APPENDIX

2018 IL App (1st) 152031-U

No. 1-15-2031

Order filed on October 9, 2018.

Modified upon denial of rehearing on November 13, 2018.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 9682 (01)
	)	
JOHN GIVENS,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

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

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

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

¶ 4 I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

¶ 14 II. ANALYSIS

¶ 15 A. First Degree Felony Murder

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

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

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

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

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

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

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

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

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

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

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

¶ 25 Initially, we note that defendant's claims do not amount to as-applied challenges because they seek to invalidate the statute's intent element which is more akin to a facial challenge.[1] *Cf. People v. Brady*, 369 Ill. App. 3d 836, 847-48 (2007) (stating that an as-applied challenge requires the defendant to show that the statute, as-applied in the particular context in which he has acted, is unconstitutional). In any event, defendant has failed to show that our felony murder statute is unconstitutional or that his sentence imposed under the statute is unconstitutional. See *People v. Jenkins*, 190 Ill. App. 3d 115, 144 (1989) ("A statutory minimum sentence for murder has been held constitutional.").

¶ 26 It is well-settled that a defendant may be found guilty of felony murder regardless of a lack of intent to commit murder. *Jones*, 376 Ill. App. 3d at 387. "Felony murder derives its

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

mental state from the underlying intended offense." *Id.* Ultimately, felony murder seeks to deter individuals from committing foreseeable felonies by holding them responsible for murder if a death results. *Id.* "Causal relation is the universal factor common to all legal liability." *Lowery*, 178 Ill. 2d at 466-67. That said, because the analogies between civil and criminal cases in which individuals are injured or killed are so close, we apply the principle of proximate cause to both classes of cases. *Id.* While other jurisdictions have determined that a felon is not responsible for the lethal acts of a nonfelon, however, our statutory and case law dictate a different, and we believe preferable, result. See *Hickman*, 59 Ill. 2d at 95.

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

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

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

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

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

¶ 31 B. CPD General Order

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

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

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

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

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

¶ 36 C. Motion to Dismiss

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

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

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

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

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

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

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

¶ 41 D. Aggravated Battery

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

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

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

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

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

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

¶ 47 D. Forfeited Contentions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶ 60 III. CONCLUSION

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

¶ 62 Affirmed.

119 N.E.3d 1033 (Table)
(This disposition of a Petition for Leave to Appeal is referenced in the North Eastern Reporter.)
Supreme Court of Illinois.

PEOPLE State of Illinois, Respondent,
v.
John GIVENS, Petitioner.

No. 124331

March 20, 2019

Leave to appeal, Appellate Court, First District. 1-15-2031

Opinion
Petition for Leave to Appeal Denied.

All Citations

119 N.E.3d 1033 (Table), 427 Ill.Dec. 751

End of Document

No. 1-15-2031

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 9682 (01)
	)	
JOHN GIVENS,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

ORDER

This cause coming to be heard on defendant-appellant's petition for rehearing regarding this Court's Rule 23 Order, entered on October 9, 2018, the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the Rule 23 Order is MODIFIED upon denial of rehearing; petition for rehearing is DENIED.

to follow

ORDER ENTERED

NOV 08 2018

APPELLATE COURT FIRST DISTRICT

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

It is immaterial whether the killing is intentional or accidental or committed by a third person trying to prevent the commission of the offense of Burglary.

I.P.I. Criminal No. 7.15 A

People's Instruction No. __

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN GIVENS, Petitioner-Appellant.	)	Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-15-2031 There heard on Appeal from the Circuit Court of Cook County, Illinois, No. 12 CR 9682 (01). Honorable James B. Linn, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN GIVENS, Petitioner-Appellant.	)	Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-15-2031 There heard on Appeal from the Circuit Court of Cook County, Illinois, No. 12 CR 9682 (01). Honorable James B. Linn, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL

Petitioner-appellant John Givens hereby petitions this Court for leave to appeal, pursuant to Illinois Supreme Court Rules 315 and 612, from the judgment of First Judicial District Appellate Court, affirming his convictions for felony murder, aggravated battery to peace officer, and possession of a stolen motor vehicle and his sentence of 20 years in prison.

