2017 IL App (1st) 14-1204-U

THIRD DIVISION
July 26, 2017

No. 1-14-1204

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
	)	
STEPHEN MILLER,	)	No. 11 CR 4654 (03)
	)	
Defendant-Appellant.	)	The Honorable
	)	Joseph Hynes,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justice Cobbs concurred in the judgment.
Justice Lavin specially concurred in the judgment.

ORDER

¶ 1 Following a jury trial in the circuit court of Cook County, Stephen Miller, was found guilty of first degree murder, unlawful vehicular invasion and aggravated battery for his involvement in the attack on two victims, Adam Abdallah (Abdallah) and Jawdat Rahman (Rahman), at a Bridgeview gas station on June 23, 2010. The defendant was sentenced to consecutive terms of 20 years' imprisonment for murder and 4 years' imprisonment for unlawful vehicular invasion, and a concurrent term of 3 years' imprisonment for aggravated battery. On appeal, the defendant

first argues that his statutory right to a speedy trial was violated when the State reindicted him seven months after he was taken into custody and supplemented the original knowing murder charge with charges of vehicular invasion and felony murder which stemmed from the same act. In the alternative, the defendant contends that the State failed to prove him guilty of murder and argues that he should have been found guilty only of involuntary manslaughter. In addition, the defendant contends that he was denied his constitutional right to effective representation when his counsel: (1) elicited damaging testimony during cross-examination; (2) failed to argue for the lesser-included offense of involuntary manslaughter; and (3) did not request, or even know that he could request, a separate verdict form for the different forms of first degree murder with which the defendant was charged. In addition, the defendant contends, and the State concedes, that his mittimus must be corrected to accurately list the offense of aggravated battery for which he was convicted under section 12-4(b)(8) (720 ILCS 5/12-4(b)(8) (West 2010)) as an aggravated battery "committed on a public way." For the reasons that follow, we affirm in part, vacate in part, and order the mittimus corrected.

¶ 2 I. BACKGROUND

¶ 3 On July 7, 2010, together with two codefendants (Marchello Cappelletti (Cappelletti) and Matthew Doolan (Doolan)), the defendant was charged in case No. 10 CR 12462 with: (1) knowing first degree murder of the victim, Abdallah, in that he "beat" the victim "about the body" knowing that such act created a strong probability of death or great bodily harm (720 ILCS 5/9-1(a)(2) (West 2010)); and (2) aggravated battery of the victim, Rahman (720 ILCS 5/12-4(a) (West 2010)).

¶ 4 On March 22, 2011, while the defendant was in custody, the State reindicted him together

with the two codefendants (Cappelletti and Doolan) under case No. 11 CR 4564. Under this new ten-count indictment, the defendant was charged with: (1) intentional first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) (count I); (2) knowing first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) (count II); and (3) felony murder of the victim, Abdallah (720 ILCS 5/9-1(a)(3) (West 2010)). The two felony murder charges were predicated on the defendant's commission of the forcible felonies of vehicular invasion (count III) and burglary (count IV). Just as the intentional and knowing murder counts, the felony murder count charged the defendant with "beat[ing]" Abdallah "about the body," and killing him during the commission of the two forcible felonies. In the 2011 indictment, the defendant was also separately charged with the two underlying forcible felonies, namely vehicular invasion (720 ILCS 12-11.1 (West 2010)) (count V), and burglary (720 ILCS 5/19-1(a) (West 2010) (count VI). The vehicular invasion count charged the defendant with "knowingly, by force" entering and reaching into the interior of the car occupied by Abdallah, with the intent to commit "aggravated battery." The 2011 indictment also charged the defendant with four counts of aggravated battery against the victim, Rahman (720 ILCS 12-4(a), (b)(1), (b)(8), (West 2010)) (counts VII-X).

¶ 5 On August 8, 2011, codefendant Cappelletti entered a guilty plea to vehicular invasion. Accordingly, on October 21, 2013, the State proceeded with a joint jury trial only against the defendant and Doolan.[1] On the first day of trial, the State indicated that it was proceeding against the defendant only on counts I (intentional murder), II (knowing murder), III (felony murder predicated on vehicular invasion), V (vehicular invasion), and IX (aggravated battery on

[1] We note that codefendant Doolan's conviction has already been affirmed on appeal. See *People v. Doolan*, 2016 IL App (1st) 141780.

a public way as to Rahman) of the 2011 charges (case No. 11 CR 4564) and dismissing all of the remaining charges, including all of the 2010 charges (case No. 10 CR 12462).

¶ 6 The following relevant evidence was adduced at trial. The parties first stipulated that if called to testify, Sue England (England) would state that she is the manger of the Shell gas station located at 8700 South Harlem Avenue, in Bridgeview, Illinois (hereinafter the Shell gas station), and that the gas station is equipped with a video surveillance system. England would further testify that the video surveillance system is comprised of several video cameras located inside and outside the store, with audio available inside the store near the cash register, but not available on the outside cameras. If called to testify, England would further state that the video system is motion activated, but that the audio system records prior to motion activation so that the audio and video portions of the videotapes are not synchronized. In addition, the parties stipulated that on June 23, 2010, the surveillance system was turned on and working properly. England would state that after being contacted by the police, she downloaded a copy of the video and audio captured by the store's surveillance system for that date and gave it to the police. The parties further stipulated that if shown, England would identify People's Exhibit No. 1 as the video and audio she gave to the police and which accurately and fairly depicts the incident that occurred at the gas station on that night.

¶ 7 The parties also stipulated that People's Exhibit No. 2 contains a compilation of relevant video and audio segments taken from People's Exhibit No. 1, with no alterations or deletions on either the video or audio segments.

¶ 8 Both exhibits were entered as evidence into the record. The identity of the individuals in the

surveillance footage was established by the testimony of numerous State's witnesses at trial and is not in dispute in this appeal. Accordingly, we summarize what is depicted by the footage in People's Exhibit No. 2.

¶ 9 The footage shows four individuals (the defendant, Cappelletti, Doolan, and James Conroyd (Conroyd)) entering the Shell gas station at 12:02 a.m. Cappelletti, wearing a white shirt, enters first and is followed by Doolan, who is overweight and wearing a baby-blue shirt. The defendant, who is wearing a black shirt and blue jeans is the last to enter the gas station. The video depicts the defendant and Doolan gesticulating out the door of the gas station, as well as inside the store, while the audio includes comments, such as "I think they're immigrants;" and "They don't even know what's going on." At 12:04 a.m., the video depicts a black Nissan Maxima pulling into the gas station with three individuals inside (Rahman, driving the car, Abdallah, sitting in the front passenger seat and Ali Dajani (Dajani), seated directly behind Abdallah).

¶ 10 Rahman exits the car to pump gas, while Abdallah and Dajani remain inside the car. At 12:05 a.m., the video shows the defendant and Doolan near the Nissan Maxima, with the defendant gesticulating and yelling at the car's occupants. Abdallah opens the front passenger door a few times, and once even puts his foot out of the door, but then closes it again. Meanwhile, Cappelletti, near the front of the car, prepares to hurl a garbage can at the car, while Rahman who up until this time has been pumping gas on the other side, walks towards him to stop him. As Cappelletti hurls the trash can towards the car, the defendant opens the front passenger door and kicks inside towards Abdallah. It is unclear from the video whether he makes contact with Abdallah. Abdallah jumps out of the car, while the defendant backs up, followed by Abdallah. The video depicts Doolan squaring his body toward Abdallah and then

punching him in the face. The video then shows Abdallah reach for the defendant, who is running off camera to the right, before they both disappear from view.

¶ 11 The footage depicts Cappelletti and Rahman struggling on the ground, and Dajani exiting the car to help Rahman by pulling at Cappelletti's shirt. While this altercation is transpiring, the next segment of the compiled video surveillance shows another camera capturing Abdallah jumping on a parked golden van and then collapsing to the ground. The same camera shows the defendant running towards the golden van, taking something from it and then returning to the Nissan Maxima where Rahman is now standing next to Dajani, Doolan and Cappelletti. The defendant is seen hitting Rahman with something, and Rahman falling to the ground. The footage also shows the golden van driving away from the gas station.

