawing a lesser-included offense instruction. See *People v. Edmondson*,

2018 IL App (1st) 151381, ¶ 40 ("[T]he decision to request a second-degree-murder instruction does not belong to a defendant personally, because second-degree murder is not a lesser-included offense of first-degree murder (or anything else).").

¶ 37 As a final matter, we cannot conclude that Lee was ineffective given the fact that the State charged defendant with personally discharging a firearm that caused Welch's death. Under section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)), a defendant who has committed first-degree murder will have 25 years to life added to his term of imprisonment "if, during the commission of the offense, [he] personally discharged a firearm that proximately caused *** death to another person." Although this enhancement does not apply to second-degree murder, introducing second-degree murder into defendant's trial would have brought the jury closer to finding that defendant knowingly killed Welch, as second-degree murder requires proof of first-degree murder in addition to an unreasonable belief that the use of deadly force was necessary. See 720 ILCS 5/9-2(a)(2) (West 2004). This would have eroded defendant's theory that Welch's death was the result of an accident; supported the State's case on the knowing-murder charge; and most importantly, strengthened the State's claim that defendant was subject to the sentence enhancement.

¶ 38 Having concluded that Lee did not act unreasonably in failing to tender a second-degree murder instruction, we need not consider whether defendant was prejudiced. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 39 However, we note that, when this court concluded that defendant was arguably prejudiced by Lee's failure to tender a second-degree murder instruction, we in no way were saying that defendant was in fact prejudiced. See *Rubio II*, 2012 IL App (2d) 101200-U, ¶ 32. The "arguably" standard that we found satisfied in *Rubio II* applies to claims of ineffective

assistance raised at the first stage of postconviction proceedings (*People v. DuPree*, 397 Ill. App. 3d 719, 737 (2010)), which is procedurally where defendant's case was when we made that ruling. That standard is completely inapplicable to claims of ineffective assistance raised at a third-stage evidentiary hearing. See *Hodges*, 234 Ill. 2d at 16-17. Thus, the court should not have found that a finding of prejudice was the law of the case.

¶ 40 The dissent, too, makes much of the fact that we found in *Rubio II* that Lee was *arguably* ineffective for failing to tender a second-degree murder instruction. *Rubio II*, 2012 IL App (2d) 101200-U, ¶¶ 24-25. What the dissent loses sight of is that, in *Rubio II*, we were taking defendant's claims as true and considering whether they, in light of the record, presented a mere gist of a constitutional violation. *Id.* ¶ 18. Now, unlike in *Rubio II*, we are considering whether *evidence*, and not merely defendant's allegations, support the claim that Lee was ineffective. Although the dissent seems to have lost sight of the significance of the procedural differences between *Rubio II* and the case now, we have not. The entire purpose of an evidentiary hearing is to find the truth. *People v. Gonzalez*, 2016 IL App (1st) 141660, ¶ 98. "At this stage, the circuit court must determine whether the evidence introduced demonstrates that the petitioner is, *in fact*, entitled to relief." (Emphasis added.) *People v. Domagala*, 2013 IL 113668, ¶34.

¶ 41 B. Involuntary Manslaughter Instruction and Verdict Form

¶ 42 We also cannot conclude that Lee's failure to tender an involuntary manslaughter instruction and verdict form constituted ineffective assistance of counsel, as Lee's failure to give the instruction was neither based on a misapprehension of the law nor the functional equivalent of withdrawing a lesser-included offense instruction. *Jackson*, 2018 IL App (1st) 150487, ¶ 29.

¶ 43 First, Lee did not misunderstand the law. Lee indicated that he did not believe that an involuntary manslaughter instruction was proper, because the evidence did not establish that

defendant recklessly killed Welch. "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9-3(a) (West 2004). "The difference between involuntary manslaughter and first degree murder lies in the mental state that accompanies the conduct resulting in the victim's death." *People v. Robinson*, 232 Ill. 2d 98, 105 (2008). "First degree murder may be committed either intentionally or knowingly, whereas involuntary manslaughter is committed unintentionally but recklessly." *People v. Maggio*, 2017 IL App (4th) 150287, ¶ 37. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that his acts are likely to cause death or great bodily harm to another. *People v. Castillo*, 188 Ill. 2d 536, 540-41 (1999).