PROCEEDINGS BELOW

The appellate court issued an unpublished decision affirming Givens' convictions and sentence on October 9, 2018. Givens filed a petition for rehearing, and the appellate court denied the petition on November 8, 2018. On November 13, 2018, the appellate court issued a modified decision upon denial of rehearing. A copy of the order denying rehearing and the modified decision are attached to this petition.

COMPELLING REASONS FOR GRANTING REVIEW

1. This Court should grant review to address the constitutionality of Illinois' proximate cause theory of felony murder as applied to John Givens. Givens, Leland Dudley, and David Strong burglarized an electronics store. Police were alerted and nineteen officers responded. As Dudley backed a minivan through the store's garage door, eight officers opened fire, killing front-seat passenger Strong. Givens was charged with felony murder of Strong.

On appeal, Givens made three distinct as-applied constitutional challenges to the proximate cause theory not previously addressed by this Court: (1) that it violated fundamental federal and state due process guarantees to allow for a murder conviction in the absence of any applicable *mens rea*; (2) that it amounted to an unconstitutional conclusive presumption of guilt for felony murder that Illinois law, the jury instructions, and the evidentiary rulings made it impossible to rebut; and (3) that it violated the eighth amendment's prohibition on cruel and unusual punishment where Givens was subject to the same penalty for intentional or knowing murder in a case with no applicable *mens rea*. His challenges are consistent with those in other jurisdictions, and with legislative changes to the felony murder rule.[1]

Instead of addressing Givens' distinct claims, the appellate court issued a decision reiterating its ruling issued in co-defendant Dudley's appeal, which

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[1] *Commonwealth v. Brown*, 81 N.E.3d 1173, 1178-79, 1191-99 (Mass. 2017); *People v. Brooks*, 2017 CO 77, ¶¶9-55 (Colo. 2018); S.B. 1437, 2018 Cal. Legis. Serv. Ch. 1015, amending West's Ann. Cal. Penal Code §§188 & 189 (eff. Jan. 1, 2019).

raised completely different claims.[2] Givens filed a petition for rehearing, arguing that the court's failure to hold oral argument was erroneous, and that its failure to address his distinct claims denied him his due process right to a full and fair appeal. The court denied rehearing, but issued a modified opinion in which it added a two-sentence paragraph indicating that Givens' claim did not amount to an as-applied challenge because it sought to invalidate the "statute's intent element which is more akin to a facial challenge," and asserting that Givens failed to show that his sentence was unconstitutional. *People v. Givens*, 2018 IL App (1st) 152031-U, ¶25 (Nov. 13, 2018). In a footnote, the court stated his claim was not novel for the purposes of oral argument. *Id.* at ¶25 n.1.

This Court should grant review to fully address Givens' constitutional challenges to the proximate cause theory of liability for felony murder, consistent with Givens' due process right to a full and fair appeal. *People v. Sistruck*, 259 Ill. App. 3d 40, 53-54 (1st Dist. 1994); *People v. Brown*, 39 Ill. 2d 307, 310-12 (1968). Contrary to the appellate court's assertion, Givens' challenge is distinct from claims previously raised in *People v. Hudson*, 222 Ill. 2d 392 (2006) and *People v. Lowery*, 178 Ill. 2d 462 (1997). 2018 IL App (1st) 152031-U, at ¶25 n.1. Additionally, the court erred when it determined that Givens presented no novel issue worthy of oral argument. Illinois Supreme Court Rule 352(a) (eff. July 1, 2018). Givens raised at least two substantial questions: his unique constitutional

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[2] Dudley argued that the court: (1) should abandon the proximate cause theory and adopt an agency theory consistent with the reasoning of Justice Heiple in *People v. Dekens* 182 Ill. 2d 247, 259-61 (1998); and (2) that his felony murder conviction was not rationally related to deterring forcible felonies because burglary was not an inherently violent felony.