¶ 12 At trial, the State played portions of Exhibit No. 2 during the testimony of all of its eyewitnesses, asking them to identify what was happening in the video surveillance footage. James Conroyd was the first to testify for the State.

¶ 13 Conroyd, a former member of the Ambrose gang, testified that at about 11 p.m. on June 22, 2010, he was having a few beers at Magnotti's in Burbank, with several Ambrose gang members, including the defendant, Doolan (whom he knew as "Fat Guy"), and Cappelletti (whom he knew as "Macho"). Conroyd stated that as they were leaving Magnotti's to go to a party, they were stopped by Burbank Police Officer Guerra. After a conversation with the officer, they left Burbank in Doolan's golden van.

¶ 14 According to Conroyd, on their way to the party, Doolan cut his hand trying to open a beer bottle, and because he was bleeding they stopped at the Shell gas station. According to Conroyd, all four men exited the van and went into the gas station. Conroyd grabbed a bag of chips and then went back into the van. He testified that he did not see much of what happened afterwards,

except for the victim, Abdallah, jumping on the van and then falling down. He also saw the defendant running to the van and grabbing a bottle before running off again. Conroyd was shown the video surveillance footage of the incident and identified the defendant and Doolan in the frames of the video, including the scenes depicting the altercation.

¶ 15 On cross-examination, Conroyd stated that while he was sitting in the van, he watched the victim, Abdallah, chasing the defendant and screaming "A.K." (*i.e.*, "Ambrose Killer") before jumping on the golden van. Conroyd further acknowledged that he never saw the defendant hit Abdallah.

¶ 16 On cross-examination, Conroyd also averred that before getting into the van, he saw another individual on the other side of the gas station, cleaning his rims, who was saying "S.D." to his friends. According to Conroyd, "S.D." is a name of another gang, "Satan Disciples."

¶ 17 The Shell gas station night shift cashier, Robert Rezzardi (Rezzardi) next testified that while working behind the register inside the mini-mart, at around midnight on June 22, 2010, he saw a gold Astrovan pull into the gas station and four men exit the van, one with a cut on his hand. Rezzardi identified the defendant and Doolan as two of those individuals. He testified that both were rude and disrespectful to the people inside the store and began flashing gang signs and yelling gang slurs.

¶ 18 Rezzardi testified that soon thereafter a black car pulled into the gas station, and he saw one of the men from the golden van walk around the building and yell at the passenger in the front seat of the black car. Rezzardi could not hear what was being said, but when he saw a trash can being thrown at the car, he called the police. Once the golden van left, Rezzardi went outside and saw a man lying on the ground right next to the gas station wheezing, and another man lying on the ground next to the car holding his bloody face.

¶ 19 Rezzardi was shown the surveillance video of the incident and identified the defendant and Doolan in several frames of the video, including the scenes depicting the altercation. He admitted, however, that he did not see the full altercation because of his position behind the cash register inside the store. He did state, however, that he personally saw the defendant "kick inside" the black car.

¶ 20 On cross-examination, Rezzardi testified that he never saw the defendant "hit nobody," just "kind of like kick at him." He also acknowledged that when he was interviewed by the police on June 23, 2010, he never told them that he saw the defendant kick anyone.

¶ 21 Dajani next testified that just as him, neither of his friends, Abdallah and Rahman, were ever in a gang. Dajani testified that at around midnight on June 22, 2010, Rahman drove them in his Nissan Maxima to the Shell gas station. Rahman was driving, Abdallah was sitting in the passenger seat, and Dajani was sitting right behind Abdallah. As they approached the station, Dajani observed a golden van parked on the west side of the gas station, and three men, whom he had never seen before, standing in front of the van. Dajani identified those three individuals as the defendant, Doolan, and Cappelletti. As Rahman pulled into the middle pump, Dajani observed another car at the first pump, where a man was cleaning his tire rims.

¶ 22 Dajani stated that while Rahman exited the car to pump gas, he and Abdallah remained seated inside the car. Neither Dajani nor his friends said anything to the defendant or Doolan, nor flashed any gang signs at them. Nonetheless, according to Dajani, the defendant and Doolan approached their car, and started flashing gang signs at them and yelling "Ambrose." As the defendant continued to scream at them, Dajani heard Abdallah respond, "Go f*** yourself," and "leave us alone." Dajani testified that he then watched the defendant approach the car, "rip open" the front passenger door and kick Abdallah in his upper chest and face area. Once the

defendant kicked Abdallah, Abdallah said, "Mother f*****," and exited the car in pursuit of the defendant, but Doolan punched him in the face, and Abdallah stumbled. Dajani observed the defendant going around the gas station, and Abdallah following him, before they disappeared from his view.

¶ 23 Dajani stated that at that point he noticed that Rahman was also involved in a fight. He had not been paying attention to Rahman before, but now he realized what was happening, and exited the car to help his friend. Once out of the car, Dajani saw Rahman on the ground fighting with Cappelletti, who was punching him. Rahman was yelling, "Let me go." Dajani testified that at that moment, Doolan who was screaming "Ambrose," approached him as if he was going to attack him, so Dajani put himself "in self-defense mode," grabbed Cappelletti by the shirt and tried to pull him off Rahman to break up the fight. Dajani stated that at that point, Doolan punched Rahman in the back of the head. Once Rahman was standing up again, Doolan looked at Dajani and said "two on two," and Dajani felt that a fight was imminent and that he had no choice but to fight.

¶ 24 According to Dajani, at that moment, the defendant appeared with beer bottles from the other side of the gas station. Dajani heard Rahman being hit with something and turned to see Rahman falling to the ground. He then watched the defendant throw a second beer bottle onto Rahman's head, yelling "Ambrose." The defendant grabbed plastic bottles of windshield washer fluid and threw them at Dajani, before running to the other side of the gas station. Dajani stated that as soon as the defendant left he went to help Rahman, and then Abdallah.

¶ 25 On cross-examination, Dajani acknowledged that the surveillance video shows that Abdallah

opened the front passenger car door twice, before the defendant opened that same door and kicked inside. He also acknowledged that the video shows that the second time Abdallah opened the door, the defendant was walking away from the vehicle in which Abdallah was sitting.

¶ 26 On cross-examination, Dajani also acknowledged that initially, codefendant Doolan attempted to help him break up the fight between Rahman and Cappelletti.

¶ 27 Rahman next testified consistently with Dajani. He explained that he drove Abdallah and Dajani from Dajani's house to the gas station to buy cigarettes and gas. Once there, Rahman exited his car to pump the gas. He testified that he noticed the golden van parked on the west side of the gas station but neither he nor his friends said anything or flashed any gang signs at the men in front of that van. Rahman was busy using his credit card on the pump when he heard loud voices behind him getting closer and yelling "Ambrose" and "Ambrose love." Rahman did not think the yelling had anything to do with him or his friends, so he continued to pump gas, until he observed an individual that he later identified as Cappelletti walk in front of his car towards the trash can. Rahman noticed two other men, whom he later identified as the defendant and Doolan standing on the other side of his car, yelling "Ambrose." Rahman turned to Cappelletti and said "we are not with that sh**." He then watched Cappelletti pick up the trash can, put it over his head and approach the car, shouting "Ambrose." Rahman believed he and his friends were about to be attacked so he blocked Cappelletti from throwing the trash can onto his car.