¶ 44 Here, defendant acted either knowingly or unintentionally. If defendant acted knowingly, he was not entitled to an involuntary manslaughter instruction, because involuntary manslaughter requires that the victim was killed unintentionally. 720 ILCS 5/9-3(a) (West 2004). Although evidence that defendant acted unintentionally might initially suggest that defendant was entitled to an involuntary manslaughter instruction, some evidence still needed to be presented that defendant disregarded a substantial and unjustified risk of death or great bodily harm.

¶ 45 Instructive on this point is *Castillo*. There, the defendant and the victim began arguing and fighting inside of a bar. *Castillo*, 188 Ill. 2d at 538. The bar owner ordered the defendant to leave, and the defendant did, calling out to the victim to come meet him outside in the parking lot. *Id.* In the parking lot, the victim and the defendant began fighting and wrestling. *Id.* The victim's friend testified that she heard a gunshot, looked over at the men, and saw the defendant standing approximately 10 feet away from the victim. *Id.* The defendant then fled after firing

the gun at the victim again. *Id.* Another eyewitness testified that the defendant fired twice at the victim while standing 10 to 15 feet away. *Id.* at 539. In contrast, the defendant stated that he was fighting with the victim when the victim drew a gun, the victim pointed the gun at the defendant, the defendant grabbed the victim's hand, and the gun fired. *Id.* The defendant then took the gun away from the victim, the victim grabbed the defendant's shirt sleeve, and the victim pulled on the sleeve. *Id.* The gun then fired. *Id.*

¶ 46 At issue on appeal was whether the trial court erred when it refused to instruct the jury on involuntary manslaughter. *Id.* at 540. Our supreme court found no error, as there was not "some evidence" that the defendant's struggle with the victim over the gun was a reckless act. *Id.* at 541. Specifically, the court observed:

> "In order for this act to be reckless, [the] defendant must have consciously disregarded a substantial and *unjustifiable* risk that the act would cause death or great bodily harm. [Citations.] The only evidence in [the] defendant's testimony that he suggests is evidence of recklessness is that he struggled with the victim after the victim drew a gun and threatened to injure him. This testimony, however, was not evidence of recklessness, but was instead some evidence that [the] defendant acted with regard to a *justifiable* risk of injuring the victim in order to protect himself. The evidence contained in [the] defendant's own testimony thus did not warrant an involuntary manslaughter instruction." (Emphasis in original.) *Id.*

¶ 47 Here, as in *Castillo*, there was not "some evidence" that defendant committed a reckless act. Rather, according to defendant's statements, defendant grabbed the gun to prevent Welch from killing Sanders or defendant. Thus, defendant, like the defendant in *Castillo*, "acted with regard to a *justifiable* risk of injuring [Welch]." *Id.*

¶ 48 Defendant argues that *People v. Lemke*, 349 Ill. App. 3d 391 (2004), supports a different conclusion. In *Lemke*, the defendant and his stepson were wrestling because the stepson refused to "settle down." *Id.* at 393. After the fight ended, the defendant yelled for his stepson to leave. *Id.* The defendant returned to his house, retrieved a gun, went back to his stepson, and pointed the gun at his stepson. *Id.* at 393, 395. The stepson, while wielding a walking stick, yelled something undiscernible. *Id.* at 393. Then, the defendant felt a sharp pain in his hip, he fell backward, and the gun fired. *Id.* at 393. The stepson was killed. *Id.* The defendant testified that he never intended to shoot his stepson. *Id.* at 393-94. The trial court found the defendant guilty of first-degree murder, and the defendant argued on appeal that his counsel was ineffective for failing to pursue an involuntary manslaughter instruction. *Id.* at 395-96, 398. The appellate court agreed, noting:

> "In this case, the defendant's recklessness does not stem from his unsafe operation of the handgun but from his possession and directing of the weapon given the situation as he described it. The defendant testified that he had been in a series of altercations with [his stepson]. By his own testimony, the defendant took the weapon outside as a part of an ongoing dispute. *** [T]he defendant's possession of the weapon in the situation as he described it was, at least, reckless. No reasonable trier of fact could have found that the defendant possessed a less-culpable state of mind. The defendant's pointing of a handgun in the direction of [his stepson] during an altercation cannot be seen as an accident." *Id.* at 400.