challenges to the proximate cause theory, and whether he was denied his constitutional right to present a defense to felony murder where he was prevented from introducing evidence of a Chicago Police Department's ("CPD") general order prohibiting officers from firing at a moving vehicle when it is the only force used against them. Recently, this Court granted a petition for leave to appeal in *People v. Marshall Ashley*, No. 123989, asking this Court to review a constitutional challenge and the lower court's denial of oral argument. As in *Ashley*, this Court should grant review of the instant petition to clarify the meaning and scope of Rule 352(a). Alternatively, this Court should issue a supervisory order remanding this matter with directions to fully consider Givens' constitutional claims and to hold oral argument in his case.

2. This Court should also grant review to address two major trial errors. First, this Court should determine whether Givens was denied his due process right to present a defense where the trial court prevented him from introducing CPD General Order G03-02-03. The general order only allows officers to fire at or into a moving vehicle to prevent death or great bodily harm to another. But, if the vehicle is the only force used against the officers, the order requires the officers to get out of the way of the vehicle's path. Givens argued that the officers' failure to follow the order constituted an intervening cause of Strong's death, and therefore a defense to proximate causation. The appellate court rejected the argument, ruling that the order was not relevant to whether Strong's death was foreseeable because there was no evidence that Givens knew about the order. The ruling was error, because whether Strong's death was foreseeable is judged by a "reasonable

person" standard. *People v. Hudson*, 222 Ill. 2d 392, 401 (2006). Further, the ruling is at odds with *People v. Domagala*, 2013 IL 113688, ¶¶39-42 and *People v. Way*, 2017 IL 120023, ¶¶28-31, in which this Court found error in failing to present or allow evidence of an intervening cause where proximate causation was at issue. The court's ruling also reinforces Givens' claim that the proximate cause theory amounts to an unconstitutional, conclusive presumption of guilt for felony murder because he is unable to present a defense to the charge.

Second, this Court should grant review where the trial court improperly instructed the jury on accountability and causation. The trial court provided standalone pattern instructions on accountability, Instruction 5.03, and accountability in a felony murder case, Instruction 5.03A, and modified a pattern instruction for homicide to include accountability language, Instruction 7.02. But accountability was not at issue with respect to the felony murder charge, as the officers were the actual shooters of Strong and Givens was prosecuted as a principle to the burglary. Moreover, the trial court improperly instructed the jury on causation in cases excluding felony murder, Instruction 7.15, which wrongly informed the jury that it could find Givens guilty of felony murder as long as Strong's death was from a cause "not unconnected" with the defendant. Not only is this not the standard for evaluating proximate cause in the felony murder context, but the provision of the faulty instruction supports Givens argument that the proximate cause theory violates due process by creating an unrebuttable presumption of guilt for any death that coincides with the commission of a forcible felony.

STATEMENT OF FACTS

Around 2 a.m. on April 30, 2012, Dudley, Strong, and Givens broke into Mike's Electronic Store, located on the corner of Western Avenue and 25th Street in Chicago. (R. GG180) None of the men were armed. (R. HH33-34) The owner of the store, Miguel Gutierrez, installed 11 security cameras, including one facing a garage entrance off of 25th which captured the entire shooting. (R. GG180-81) The night of the shooting, Gutierrez left his grey minivan parked inside the garage. (R. GG185-91) A tenant, Sergio Hernandez, lived above the store. (R. GG193-94, 201) Hernandez came home around midnight, and parallel-parked his red van in front of the driveway leading to the garage. (R. GG141, 145-47) Hernandez called the police when he heard noises below. (R. GG144-48, 150-52)

Between 2:30 and 2:40 a.m., 19 officers arrived at the scene, turning off lights and sirens to avoid detection. (R. GG238, 244; HH40, 98,140) The officers announced their office, but received no response. (R. GG155, 222; HH19-20,102) When Hernandez came downstairs, he saw that two people were in Gutierrez's running van, and one person was getting in the van. (R. GG151-52, 160-61, 163-64, 170) After speaking with Hernandez, the officers attempted to kick in a door leading to the garage. (R. GG225-26) When officers saw the van's lights come on, they yelled to other officers to get out of the way.[3] (R. GG225-27)

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[3] An audio recording tendered in discovery and publicly available on the Civilian Office of Police Accountability's ("COPA") website shows that an officer warned his fellow officers that the van was coming out of the garage a minute beforehand. The appellate court rejected Givens' motions to supplement the record with the recording or to take judicial notice of the recording. The COPA investigation into the officers' conduct remains open.