¶ 28 Rahman testified that at that point he heard Abdallah say, "You mother f******, get the f*** out of here." Rahman stated that he did not see Abdallah because he was already fighting with Cappelletti, who had attacked and hit him in the face. Rahman averred that he and Cappelletti ended up on the ground fighting, but that soon he felt someone pulling him away

from the ground, before being punched in the head. Rahman could not see who pulled him away from the fight or who punched him in the head. He stated that once he was standing again, he saw Dajani next to him and Doolan and Cappelletti in front. Doolan said "two on two," and Dajani said "Okay, let's go." Rahman testified that while all of this was happening he did not want to fight, but felt that he had to. As Rahman was standing face to face with Doolan and Cappelletti he felt someone attack him from behind by striking him on the head. Rahman did not see who attacked him and did not know he was hit with a glass bottle, but just collapsed to the ground next to his car. Rahman could not feel anything from his neck down and kept blacking out. As he was lying on the ground, however, he saw the defendant approach him and hit him with a bottle over the head. Rahman lost consciousness and did not wake up until he was in the hospital.

¶ 29 On cross-examination, Rahman admitted that when he spoke to police officers at the hospital in the early morning hours of June 23, 2010, he told them that he had previously seen the gold Chevrolet Astrovan belonging to the offenders in Burbank, and that the occupants were gang members who had flashed gang signs at him. On redirect, Rahman explained, however, that as he drove into the gas station he could not be sure it was the same van or one that just looked like the one he had seen before.

¶ 30 Bridgeview police officer Edwin Sullivan (Officer Sullivan) next testified that at about 12:05 a.m. on June 23, 2010, he responded to a call regarding a fight in progress at the Shell gas station. When he arrived at the scene, the fight was over and there was no van at the gas station. Officer Sullivan testified that he found Abdallah lying on the ground on the west side of the gas station just beyond the doorway to the gas station mini-mart. Abdallah was "not breathing," so the officer immediately called for an ambulance. Officer Sullivan then proceeded to the east side

of the gas station where he saw Rahman lying on the ground with his head underneath a black vehicle, surrounded by blood and glass shards. Because Rahman was "bleeding heavily from the mouth," Officer Sullivan immediately called for a second ambulance.

¶ 31 Once the two victims were transported in the ambulances, Officer Sullivan began speaking to eyewitnesses on the scene. He then drove three of those eyewitnesses to the police station, including Dajani, Michael Lapacinskas and James Andrysiak. The last two witnesses died before trial, and their death certificates were introduced into the record at trial.

¶ 32 Burbank police officer and gang expert Roberto Guerra (Officer Guerra) next testified that he is familiar with the Ambrose gang, its identifying colors (baby blue and black), its rules, history, hierarchy and symbols. He stated that he had gathered intelligence about the Ambrose gang in Burbank and knew that it included men and women, ranging in age from "ten to twenty to thirty-five, even older" most of whom were white. Officer Guerra testified that he knew Doolan belonged to the Ambrose gang based on their prior interaction when Doolan identified his gang affiliation. He also knew that Doolan drove a golden Chevrolet Astrovan.

¶ 33 Officer Guerra testified that at around 10:30 or 10:45 p.m., on June 22, 2010, he was on duty patrolling the neighborhood in his vehicle when he encountered Doolan and the defendant near Doolan's van. The officer told them to leave Burbank and watched as they left in Doolan's van. A little after midnight, Officer Guerra received a call of a fight in progress at the Shell gas station. After learning the partial license plate of the vehicle used by the offenders, Officer Guerra recognized it as Doolan's van and proceeded to the gas station to assist the Bridgeview police. Once there, he provided the Bridgeview police with a photograph of Doolan's van. At that time, Officer Guerra was also able to watch the gas station's surveillance video and identified the defendant and Doolan from the video. At trial, he was asked to watch the video

again and comment on what was happening, explaining that Doolan and the defendant were throwing gang signs, both while inside the gas station store and later at the three men in the black Nissan Maxima right before the altercation. The officer further stated that he could not see anyone in the Nissan Maxima flashing any gang signs.

¶ 34 Officer Guerra was also shown several photographs, which the parties had previously stipulated were photographs of the defendant's tattoos and testified that they were Ambrose gang insignia.

¶ 35 Bridgeview firefighter paramedic, Mark Toczek (Toczek) next testified that at about 12:05 a.m. on June 23, 2010, he responded to call for an ambulance at the Shell gas station. A police officer directed him to Abdallah, who was unresponsive and lying face down on the ground near the entrance to the gas station. Abdallah's skin color was cyanotic (bluish), which meant he was not getting enough oxygen, and he had no pulse. Using an EKG monitor, Toczek determined that Abdallah's heart was in a "V Fib Rhythm," which means that it was "shaking but not pumping." Together with his partner, Toczek shocked Abdallah's heart several times at the scene and in the ambulance, but Abdallah never regained consciousness.

¶ 36 Bridgeview Fire Department paramedic Anthony Oakley (Oakley) testified that at about 12:05 a.m. on June 23, 2010, he responded to a call about a battery victim at the Shell gas station. Once there, an officer directed him to Rahman's car, next to the gas pumps. Oakley stated that Rahman was lying on the ground, his head and the top of his torso face down under a black car, with a pool of blood nearby. Oakley noticed abrasions on Rahman's face and "a good amount of blood" on his head. With the help of his partner, Oakley put Rahman into the ambulance and drove him to the hospital. Rahman was breathing and in stable condition, but did not regain consciousness until they arrived at the hospital, where his injuries were treated.

¶ 37 Former deputy chief Cook County medical examiner and expert forensic pathologist Dr. Mitra Kalelkar (Dr. Kalelkar) next testified that she conducted the autopsy on the victim, Abdallah. She opined that Abdallah, who had an abnormally enlarged and hypertrophied heart, had died as a result of "stress due to altercation," and that the manner of death was homicide. Dr. Kalelkar further stated that a factor that significantly contributed to Abdallah's death was the multiple blunt force trauma suffered to his face. She explained that Abdallah had lacerations on his chin, lips and right knee, which were indicative of "blunt force trauma" but admitted that she did not believe any of those injuries alone could have caused his death. She did opine, however, that those injuries would have caused him to be stressed out and for his heart to go out of rhythm.

¶ 38 On cross-examination, Dr. Kalelkar admitted that Abdallah's enlarged heart was "a preexisting condition." She also acknowledged that the blunt force trauma injuries on Abdallah's body could and may have been caused by the "mass" of his body hitting the ground when his heart went into cardiac arrest. Nonetheless, Dr. Kalelkar asserted that the injury to Abdallah's lips was more likely to have resulted from a direct punch.

¶ 39 After the State rested its case-in-chief, the defense called five witnesses to the stand. Lyons police detective Richard Brown (Detective Brown) first testified that at about 4 a.m. on June 23, 2010, as part of the investigation into the Shell gas station incident, he interviewed the station attendant, Rezzardi, at the Bridgeview police station. Detective Brown testified that during that interview, Rezzardi told him that the man who was cleaning his tire rims on his silver car at the gas station "went to help the guys in the black car once everyone began fighting."

¶ 40 Hickory Hills police detective Adam Gulczynski (Detective Gulczynski) testified that at about 2 a.m. on June 23, 2010, he interviewed Dajani at the Bridgeview police station. Detective Gulczynski acknowledged that during that interview, Dajani told him that the individual that

kicked Abdallah wore a white or baby blue T-shirt, rather than the black one worn by the defendant, as is depicted in the surveillance video.

¶ 41 Palos Park police officer Barry Churin (Officer Churin) next testified that at about 2:15 a.m. on June 23, 2010, he interviewed Rahman in the emergency room at Christ Hospital. Officer Churin acknowledged that Rahman told him that prior to the incident he had observed the golden Astrovan several times in the Burbank area in which the occupants were gang members throwing gang sings. The officer also admitted Rahman told him that when he drove into the gas station, the offenders appeared to start to leave the station, but then looked at him and walked towards him and his vehicle.

¶ 42 Cook County Sherriff's Police evidence technician Thomas Shader, next testified that he observed Dr. Kalelkar conduct Abdallah's autopsy, and that prior to that autopsy Dr. Kalelkar informed him that the victim had suffered a broken nose.