¶ 49 *Lemke* is distinguishable. In *Lemke*, the defendant initially pointed the gun at his stepson and did so for no justifiable reason. Because an unjustifiable risk of death is required for involuntary manslaughter, the *Lemke* jury should have been instructed on involuntary

manslaughter. Here, however, there was no clear evidence that defendant pointed the gun at Welch intentionally. To the extent that his statements could be taken to support that inference, he maintained that he acted only to protect himself and Sanders during a violent altercation. Thus, according to defendant's statements, he did not act recklessly.

¶ 50 Second, even though involuntary manslaughter is a lesser-included offense of first-degree murder (*Robinson*, 232 Ill. 2d at 105), no involuntary manslaughter instruction was presented that Lee could have "withdrawn" during closing argument. See *Shamlodhiya*, 2013 IL App (2d) 120065, ¶ 20.

¶ 51 Of further concern is that the dissent characterizes Lee's relationship with defendant as one where Lee neither informed defendant how his case could proceed nor asked defendant how he wished to proceed. The record rebuts this characterization. Not only did we note in *Rubio II* that Lee conferred with defendant numerous times during the trial about how he wished to proceed (Rubio II, 2012 IL App (2d) 101200-U, ¶ 11), but at the evidentiary hearing, it was made clear that defendant consulted with Lee and agreed with his advice. Thus, to say that Lee, in fact, unilaterally decided what instructions to tender is completely unfounded. See *Domagala*, 2013 IL 113668, ¶34.

¶ 52 In reaching the conclusion that counsel was not ineffective for failing to tender an involuntary manslaughter instruction we note that, even though Lee argued that defendant acted stupidly and at least one court has equated acting stupidly with acting recklessly (*People v. Watkins*, 361 Ill. App. 3d 498, 500, 502 (2005)), we cannot conclude that this warranted giving the jury an involuntary manslaughter instruction. Putting aside the fact that the jury was told that it should not consider things mentioned in closing arguments that were not based on the evidence (see *People v. Desantiago*, 365 Ill. App. 3d 855, 866 (2006) ("[A] statement made during closing

arguments constituting alleged prejudice to the defendant will be cured when the trial court subsequently instructs the jury that closing arguments are not evidence and that they should disregard any argument not based on the evidence.")), Lee, by our count, mentioned the word stupid in relation to defendant only 5 times during his closing argument, which comprised 43 pages of the record.[2] When he did, he did so in the context of defendant owning a malfunctioning gun, pulling it out of Sanders' pocket, and being a generally stupid kid. In our view, given that the main premise of his argument was that Welch's death was the result of a tragic accident, Lee's comments cannot be read as urging the jury to find that defendant acted recklessly. See *Edmondson*, 2018 IL App (1st) 151381, ¶ 44 ("Arguing a defense that the jury cannot legally credit [because the applicable instruction was not given] is not a reasonable trial strategy.").

¶ 53 Because we determine that Lee did not act unreasonably in failing to ask that the court instruct the jury on involuntary manslaughter, we need not consider whether defendant was prejudiced. *Colon*, 225 Ill. 2d at 135.

¶ 54 As a final matter, however, we observe that defendant could not show prejudice, as to Lee's failure to seek an instruction on either second-degree murder or involuntary manslaughter. Although defendant might have been eligible for those instructions as to his knowing-murder charge, the fact remains that he was also charged with felony murder. And as to that charge, there is no question that Sanders was committing burglary when defendant shot and killed Welch, and defendant was not entitled to rely on self-defense, defense of others, recklessness, or accident. See *People v. Brown*, 2015 IL App (1st) 134049, ¶ 46 (felony murder "does not

[2] By our count, Lee also used similar words, like fault and blame, only six times in reference to defendant.

require a particular mental state"). Therefore, even if the jury had been instructed on second-degree murder or involuntary manslaughter, it still would have found defendant guilty of first-degree murder. That is, even if we were to determine that Lee's performance was deficient, defendant could not demonstrate prejudice.