Video footage admitted at trial showed that about three minutes before the shooting, a squad car parked in the middle of 25th, near the garage driveway. ((P. Ex. 73AA-2, file 5-2, 2:42:01) Officers Michael Curry and Michael Papin walked towards the garage at about 2:45 a.m., and Curry drew his gun and kept it at his side. (2:44:47, 2:45:10) Shortly before the shooting, another officer approached Papin and Curry as they stood near the garage door. (2:45:37) Several officers took positions on either side of the garage door. (2:45:35-2:45:47) At 2:45:47 a.m., Dudley backed Gutierrez's van through the garage door, hitting the red van parked in the driveway. As it did, Papin spun around and ran west, and Curry fired his weapon. (2:45:48, 2:45:50) Curry reloaded his weapon about ten seconds after he fired his first shot. (2:45:59-2:46) Eight seconds after the van exited the garage, it came to a stop and sank to the ground. (2:45:54) After the van stopped, multiple officers approached the van with their weapons drawn. (2:46 *et seq.*) The dash camera from the squad car parked in the middle of 25th captured a hail of bullets being fired at the van as it reversed. (P. Ex. 79, 3:39 *et seq.*) The dash camera captured the van lurching forward and coming to stop, and officers continued to fire at the van after it stopped moving. (3:44-48)

Multiple officers testified at Givens' trial. After Officer Daniel Lopez spoke with tenant Hernadez, he went into a hallway and kicked in a small hole in the bottom of the door leading to the garage, and announced his office. (R. GG222-23, 225) Through the hole, Lopez saw the van, heard a door slam and the ignition turn on, then saw the white reverse lights. (R. GG225-26) As Lopez yelled to the other officers to get out of the way, the van burst through the garage door. (R. GG. 227,

229) Officer Terrance Pratscher heard someone say that the men were in the van, but denied hearing a warning that the van was coming out of the garage. (R. HH13, 29-31) Curry also heard an officer say that the men were coming out of the garage, but denied receiving a radio warning. (R. HH71) Papin heard an officer say that the men were inside the car and the revving of an engine, but denied hearing a radio warning. (R. HH80-81, 92) Officer George Mendez heard Lopez say that the men were coming out, but denied hearing a radio dispatch warning the officers to be prepared if the van came out of the garage. (R. HH103, 113-14)

After the van crashed through the door, multiple officers claimed that they saw Papin disappear behind the van. (R. GG227; HH13-14, 104) Lopez claimed Papin rolled underneath the wheels of the van. (R. GG227) Curry saw the van strike Papin, and saw Papin pass him, but claimed that he did not know if Papin was behind or underneath the van. (R. HH45-46, 64-65) Papin testified that the van exited a "fraction of a second" after he heard an officer state that they started the van. (R. HH81) Papin, who was standing directly in front of the garage door, denied that he had any time to get out of the way.[4] (R. HH81) The van hip-checked Papin, and he bounced off of the van but was able to keep his balance. (R. HH82) The video shows Papin turning around and running away, bumping into Curry in the process. (P. Ex. 73AA-2, 2:45:47-50) Papin suffered no fractures, nor was he given any pain medication. (R. HH86-87)

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[4] Officer Adrian Valadez told an investigator with the now-defunct Independent Police Review Authority ("IPRA") that he approached Papin and warned him to get out of the way before the van left the garage. Givens' motion to supplement the record with Valadez's IPRA transcript was denied. Counsel believes Valadez is shown on the video approaching Papin.