¶ 43 Defense expert forensic pathologist, Dr. Michael Wolfson Kaufman (Dr. Kaufman) next testified that after reviewing Dr. Kalelkar's protocol from Abdallah's autopsy and the surveillance videos of the incident, he prepared his own report detailing his opinions in the case. Dr. Kaufman agreed with Dr. Kalelkar that Abdallah died from a fatal heart rhythm triggered by the stress of the altercation, given Abdallah's abnormally large heart. He further opined that any injuries that Abdallah sustained to his face or knee did not cause his death. Specifically, he testified that none of the injuries to his face caused any broken of fractured bones.

¶ 44 After the defense rested, the parties proceeded with a jury instruction conference, during which, *inter alia*, the State requested a second degree murder instruction over the objection of the defendant. After significant argument by all parties, the court denied the State's request for a second degree murder instruction. The defendant requested that the jury be instructed on the

lesser included offense of involuntary manslaughter, and aggravated battery as an additional lesser-included offense of murder. The trial court granted the defendant's request as to involuntary manslaughter but refused to instruct the jury on aggravated battery.

¶ 45 In closing argument, the State argued that the jury should find that the defendants "intended to kill or do great bodily harm" because the acts of kicking or punching were "intentional acts" or "deliberate action" and there was "nothing reckless about them." Alternatively, the State argued that the jury should find the defendants guilty of felony murder because they committed a vehicular invasion, "the result of which was the death of Abdallah." The State further argued that to find the defendants guilty of felony murder, "it does not mean it has to be a direct foreseeable consequence that [Abdallah] died."

¶ 46 Defense counsel responded by arguing that the State's evidence was insufficient to prove that the defendant kicked into the vehicle. In addition, defense counsel argued that the evidence failed to show that the defendant had the intent to cause great bodily harm or death to Abdallah. Counsel, however, made no argument about why the jury should find the defendant guilty only of the lesser included offense of involuntary manslaughter.

¶ 47 After deliberations, the jury signed a general verdict form and found the defendant guilty of first degree murder, vehicular invasion, and aggravated battery on a public way (for the charge related to Rahman).

¶ 48 The defendant filed a posttrial motion, arguing, *inter alia*, that it had been unclear whether the State was proceeding under all the murder charges, and it was not clear from the verdict what the jury relied on in terms of their results. Alternatively, the defendant argued that if the jury found that the defendant had committed a felony murder then the offense of vehicular invasion and felony murder should merge. The State argued that the defendant could have asked for a

separate verdict form, but had failed to do so. The trial court ruled that the "one good count" rule applied and the defendant was "presumed convicted of intentional murder."

¶ 49 The trial court subsequently merged all of the murder counts into a single conviction based on count I of the 2011 indictment (intentional first degree murder) and sentenced the defendant to the minimum 20-year sentence for first degree murder. Additionally, the court imposed a consecutive four-year sentence for vehicular invasion and a concurrent three-year sentence for aggravated battery on a public way. The defendant now appeals.

¶ 50 II. ANALYSIS

¶ 51 A. Compulsory Joinder and the Right to a Speedy Trial

¶ 52 On appeal, the defendant first contends that his statutory right to a speedy trial was violated when the State reindicted him over 120 days after he had been taken into custody, and supplemented the knowing first degree murder charge in the original indictment with vehicular invasion and felony murder charges. The defendant concedes that he failed to raise this issue below, but nonetheless asserts that we should excuse his procedural default because his trial counsel was ineffective for failing to file a motion to dismiss the improper charges. The State agrees with the defendant and concedes that trial counsel was ineffective for failing to file such a motion, so as to permit the defendant to argue the merits of this issue on appeal. Our courts have repeatedly recognized that counsel's failure to render effective assistance by not raising a forfeited issue is an exception to forfeiture. See *People v. Tate*, 2012 IL 112214, ¶ 14. Accordingly, we turn to the merits.

¶ 53 A defendant demonstrates ineffective assistance of counsel by showing that counsel's performance was both objectively unreasonable and resulted in prejudice to the defendant. *Tate*, 2012 IL 112214, ¶ 14.

¶ 54 Criminal defendants possess both constitutional (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8) and statutory (725 ILCS 5/103–5 (West 2010)) rights to a speedy trial. Although these provisions address similar concerns, the statutory right and the constitutional right are not coextensive. *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006); *People v. Gooden*, 189 Ill. 2d 209, 216–17 (2000). In the case at bar, the defendant only asserts a violation of his statutory right to a speedy trial and does not raise a constitutional issue.

¶ 55 Pursuant to section 103-5(a) of the Illinois Code of Criminal Procedure of 1963 (the speedy trial statute) "every person in custody" in Illinois "for an alleged offense" must be tried "within 120 days from the date he was taken into custody unless delay is occasioned by the defendant. ***." 725 ILCS 5/103-5 (West 2010). The 120 days period begins to run automatically when a defendant remains in custody pending trial, and the defendant need not make a formal demand for trial. *People v. Phipps*, 238 Ill. 2d 54, 66 (2010). If a defendant is not brought to trial within the statutory time frame, he must be released from custody and the charges must be dismissed. 725 ILCS 5/103-5(d) (West 2010); see also *Woodrum*, 223 Ill. 2d at 299.

¶ 56 When a defendant is charged with a single crime, the application of the speedy trial statute generally involves a straightforward counting exercise. *People v. Williams*, 2014 Ill. 2d 191, 198 (2003). Things become more complicated, however, when, as here, the defendant is charged with multiple but factually related offenses at different times. *Williams*, 2014 Ill. 2d at 198. Our supreme court has stated that in such cases, the speedy-trial guarantee "is tempered by compulsory joinder principles." *People v. McGee*, 2015 IL App 130367, ¶ 26.

¶ 57 The compulsory joinder provision of the Criminal Code of 1961 (the compulsory joinder statute) provides in relevant part:

"(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution * * * if they are based on the same act." 720 ILCS 5/3–3 (West 2010).

¶ 58 Thus, under the compulsory joinder statute, multiple charges against a defendant must be joined in a single prosecution if the following three conditions are satisfied: (1) the multiple charges are known to the prosecutor when the prosecution begins; (2) the charges are within the jurisdiction of a single court; and (3) the charges are based upon the same act. *McGee*, 2015 IL App 130367, ¶ 28 (citing *People v. Kazenko*, 2012 IL App (3d) 110529, ¶ 12)).

¶ 59 In the present case, only the third prong is at issue. In evaluating what constitutes "charges based upon the same act," our supreme court has explicitly rejected the application of an offense elements-based analysis applied in the context of the one-act one-crime rule, and double jeopardy. *People v. Hunter*, 2013 IL 114100, ¶ 22. Instead, the court has stated that the "same act" requirement was " 'designed to describe the situation in which several persons are affected by only one act of the defendants, such as *** the stealing, in a single container, of several articles of property belonging to different persons; or violating by one act two different statutory provisions. " *Hunter* 2013 IL 114100, ¶ 18 (quoting Ill. Ann. Stat., ch. 38, ¶ 3-, Committee Comments-1961, at 102 (Smith-Hurd 1989)). As such, the phrase "based on the same act" has not been given a "hypertechnical interpretation to create multiple acts based on discrete moments in time." *Hunter* 2013 IL 114100, ¶ 18. Rather, joinder is required where "the defendant is engaged 'in only one continuous and uninterrupted act.' " *Hunter* 2013 IL 114100, ¶ 18 (quoting

People v. Quigley, 183 Ill. 2d 1, 11 (1998)). Nonetheless, joinder is not required where "multiple offenses arise from a series of closely related acts." *Quigley*, 183 Ill. 2d at 8; see also *Hunter*, 2013 IL 114100, ¶ 23 ("the legislature did not intend to impose joinder on offenses that 'arise from a series of acts which are closely related with respect to the offenders' single purpose or plan.' ") (quoting Ill. Ann. Stat., ch. 38, ¶3-3, Committee Comments-1961, at 102 (Smith-Hurd 1989)).