¶ 55 The dissent points out that there is a reasonable probability that, had the jury been instructed on second-degree murder, defendant would have been convicted of second-degree murder. (*Infra*, ¶ 61). This argument would be much more convincing had the defendant been charged only with *knowing* murder. However, the dissent completely overlooks that defendant was also charged with *felony* murder, which is not even addressed in the dissent. There is no mitigation available to reduce a charge of felony murder in this case. Felony murder is first-degree murder. Thus, the instruction on second degree murder would not have averted a conviction of first-degree murder.

¶ 56 In addition, given that defendant stood by as Sanders rifled through Welch's car and that Welch was killed when he attempted to stop them, any contention that the felony-murder charge was not viable is groundless. Because the evidence supporting felony murder was strong, the State would have asked that the jury be instructed that defendant could not justify his actions as self-defense. Indeed, the State notes as much in its brief.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we reverse the judgment of the circuit court of Winnebago County.

¶ 59 Reversed.

¶ 60 JUSTICE HUTCHINSON, dissenting.

¶ 61 I disagree with the majority's determination in this case. In my view, as the trial court

determined after an evidentiary hearing, defendant's counsel was ineffective, and there is a reasonable probability that had the instructions been tendered, then the verdict would have been different.

¶ 62 I am mindful of our standard of review—manifest error. This deferential standard embodies "the understanding that the post-conviction trial judge is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a 'position of advantage in a search for the truth' which 'is infinitely superior to that of a tribunal where the sole guide is the printed record.' " *People v. Coleman*, 183 Ill. 2d 366, 384 (1998) (quoting *Johnson v. Fulkerson*, 12 Ill. 2d 69, 75, (1957)). As the majority recites, a decision may only be reversed as manifestly erroneous when it is "arbitrary, unreasonable[,] and not based on the evidence." (Citations and internal quotation marks omitted.) *Supra* ¶ 25. I am still uncertain of what precisely the majority makes of the trial court's decision in this case. I understand that they disagree with it, but *how* did the trial court err? Was its decision arbitrary or somehow whimsical? Was it unreasonable and not based on good sense? Was it somehow not based on the evidence in this case? Reasonable minds can differ, and when our standard of review is *de novo* we may have the final say. But where the standard is manifest error, deference ought to prevail. See *Coleman*, 183 Ill. 2d at 383-85.

¶ 63 As the trial court noted, attorney Lee's statements at the jury instruction conference and his testimony at the third-stage hearing exposed that he believed defendant's testimony was a prerequisite to instructing the jury on imperfect self defense. At the post-conviction hearing, Lee stated, "I did not expect we would be asking for a self-defense instruction nor a second-degree instruction based on imperfect self defense unless Salvador testified." Contrary to the majority's position, this was not an all-or-nothing defense from the outset, but something the defense "w[as]

dealing with throughout the trial on the fly"; and it was not "fully fleshed out" in light of Lee's apparent misapprehension of the law, which is what the trial court found.

¶ 64 I cannot think of a more elegant defense of the trial court's grant of postconviction relief than much of the text of this court's 2012 decision in *Rubio II*. There, we summarized the jury instruction conference as follows:

> "During trial, the court inquired, based on defense counsel's submissions, whether defense counsel was going to submit a self-defense instruction. The court asked that, if counsel was going to pursue such a defense, counsel tender a self-defense instruction the next day. Counsel advised the court that he would.
>
> The next day, when the court asked whether counsel would be submitting a self-defense instruction, counsel responded, 'I'm not going to submit any.' Counsel explained, 'There's no-I don't believe there's sufficient evidence presented at this point to justify that instruction.' The court asked whether counsel was withdrawing the defense of self-defense, and counsel replied, 'I don't know that I can withdraw it as a potential defense simply because of the fact that it would be my client's decision as to whether he testifies or not.' However, counsel asserted, 'But at this point, I would affirm to the Court I do not expect to be presenting any self-defense type of defense in this case.' The court cautioned counsel that, 'if you think there is even a shred of a possibility,' counsel should submit a self-defense instruction." *Rubio II*, 2012 IL App (2d) 101200-U, ¶¶ 8-9.