After the van backed out of the garage, Pratscher fired 11 times at the van because he thought Papin was being dragged by the van. (R. HH13-14) Curry fired 18 times at the van. (R. HH46-47, 59-60) Lopez, Pratscher, Curry, and Mendez claimed that Dudley made an up-and-down motion and that the van lurched forward in the direction of the officers. (R. GG229; HH15-16, 48-49,105, 116) Lopez, who was closest to the passenger side, testified that he fired six rounds while aiming at the driver "to eliminate the threat of the vehicle hurting anybody else." (P. Ex. 178; R. GG229-30) Mendez fired his gun eight times. (R. HH105, 116) When Mendez approached the van, he claimed that the gearshift was in the "drive" position. (R. HH107-08)

Detective John Benigno testified that eight officers discharged a maximum of 77 rounds. (R. HH14-41) Strong was shot eight times. (R. HH122-31, 137-38) Dudley was shot twice in the forehead, twice in the left shoulder, and twice in his back. (R. HH150) Givens was shot twice in his left wrist, once in his right thigh, once in his right shin, once in his left chest, and once in the neck. (R. HH152) The defense did not put on any evidence. (R. HH157) Since the shooting, Givens is confined to a wheelchair.

Prior to trial, the court ordered the State to turn over documents related to the ongoing investigation into the officers' use of deadly force by IPRA, deeming them "absolutely discoverable and relevant." (R. U2; CC4,6) The trial court told the defense that it would be given "total latitude" to tell the jury that the police were wrong and to "talk about excessive force." (R. GG10) CPD General Order 03-02-03, which had been in effect for almost a decade on the date of the shooting,

stated that "[f]iring at or into a moving vehicle is only authorized to prevent death or great bodily harm to the sworn member or another person." (Supp. C. 43-44) It also clearly stated, "[w]hen confronted with an oncoming vehicle and that vehicle is the only force used against them, sworn members will move out of the vehicle's path," and that officers are not to fire into a window when the person lawfully fired at is not clearly visible. (Supp. C. 43-44) When defense counsel attempted to cross-examine Pratscher about the general order, a off-the-record sidebar was held and an objection sustained. (R. HH26) Later, the court spread of record the sidebar, and indicated that the CPD general order was "misleading" and would "confuse the jury because they are not the letter of the law." (R. HH159) Defense counsel argued that the order was relevant because the officers' use of excessive force meant that Strong's death was not as likely to be foreseen. (R. HH159) The court responded that even if the officers violated CPD orders, the defendants could still be criminally liable. (R. HH159)

The court indicated that "[a]ccountability language is going to be given on all the instructions," and provided pattern jury instructions on accountability (Instruction 5.03); accountability in a felony murder case (Instruction 5.03A); and accountability for homicide (Instruction 7.02). The jury was also instructed on causation in cases excluding felony murder (Instruction 7.15), and on causation in felony murder cases (Instruction 7.15A). (C. 183, 185-88; R. HH160, 228-32) During deliberations, the jury asked "Do we have to follow the letter of the law or are (*sic*) can we interpret it the way that we choose." (R. MM251) The court responded that it had given the jury the law that applied to the case, and that it

should continue to deliberate. (R. MM251) The jury returned guilty verdicts, and Givens was sentenced to a term of 20 years in prison on the felony murder count, and two concurrent six-year terms on the aggravated battery and possession of a stolen motor vehicle counts. (R. MM253; Supp. R. A28)

Givens raised seven claims on direct appeal. Relevant to this petition, Givens argued that Illinois' proximate cause theory of liability as applied to him violated his right to due process under the federal and state constitutions, and that his conviction violated the eighth amendment's prohibition on cruel and unusual punishment. Givens also argued that he was denied his constitutional right to present a defense to felony murder, namely that the officers' violations of the CPD's deadly force policy were a direct and intervening cause of Strong's death, and therefore not a foreseeable consequence of the burglary. He alleged counsel's ineffectiveness for failing to make an offer of proof with the IPRA transcripts and radio recording that supported his claim that the officers violated their general orders. Givens' motion to supplement the record with the above documents, as well as a motion to reconsider, were both denied. Givens also argued that the accountability instructions and the causation instruction were legally improper and warranted a new trial. The appellate court rejected all of Givens' claims, and denied his petition for rehearing asserting that the court erred in its analysis of the above three claims.