¶ 60 Our supreme court has explained the interplay between the speedy-trial and compulsory joinder statutes in the following manner:

> " 'Compulsory joinder requires the State to bring multiple charges in a single prosecution. The charges are tried together unless the circuit court determines that a separate trial is required in the interest of justice. [Citation.] Once a speedy-trial demand is filed, the multiple charges are subject to the same speedy-trial period. If the charges are required to be brought in a single prosecution, the speedy-trial period begins to run when the speedy-trial demand is filed, even if the State brings some of the charges at a later date. "Where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement of the prosecution, the time within which trial is to begin on the new and additional charge is subject to the same statutory limitation that is applied to the original charges." [Citation.]' " *Hunter*, 2013 IL 114100, ¶ 10 (citing *Quigley*, 183 Ill. 2d at 13).

¶ 61 The purpose of this rule is to prevent "trial by ambush." *Phipps*, 238 Ill. 2d at 67; see also *Quigley*, 183 Ill. 2d at 7 (the compulsory joinder statute is intended to "prevent the prosecution of multiple offenses in a piecemeal fashion and to forestall, in effect, abuse of the prosecutorial process."). In other words, without this rule,

> "[t]he State could lull the defendant into acquiescing to pretrial delays on pending charges, while it prepared for a trial on more serious, not-yet-pending charges. *** When the State filed the more serious charges, the defendant would face a Hobson's' choice between a trial without adequate preparation and further pretrial detention to prepare for trial. " *Williams*, 204 Ill. 2d at 207.

Accordingly, in determining whether subsequent charges should have been joined in an earlier indictment, a reviewing court focuses on whether the defendant had adequate notice of the subsequent charges to allow preparation of a defense. *Phipps*, 238 Ill. 2d at 67. As our supreme court has explained:

> "The focus is on whether the original charging instrument gave the defendant sufficient notice of the subsequent charges to prepare adequately for trial on those charges. If the original charging instrument gives a defendant adequate notice of the subsequent charges, the ability to prepare for trial on those charges is not hindered in any way. *Phipps*, 238 Ill. 2d at 67-68.

¶ 62 Whether charges were subject to compulsory joinder so as to trigger a defendant's statutory right to a speedy trial is a question of law, which we review *de novo*. *McGee*, 2015 IL App (1st) 130367, ¶ 28.

¶ 63 In the present case, the defendant contends, and the State concedes, that his vehicular invasion conviction must be vacated because count V of the 2011 indictment (case No. 11 CR 4564), charging him with vehicular invasion, was untimely added after the defendant had spent 217 days in custody, in violation of the compulsory joinder and speedy trial statutes (720 ILCS 5/3-3 (West 2010); 725 ILCS 5/103-5(a) (West 2010)). The State concedes that the vehicular invasion charge was known to the prosecution at the time the original indictment was filed in

2010 and that it was within the jurisdiction of a single court. The State therefore admits that in bringing the 2011 indictment, the State could only bring additional charges that were not "based on the same act," (720 ILCS 5/3-3 (West 2010)) and that any "new and additional charges" would violate compulsory joinder principles (*Phipps*, 238 Ill. 2d at 66).

¶ 64 The State nonetheless disagrees that the defendant's felony murder conviction charged in the 2011 indictment and premised on his commission of the improperly charged vehicular invasion must also be vacated. In that respect, the State argues that because the defendant was charged with knowing murder in the 2010 indictment, the exact manner in which he committed the murder (*i.e.*, whether it was intentional, knowing or a result of his commission of a felony) did not have to be specified in the initial indictment so as to give him sufficient notice to prepare for his defense at trial. Accordingly, the State argues that the felony murder charge was not a new or additional charge based on the same act, but rather, the same charge of murder brought under a different theory. For the reasons that follow, we agree.

¶ 65 It is well settled that Illinois law recognizes only one offense of murder, which may be committed in numerous ways. See *People v. Smith*, 233 Ill. 2d 1, 16 (2009) ("[w]hile our statute describes three 'types' of murder, first degree murder is a single offense. As we have explained on numerous occasions, ' "the different theories embodied in the first degree murder statute [citation] are merely different ways to commit the same crime." ' [Citation.]"); see also *People v. Maxwell*, 148 Ill. 2d 116, 137 (1992) ("Illinois law recognizes only a single offense of murder, which may be committed in a variety of ways.") Section 9–1(a) of the Criminal Code of 1961 defines the offense of murder in the following terms:

> "A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter." 720 ILCS 5.9-1(a) (West 2010).

¶ 66 Because there is but one crime of murder and a defendant indicted under one or more of the subparagraphs of this section may be convicted under any one of the subparagraphs, our supreme court has repeatedly held that under certain circumstances, the defendant may be convicted of felony murder even though he was not specifically charged with felony murder under section 9-1(a)(3). See *People v. Cooper*, 194 Ill. 2d 419, 428 (2000) ("in certain circumstances, felony murder need not be specifically charged in the indictment in order for a defendant to be convicted of felony murder"); see also *Maxwell*, 148 Ill. 2d at 137 ("Just as the method of committing murder is not integral to the offense and therefore need not be specified in the charging instrument [citation] ***, the precise statutory theory of the offense of murder is not a matter that must be specifically alleged."). According to our supreme court, this is permissible only where the failure to charge the defendant with felony murder has not: (1) prejudiced the defendant in his preparation for trial or (2) exposed the defendant to the risk of double jeopardy. *Maxwell*, 148 Ill. 2d at 133-37 (citing *People v. Allen*, 56 Ill. 2d 536, 542-43 (1974)).

¶ 67 In the present case, the defendant contends that he was prejudiced because he was convicted under a general murder verdict form, which included a felony murder charge incorporating the vehicular invasion charge that the State itself concedes should be vacated. For the reasons that follow, we disagree.

¶ 68 The defendant here was neither prejudiced nor exposed to the risk of double jeopardy by the State's subsequent charge of felony murder. In coming to this conclusion, we find the decisions in *Allen*, 56 Ill. 2d at 542 and *Maxwell*, 148 Ill. 2d at 133-37 instructive.

¶ 69 In *Allen*, the defendant participated in the planning and attempted commission of an armed robbery, during which a police officer was shot and killed. *Allen*, 56 Ill. 2d at 537-41. The State charged the defendant in a two count indictment with intentional and knowing murder under sections 9-1(a)(1) and 9-1(a)(2) of the Criminal Code. *Allen*, 56 Ill. 2d at 541 (citing Ill. Rev. Stat. 1967, ch. 38, par. 9-1(a)(1), (2)). Although the defendant was never indicted on felony murder under section 9-1(a)(3), nor on any underlying felony offense, at trial, the State argued that the defendant had committed felony murder and the jury was instructed on this uncharged theory of the offense. *Allen*, 56 Ill. 2d at 541-32 (citing Ill. Rev. Stat. 1967, ch. 38, par. 9-1(a)(3)). The defendant appealed his conviction arguing that he had been convicted of a crime with which he was not charged—felony murder. *Allen*, 56 Ill. 2d at 542

¶ 70 Following its prior holding in *People v. Rosochacki*, 41 Ill. 2d 483, our supreme court held that there is only one offense of murder, but that it may be prosecuted under different theories, including felony murder, and that therefore the defendant had not been improperly instructed with felony murder even though he had never been charged with felony murder or with any underlying felony offense. *Allen*, 56 Ill. 2d at 542. In coming to this decision, our supreme court evaluated: (1) whether the defendant would be in danger of double jeopardy; and (2) whether he would be able to defend against the charges brought against him. *Allen*, 56 Ill. 2d at 543.

¶ 71 The court noted that the murder statute describes three different mental states or conduct that must accompany the acts which cause the death, so that if the defendant were charged under the intentional murder theory and acquitted, he could not again be charged and tried for murder

under either the knowing or felony murder theories. *Allen*, 56 Ill. 2d at 543. Therefore, the court concluded that the defendant could not be in any danger of double jeopardy. *Allen*, 56 Ill. 2d at 541-42.