¶ 65 The trial court judge was absolutely right. The defendant is entitled to jury instructions that fully and fairly set forth the applicable law concerning the case, and even slight evidence offered by the State may justify instructing the jury on imperfect self defense and second degree murder. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Davis*, 213 Ill. 2d 459, 478

(2004); *People v. Jones*, 175 Ill.2d 126, 132 (1997); *People v. Everette*, 141 Ill. 2d 147, 156 (1990); *People v. Lockett*, 82 Ill. 2d 546, 553 (1980). But relevant here, consider what counsel said in the crucible of the moment at the jury instruction conference. He did *not* say, "I do not believe it is sound trial strategy to offer an instruction on second degree murder and imperfect self defense." Rather, he said, "I don't believe there's *sufficient evidence presented at this point* to justify that instruction." (Emphasis added.)

¶ 66 In our 2012 decision, we determined that Lee's statements at the jury instruction conference indicated (at least arguably) both professional negligence and prejudice. See *Rubio II*, 2012 IL App (2d) 101200-U, ¶¶ 24-25, 32-33. I believe our statement concerning prejudice, however, was particularly detailed and revealing. We said:

> "With these principles in mind and in light of those factors delineated above, we determine that it is at least arguable that defendant was prejudiced when a second-degree murder instruction was not tendered to the jury. That is, we determine that, even though some of the evidence indicated that Welch was shot accidentally, there was slight evidence that supported the giving of a second-degree murder instruction and arguably a reasonable probability that defendant would have been convicted of that offense.
>
> Specifically, the evidence revealed that defendant, a teenager, and his teenaged friend were outside a bar on the night of the Super Bowl. Because Sanders wanted to light a cigarette and he did not have a functioning lighter, he decided to enter Welch's car and use a lighter he saw in that car. As Sanders was in Welch's car, he began taking change he found in the car. Welch, an adult whom neither Sanders nor defendant knew, came running toward his car when he saw that someone was in it. Once at his car, Welch began fighting with Sanders. During that fight, Welch pulled Sanders' shirts off, beat

> Sanders, and attempted to choke Sanders. Defendant intervened, and Welch began fighting with defendant. As with Sanders, Welch attempted to choke defendant, and he punched defendant in the face and jaw. Welch also swore at defendant and, possibly, threatened to kill defendant. Defendant retrieved his gun from Sanders, wanting to get the gun before Welch did because defendant was afraid that Welch would use the gun to kill him." *Rubio II*, 2012 IL App (2d) 101200-U, ¶¶ 32-33

¶ 67 Were we to remove the word "arguable" from the preceding paragraphs, nothing would change. See *supra* ¶ 39. What we said in 2012 was an accurate recitation of *the facts* of this case. Those facts demanded that effective counsel tender instructions on imperfect self defense and second degree murder. And, had counsel done so, I believe there is a reasonable probability the outcome of defendant's trial would have been different.

¶ 68 I see no need to address the question of whether the jury also should have been instructed on involuntary manslaughter, but I would note that there is authority that would have permitted such an instruction, even if it was inconsistent with other evidence. See *Everette*, 141 Ill. 2d at 156-57 ("a homicide defendant is entitled to an instruction on self-defense where there is some evidence in the record which, if believed by a jury, would support the defense, even where the defendant testifies he accidentally killed the victim"). To me, however, the issue of counsel's ineffectiveness on second degree murder alone ably justifies the trial court's decision to grant defendant a new trial.

¶ 69 I close with an observation made by the trial court. I, too, "think it is important to note that the defendant 17 at the time he was charged with this offense [and] 19 at the time of trial." I, too "think it's important to note Attorney Lee's testimony that [defendant] [was] very agreeable and relied heavily on [the] advice [of] counsel." Here, the record supports the trial court's

determination that Lee led defendant horribly astray. Lee unilaterally impeded the jury's consideration of what may well have been a viable claim of self defense, whether the defendant's belief was mistaken or otherwise. Lee repeatedly called the defendant "stupid" and "not blameless," but he left the jury with no real option to meaningfully consider defendant's potential lesser culpability. I don't believe Lee was ineffective merely because his strategy was unsuccessful (*supra* ¶ 32), I believe he was ineffective because his misapprehension of the law left defendant with no real strategy at all.

¶ 70 For these reasons, I respectfully dissent.