ARGUMENT

I. This Court should grant leave to appeal to address John Givens' argument that Illinois' proximate cause theory of liability for felony murder violates federal and state due process guarantees, as well as the eighth amendment.

There is no dispute that John Givens did not fire the fatal shots that killed David Strong. One or more of the eight officers who fired 77 rounds at the van actually killed Strong. Givens was prosecuted for felony murder predicated on burglary under Illinois' proximate cause theory, in which "liability attache[s] under the felony-murder rule for any death proximately resulting from the unlawful activity–notwithstanding the fact that the killing was by one resisting the crime." *People v. Lowery*, 178 Ill. 2d 462, 465 (1997). This Court has upheld the proximate cause theory on three rationales: (1) that the felony murder rule is analogous to civil tort law, and therefore proximate cause should apply with equal force; (2) that sound public policy supports holding felons liable for "foreseeable" deaths that result from a chain of events they set in motion; and (3) that forcible felonies are so "inherently dangerous" that death should be classified as a murder to protect the public and deter others. 178 Ill. 2d at 466-69.

However, this Court has not analyzed the proximate cause theory under federal and state due process. Although states have broad power to define what constitutes a crime and regulate procedures for carrying out their laws, the state's administration of its laws can violate due process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). One fundamental notion is that in order to constitute a crime, one must have an "evil-

meaning mind." *Morissette v. U.S.*, 342 U.S. 246, 251 (1952). Historically, courts have upheld the felony murder rule by determining that an accidental or unintentional death could still constitute murder when it occurred during the perpetration or attempted perpetration of felony, because the "malice" or *mens rea* element necessary to elevate a death to murder could be "constructively imputed by the malice incident to the perpetration of the initial felony." *Commonwealth v. Redline*, 137 A.2d 472, 475 (Pa. 1958). "In adjudging a felony-murder, it is to be remembered at all times that the thing which is imputed to a felon for a killing incidental to his felony is malice and not the act of killing. The mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine." 137 A.2d at 476.

Givens' felony murder conviction does not satisfy basic due process. The officers who fired the fatal shots were not co-conspirators or accomplices, so a mental state for murder cannot be "constructively imputed" from Givens or Dudley to the police. In essence, the proximate cause theory makes felony murder a strict liability offense. *People v. Causey*, 341 Ill. App. 3d 759, 769 (1st Dist. 2003). While strict liability crimes are not *per se* unconstitutional, the U.S. Supreme Court has noted that they are disfavored, and consistent with the rule of lenity required a *mens rea* even in cases where a statute does not include a mental state. *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 437-48 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with the intent requirement."). This Court has invalidated statutes that lack a culpable mental state on grounds that the statute

violates federal and state due process guarantees. *People v. Zaremba*, 158 Ill. 2d 36, 40-43 (1994). Recently, the Massachusetts Supreme Court ruled that in order to find a defendant guilty of felony murder based on participation in an underlying felony when he did not actually commit the killing, the State must now show that the defendant also had an intent to kill, to cause "grievous bodily harm, or that a reasonable person would have known that his actions created a strong likelihood that death would result." *Commonwealth v. Brown*, 81 N.E.3d 1173, 1196 (Mass. 2017). It noted that a felony murder rule which punished all deaths committed during a felony without "proving the relation to the perpetrator's state of mind to the homicide, violates the most fundamental principle of the criminal law–criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result." 81 N.E.3d at 1195.