¶ 72 With respect to defendant's ability to sufficiently defend himself against the charges, our supreme court in *Allen* found that the record did not reflect that "the defendant was in any way misled by the indictment in the preparation of his defense." *Allen*, 56 Ill. 2d at 543. In doing so, the court noted that the defendant was aware of the felony murder theory from the State's opening argument to the instructions to the jury, and that he never objected to this theory being introduced, nor alleged surprise or asked for a continuance for the purposes of preparing a defense to this charge. *Allen*, 56 Ill. 2d at 543. As such, the court found no prejudice had resulted to the defendant from the uncharged felony murder jury instructions. *Allen*, 56 Ill. 2d at 543.

¶ 73 Similarly, in *Maxwell*, the State charged the defendant with intentional and knowing murder under sections 9-1(a)(1) and (a)(2), as well as attempted armed robbery and two counts of armed violence. *Maxwell*, 148 Ill. 2d at 133 (citing Ill. Rev. Stat.1985, ch. 38, par. 9-1(a)(1), (2)). The State *nol-prossed* the armed violence charges before trial. *Maxwell*, 148 Ill. 2d at 133. Subsequently, before jury selection, the State for the first time informed the court and the defendant that it would seek to have the jury instructed on felony murder predicated on attempted robbery. *Maxwell*, 148 Ill. 2d at 124, 133. Defense counsel objected, but the trial court ruled that it would give the felony murder instruction "if the evidence so warranted." *Maxwell*, 148 Ill. 2d at 133. After the close of evidence, the trial court instructed the jury on all three theories of murder, including felony murder. *Maxwell*, 148 Ill. 2d at 133. Just as in the present case, the jury found the defendant guilty of murder based on a general verdict form that

did not specify the "theory or theories on which the jury's determination of guilt for that offense rested." *Maxwell*, 148 Ill. 2d at 133.

¶ 74 The defendant appealed, contending, *inter alia*, that he was prejudiced when the jury was instructed on the indicted charge of felony murder. *Maxwell*, 148 Ill. 2d at 140. Our supreme court affirmed the defendant's conviction, holding that Illinois recognizes only one offense of murder, and that therefore the State did not need to specifically allege the precise statutory theory of the offense of murder in its indictment. *Maxwell*, 148 Ill. 2d at 137. In doing so, the court explicitly rejected the defendant's claim that he had been prejudiced, noting:

> "Before trial, the defense was apprised of the State's intended use of the theory and, throughout the proceedings, had full opportunity to defend against it." *Maxwell*, 194 Ill. 2d at 138.

The court further stated that there was "no threat that the defendant" could twice be put in jeopardy for the offense, because the indictment and the record of proceedings "were adequate protection against any risk of multiple punishments or multiple prosecutions for the murder." *Maxwell*, 194 Ill. 2d at 138.

¶ 75 In the present case, just as in *Allen* and *Maxwell*, the defendant was sufficiently apprised of the State's intended use of the felony murder theory so as to be precluded from arguing any prejudice. Specifically, the original 2010 murder charge apprised the defendant that he was going to be prosecuted for murder, under a knowing murder theory. In addition, the second 2011 indictment gave the defendant notice that the State would further proceed under a felony murder theory. The fact that at this point in time, the State was precluded from adding any new charges, such as the underlying vehicular invasion felony charge, is irrelevant, since the defendant had already been charged with first degree murder in 2010, so as to have been placed on notice that

he could be tried for murder under any of the three murder theories recognized in this state. See *Maxwell*, 148 Ill. 2d at 137. Moreover, a review of the two sets of indictments reveals that the original knowing murder charge and the subsequent felony murder charge sufficiently apprised the defendant of the conduct that he would be required to defend against. The 2010 knowing murder charge was based upon the defendant's conduct in beating Abdallah, which occurred when the defendant kicked into the vehicle at Abdallah. The 2011 felony murder charge was based on vehicular invasion, which occurred when the defendant kicked into the vehicle at Abdallah. Although the 2011 indictment gave a new legal name for the defendant's conduct, the conduct itself remained exactly the same, a kick. Since the defendant's trial did not commence more than two and a half years after the second 2011 indictment, the defendant cannot now plausibly argue that he was somehow surprised or denied ample opportunity to prepare for trial and defend against a murder charge premised on the beating of Abdallah that resulted in Abdallah's death. See *Maxwell*, 148 Ill. 2d at 124, 133 (holding that the defendant was not prejudiced when he was informed on the eve of trial that the State would proceed under a felony murder charge). As such, the defendant here cannot establish prejudice.

¶ 76 In addition, just as in *Allen* and *Maxwell*, there is no risk here that the defendant can be exposed to double jeopardy. As our supreme court has repeatedly held because first degree murder is a single offense, " '[a] conviction on any one of the theories of first degree murder operates to bar a second trial on a theory not prosecuted.' " *Cooper*, 194 Ill. 2d at 429 (quoting *People v. Daniels*, 187 Ill. 2d 301, 316 (1999)); see also *Allen*, 56 Ill. 2d at 54. Because each of the sub-paragraphs of section 9-1(a) describes the mental state or conduct of the defendant which must accompany the acts which caused the death, if the State had charged the defendant with knowing murder alone, and had the jury returned a not-guilty verdict, the State could not, in a

later trial, seek to convict the defendant of the same murder pursuant to a theory of felony murder or intentional murder. See *Cooper*, 194 Ill. 2d at 429; *Daniels*, 187 Ill. 2d at 316; *Allen*, 56 Ill. 2d at 54. Therefore double jeopardy was not possible.

¶ 77 For all of the aforementioned reasons, we conclude that the defendant's statutory rights to a speedy trial and compulsory joinder were not violated when he was charged with felony murder in 2011, and that consequently trial counsel was not ineffective for failing to file a motion to dismiss the felony murder charge on this ground.

¶ 78 However, even if we were to conclude that felony murder was an improper charge, and that defense counsel was unreasonable for failing to move for dismissal of the felony murder and vehicular invasion charges, we would nonetheless conclude that the defendant has failed to establish prejudice under *Strickland*, so as to succeed on an ineffective assistance of counsel claim and obtain reversal of his conviction. To succeed on the second prong of *Strickland*, the defendant must prove that a reasonable probability exists that the jury "would have entertained reasonable doubt" as to his guilt, but for counsel's failure to move to dismiss the vehicular invasion and felony murder charges. See *People v. Steidl*, 177 Ill. 2d 239, 250 (1997). Since the jury here returned a general guilty verdict, we must presume that it found the defendant guilty of intentional murder. *People v. Perry*, 2011 IL App (1st) 081228, ¶ 54. Given this presumption, the defendant could not have been prejudiced by any failure to file a motion to dismiss the vehicular invasion and felony murder counts. Neither of those counts provided an avenue for the State to introduce irrelevant or prejudicial evidence because they were based on the same exact evidence that supported the intentional murder charge. Neither vehicular invasion nor felony murder would inflame the jury's emotions more than the more egregious intentional murder count. Accordingly, the defendant has failed to demonstrate that there is a reasonable probability

that the jury would have come to a different verdict if felony murder and vehicular invasion had not been charged.

¶ 79 B. Sufficiency of the Evidence

¶ 80 On appeal, the defendant next contends that the State failed to prove him guilty of murder. He contends that the State failed to prove the requisite mental states for intentional murder (720 ILCS 5/9-1(a)(1) (West 2010)) and knowing murder (720 ILCS 5/9-1(a)(2) (West 2010)) beyond a reasonable doubt because the evidence at trial established merely that the defendant acted recklessly, and therefore justified only a conviction for the lesser included offense of involuntary manslaughter (720 ILCS 5/9-3 (West 2010)). In addition, the defendant contends that the State failed to prove him guilty of felony murder based upon vehicular invasion (720 ILCS 5/9-1(a)(3) (West 2010)) because: (1) the elements and mental state for the predicate felony of vehicular invasion were not proven beyond a reasonable doubt; (2) Abdallah's death was not a foreseeable result of the defendant's act; and (3) the vehicular invasion offense was inherent in the act of murder and had no independent felonious purpose. For the reasons that follow, we disagree.

¶ 81 It is well-settled that when reviewing a challenge to the sufficiency of evidence, a reviewing court must determine whether the evidence, when viewed in the light most favorable to the State, would have permitted any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48; see also *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)). It is the responsibility of the trier of fact to resolve conflicting testimony, to weigh the evidence, and to draw reasonable inferences from those facts. See *Brown*, 2013 IL 114196, ¶ 48. Where the evidence produces "conflicting inferences" it is the trier of fact's responsibility to resolve that conflict. *People v. Pryor*, 372 Ill. App .3d 422, 430 (2007). Therefore, a reviewing court will

not substitute its judgment for that of the trier of fact on issues of weight of evidence, or the credibility of witnesses. See *Brown*, 2013 IL 114196, ¶ 48. A criminal conviction will be reversed only where evidence is so contrary to the verdict, or so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt regarding defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48. This same standard will apply regardless of whether the evidence is direct or circumstantial, and regardless of whether the defendant receives a bench or a jury trial. *Brown*, 2013 IL 114196, ¶ 48; see also *Cooper*, 194 Ill. 2d at 431.

¶ 82 In the present case, the defendant was charged, and the jury was instructed on all three theories of murder: (1) intentional; (2) knowing; and (3) felony. 720 ILCS 5/9-1(a) (West 2010). The defendant was found guilty under a general verdict form, and the jury did not specify under which theory of murder it convicted the defendant. Nonetheless, under the longstanding "one good count" rule, the trial court found the defendant guilty of the most culpable mental state, intentional murder.

¶ 83 Under the one good count rule, the appellate court presumes that the jury found the defendant guilty of the most serious offense, intentional murder. *People v. Davis*, 233 Ill. 2d 244, 263 (2009). This court has already found the evidence presented at the defendant's trial was sufficient to convict codefendant Doolan of intentional murder (*Doolan*, 2016 IL App (1st) 141780, ¶¶ 50-53), and we find the same result is required here.

¶ 84 A defendant's mental state separates first degree murder and involuntary manslaughter. *People v. Kibayasi*, 2013 IL App (1st) 113391, ¶ 42. First degree murder requires the intention to cause death or great bodily harm, or knowledge of a great probability of death or great bodily harm. 720 ILCS 5/9-1(a)(1)-(2) (West Supp. 2009). By contrast, an involuntary manslaughter conviction is appropriate where a defendant "recklessly performs an act that is likely to cause

death or great bodily harm to another person." *Kibayasi*, 2013 IL App (1st) 113391, ¶ 42 (citing 720 ILCS 5/9-3(a) (West 2008). Direct evidence of intention is not required; a fact finder may infer that a defendant acted knowingly or intentionally "from the circumstances surrounding the incident, defendant's conduct, and the nature and severity of the victim's injuries." *Kibayasi*, 2013 IL App (1st) 113391, ¶ 42. A voluntary act which has "the natural tendency to cause death or great bodily harm" provides evidence of an intentional act rather than mere recklessness." *Kibayasi*, 2013 IL App (1st) 113391, ¶ 42.

¶ 85 In the present case, the evidence presented at trial was sufficient to establish that the defendant caused or was accountable for the intentional murder of Abdallah. Here, a rational jury could infer from the eyewitness testimony, medical testimony, and video evidence that the defendant and codefendant Doolan intended to kill or cause great bodily harm to Abdallah, or knew that their conduct would create the strong possibility of death or great bodily harm. The evidence, viewed in the light most favorable to the State, established that the defendant forced open the door of Rahman's vehicle and kicked Abdallah in the face or chest and that codefendant Doolan subsequently squared his body to Abdallah and punched him in the head. Although "generally *** death is not a reasonable or probable consequence of a blow with a bare fist" (*People v. Gresham*, 78 Ill. App. 3d 1003, 1007 (1979)) our supreme court has explained that "[a]n individual who kills another by punching and kicking can be convicted of first degree murder if he acts with the requisite mental state." *People v. DiVincenzo*, 183, Ill. 2d 239, 254 (1998). Importantly, "inferences as to [a] defendant's mental state are a matter particularly within the province of the jury." *DiVincenzo*, 183, Ill. 2d at 254. Even though, as the defendant argues, he may not have been able to foresee the ultimate medical cause of Abdallah's death, it is entirely foreseeable that forceful blows to the chest and face, particularly when paired with

additional, coordinated blows from codefendant Doolan, had a natural tendency to cause great bodily harm or death. Consequently, the evidence was sufficient to establish the defendant's conviction for intentional or knowing murder, and we need not consider the parties' arguments pertaining to felony murder.

¶ 86 C. Ineffective Assistance of Counsel

¶ 87 The defendant next contends that he was denied his constitutional right to effective representation when trial counsel: (1) failed to advocate in closing argument in support of the requested lesser included offense of involuntary manslaughter; (2) elicited damaging testimony from the gas station attendant in cross-examination that helped the State to prove he kicked Abdallah; and (3) not requesting, or knowing that he could request, separate verdict forms for the various theories of murder. For the reasons that follow, we disagree.

¶ 88 It is axiomatic that every defendant has a constitutional right to the effective assistance of counsel. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); see also *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). According to *Strickland*, in order to prevail on a claim of ineffective assistance of counsel a defendant must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms; and (2) that he was prejudiced by counsel's conduct, *i.e.*, that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94); see also *People v. Domagala*, 2013 IL 113688, ¶ 36. Failure to establish either prong

of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶ 11; see also *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 89 The defendant first contends that counsel was ineffective for failing in closing argument to explain to the jury why it should find the defendant guilty of involuntary manslaughter rather than murder. We disagree.

¶ 90 "Counsel's decision to argue a particular defense theory during closing argument is a matter of trial strategy," and counsel's choice does not constitute ineffective assistance simply because it was unsuccessful. *People v. Milton*, 354 Ill. App. 3d 283, 289-90 (2004) (citing *People v. Franklin*, 135 Ill. 2d 78, 119 (1990)). As the United States Supreme Court has explained:

> "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' [citation] but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. Judicial review of a defense attorney's summation is therefore highly deferential[.]" *Yarborough v. Gentry*, 540 U. S. 1, 6 (2003).

¶ 91 In the present case, the record establishes that both the defendant's and codefendant Doolan's counsels adopted an "all or nothing" strategy and tried to win acquittal on the murder charges rather than champion a conviction for a lesser involuntary manslaughter charge. Such a decision by counsel is recognized as a valid trial strategy. See *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007) ("Counsel's decision to advance an 'all-or-nothing defense' has been recognized as a valid trial strategy."); see also *People v. Daniels*, 331 Ill. App. 3d 380, 392–93 (2002));

People v. Barnard, 104 Ill. 2d 218, 231–32 (1984); *People v. Benford*, 349 Ill. App. 3d 721, 728–29 (2004). The rationale is that "merciful jurors may disregard even overwhelming proof of culpability and acquit entirely, or convict of a lesser crime than the evidence warrants," but where a lesser-offense instruction is given and argued thoroughly, "a jury may be induced to find defendant guilty of the lesser offense rather than to continue the debate as to his innocence." *Benford*, 349 Ill. App. 3d at 728.

¶ 92 Defense counsel here sought to dissociate Abdallah's death from the defendant's and Doolan's actions, arguing that the video evidence did not show that the defendant actually struck Abdallah, or even kicked into Rahman's vehicle. Although there was no legal impediment to arguing involuntary manslaughter in the alternative, defense counsel, may well have believed that he would appear, at the very least, disingenuous if he argued both theories, or that the jury would be less likely to acquit of murder if it was presented with an argument for involuntary manslaughter. Such an argument necessarily would have required defense counsel to admit that the defendant had committed the act of kicking Abdallah, but then attempt to argue that the act was committed recklessly. It was up to defense counsel to decide whether the jurors, in whose selection he participated, and whose demeanor he was able to observe during the presentation of the evidence, would be more receptive to either theory. This is a matter of strategy, and, to the extent it is based on factors not appearing in the record, such as juror demeanor, it is one that we are not permitted to rationally second guess. Accordingly, we conclude that the defendant has not "overcome the strong presumption" that counsel's decision "was the product of trial strategy and not incompetence." *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010); see also *People v. Shamlodhiya*, 2013 IL App (2d) 120065, ¶¶ 20-23 (affirming the summary dismissal of a defendant's postconviction petition claiming counsel was ineffective for adopting an all-or-

nothing strategy in closing argument that the defendant contended "diminished if not eviscerated [his] choice to request [an] involuntary manslaughter instruction[]").

¶ 93 For this same reason, we reject the defendant's assertion that counsel was ineffective for failing to request, or even realize that he could have requested, separate jury verdict forms. It is well-accepted that the submission of general verdict forms rather than separate verdict forms is a matter of trial strategy that will not support a claim of ineffectiveness. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010). In the instant case, the submission of separate forms plainly would have undermined the "all or nothing" strategy adopted by trial counsel. The submission of separate verdict forms would have placed counsel in the predicament of having to tell the jury that if it found the defendant committed vehicular invasion, it would have to find him guilty of felony murder, making it far easier for the jury to convict the defendant of murder. See *Calhoun*, 404 Ill. App. 3d at 384 (finding that where felony murder was still a viable theory to submit to the jury, defense counsel may have found giving the jury special verdict forms would enable it to find the defendant guilty of felony murder because evidence of the underlying felony was overwhelming). Moreover, even if the felony murder charge had been dismissed prior to trial and not been presented to the jury, separate murder verdict forms on intentional versus knowing murder would not have aided the defendant, since as already articulated above, the evidence of his guilt under either theory was overwhelming.

¶ 94 Contrary to the defendant's supposition that counsel "did not even realize that he could have requested separate forms," the record reflects that during the jury instruction conference, defense counsels participated in prolonged discussion over both the involuntary manslaughter instruction and the State's requested second degree murder instruction, which defense counsel strenuously objected to and succeeded in striking from the proposed instructions. Counsel's arguments

during this jury instruction conference are consistent with his "all or nothing" strategy. Under this record, we reject the defendant's invitation to interpret counsel's posttrial statements taken out of context as evidence of counsel's ignorance of the law. *People v. Perkins*, 229 Ill. 2d 34, 51 (2008) (rejecting interpretations of counsel's statements as proof of counsel's ignorance of the law). Accordingly, we hold that the defendant has failed in his burden to establish counsel's conduct fell below an objective standard of reasonableness.

¶ 95 The defendant next contends that counsel was ineffective for eliciting incriminating testimony from the gas station attendant, Rezzardi, that helped the State prove that he kicked Abdallah. The defendant points out that on cross-examination, Rezzardi stated that he "just seen [the defendant] kind of like kick at [Abdallah]," which permitted the State on redirect to get Rezzardi to agree that he saw the defendant kick inside the car. The defendant asserts that counsel's cross-examination of Rezzardi served no strategic purpose and in fact harmed his case. For the reasons that follow, we disagree.

¶ 96 Generally, "the manner and extent of cross-examination are matters of trial strategy that will not ordinarily support an ineffective-assistance-of-counsel claim." *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32 (citing *People v. Ramey*, 152 Ill. 2d 41, 54 (1992)). Defense counsel here was attempting to discredit Rezzardi by showing that Rezzardi's eyewitness testimony was the product of his pretrial meetings with prosecutors, and his watching of the video surveillance footage prior to trial, rather than his actual recollections of what transpired during the incident. Counsel's strategy in this respect is apparent from his later introduction of the testimony of Detective Brown about his interview with Rezzardi hours after the attack.

¶ 97 Regardless, even if we were to find that counsel's cross-examination of Rezzardi was

deficient, the defendant cannot demonstrate that he suffered prejudiced from the introduction of Rezzardi's testimony at trial. To establish the second prong of *Strickland*, the defendant must show that there is a reasonably probability that but for counsel's conduct, the outcome of the proceedings would have been different. *Clendenin*, 238 Ill. 2d at 317. In the present case, even without Rezzardi's testimony the evidence overwhelmingly established that the defendant kicked Abdallah. Dajani, who was seated immediately behind Abdallah, testified that he observed the defendant grab open the door and kick Abdallah in the upper chest and face, and the defendant presented no eyewitness testimony to the contrary. More importantly, the video surveillance footage introduced at trial and played to the jury numerous times plainly shows the defendant and codefendant initially surrounding and harassing the occupants of Rahman's car, and then escalating the encounter to a coordinated attack, with the defendant ripping open the door of the car, and kicking inside towards Abdallah, followed by codefendant Doolan squaring his body at and then punching Abdallah in the face. Under this record the defendant cannot establish that there is a reasonably probability that but for Rezzardi's testimony the jury would not have convicted him of murder, in the very least, under an accountability theory. Accordingly, the defendant has failed in his burden to establish prejudice under *Strickland*.

¶ 98 D. Mittimus

¶ 99 The defendant finally argues, and the State concedes, that his mittimus must be corrected to reflect that he was convicted of aggravated battery pursuant to section 12-4(b)(8) of the Criminal Code of 1961 (for committing an aggravated battery on a public way) under which he was prosecuted, and not pursuant to section 12-4(a) of that Code (720 ILCS 5/12-4(a), 12-4(b)(8) (West 2010)) (for committing aggravated battery by causing great bodily harm). The record reflects that the defendant was charged, *inter alia*, with four counts of aggravated battery against

Rahman, including: (1) aggravated battery causing great bodily harm (720 ILCS 5/12-4(a) (West 2010)) (count VII); and (2) aggravated battery committed on a public way (720 ILCS 5/12-4(b)(8) (West 2010)) (count IX). On the first day of trial, the State *nol-prossed* all of the aggravated battery charges, except for count IX—aggravated battery on a public way (720 ILCS 5/12-4(b)(8) (West 2010)). Accordingly, the parties agree that the defendant was convicted under count IX and not count VII, as his mittimus currently reflects. Pursuant to the authority granted us under Illinois Supreme Court Rule 615(b), we direct the clerk of the circuit court to correct the mittimus to reflect that the proper conviction. See *People v. Burton*, 2015 IL (1st) 131600, ¶ 40 ("This court has the authority, under Illinois Supreme Court Rule 615(b), to order the clerk to correct the mittimus without remand.").

¶ 100 III. CONCLUSION

¶ 101 For all of the aforementioned reasons, we vacate the defendant's conviction for vehicular invasion, but affirm his convictions for murder and aggravated battery on a public way, and order that his mittimus be corrected so as to reflect the proper convictions.

¶ 102 Affirmed in part; vacated in part; mittimus corrected.

¶ 103 Justice LAVIN, specially concurring:

¶ 104 The majority holds today that the State, more than 120 days after the filing of the original indictment charging knowing murder, may charge a defendant anew with felony murder based on a predicate felony that was neither charged in the original indictment nor otherwise supported by the facts alleged in the original indictment. In other words, so long as the State timely charges a defendant with murder within the 120-day period, a defendant must prepare a defense to any of the three forms of murder, and should also anticipate defending against *any* possible underlying felony. This poses a problem if a defendant commits multiple underlying felonies. It

also places too much burden on public defenders who are already over-burdened and violates the very intent of the speedy trial/compulsory joinder law, which is to notify the defendant of the charges against him so he can prepare for trial within the specified 120 days. To hold otherwise nullifies the 120-day period.

¶ 105 Furthermore, I depart from the majority's analysis of prejudice under *Strickland*. The relevant question for prejudice is not whether defendant had notice before trial to defend against felony murder. Rather, it is whether a jury deprived of an instruction of felony murder based on vehicular invasion may have acquitted defendant. The evidence was sufficient but not overwhelming as the majority states.

¶ 106 Because I find trial counsel's performance was not deficient in this instance, I agree that defendant cannot sustain his ineffective assistance of counsel claim. Accordingly, I concur in the result.