As applied to Givens, the proximate cause theory violates both federal and state due process. Nothing in the plain language of the felony murder statute requires Illinois to utilize the proximate cause theory, and the majority of states limit the application of the felony murder rule to deaths caused by an act of the defendant or one acting in concert with him, *i.e.*, the agency theory. 720 ILCS 5/9-1(a)(3) (West 2012); *Lowery*, 178 Ill. 2d at 466. Givens is not making a facial challenge because the statute contains no language requiring the proximate cause theory, and because he is not contending that the agency theory would be similarly unconstitutional. *People v. Givens*, 2018 IL App (1st) 152031-U, ¶25.

Additionally, the proximate cause theory violates due process by creating a conclusive presumption of guilt for felony murder as long as the State proves

Givens committed an underlying, independent predicate felony. *Sandstrom v. Montana*, 442 U.S. 510, 514-24 (1979); *People v. Watts*, 181 Ill. 2d 133, 141-50 (1998). A presumption allows the fact finder to assume the existence of an ultimate fact after certain predicate facts are established. *Watts*, 181 Ill. 2d at 141-42. A conclusive presumption is one which the fact finder cannot reject, and "relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts." *Id.* at 142. Once a conclusive presumption is triggered, "the defendant is not allowed to attempt to rebut the connection between the proven and presumed facts." *Id.*

The existence of a conclusive presumption is shown by the jury instructions in this case. Once the State proved Givens committed a burglary, the jury was required to find him guilty of felony murder even in the absence of a mental state. The jury was instructed that it did not have to find that Givens intended to kill Strong, and further, that "A person commits the offense of first degree murder when he commits the offense of burglary, and the death of an individual results as a direct and foreseeable consequence of a chain of events set into motion by his commission of the offense of burglary," and that "It is immaterial whether the killing is intentional or accidental or committed by a third person trying to prevent the commission of the offense of burglary." IPI-Crim. 5.03A & 7.15A (West 2015); (C. 186, 188). Although Instruction 7.15A purports to limit liability to deaths that are a direct and foreseeable consequence of the predicate felony, that phrase is meaningless when followed by an explanation that whether a death is intentional, accidental, or committed by a third party is immaterial. IPI-Crim.

7.15A. "Direct and foreseeable" was not defined for the jury, and in practice this Court has found just about any death "foreseeable." *People v. Hudson*, 222 Ill. 2d 392, 394 (2006); *People v. Brackett*, 117 Ill. 2d 170, 176-81 (1987). This claim is reinforced by the erroneous causation instruction, advising the jury that "the State must prove beyond a reasonable doubt that defendant's acts were a contributing cause of the death and that the death did not result from a cause unconnected with the defendant. However, it is not necessary that you find the acts of the defendant were the sole and immediate cause of death." IPI-Crim. 7.15 (Causation in Homicide Cases Excluding Felony Murder); (C. 187). A reasonable juror would have understood that once he found that Givens committed burglary, he had no choice but to convict Givens of felony murder.

Furthermore, the combination of Illinois law and the trial court's ruling preventing Givens from introducing General Order 03-02-03 in defense of the felony murder charge makes the presumption of guilt for Strong's death irrebuttable, and therefore unconstitutional. *Watts*, 181 Ill. 2d at 147-50; *Francis v. Franklin*, 471 U.S. 307, 309-18 (1985). Self-defense is not a defense to felony murder. *People v. Moore*, 95 Ill. 2d 404, 411 (1983). "Without lawful justification" is not an element of felony murder, and whether or not the person who actually committed the shooting was justified is irrelevant to the defendant's guilt. *People v. Martinez*, 342 Ill. App. 3d 849, 854 (1st Dist. 2003). This Court ruled that involuntary manslaughter is not a lesser-included offense of felony murder because the former requires proof of at least a reckless mental state, while the latter requires no proof of a mental state. *People v. Davis*, 213 Ill. 2d 459, 475-77

(2004). Because Illinois' proximate cause theory creates a mandatory presumption of guilt for any death that results from a forcible felony, and relieves the State of its burden to prove beyond a reasonable doubt that Givens had any conceivable *mens rea* for Strong's death, it violates due process. *Sandstrom*, 442 U.S. at 515-24 (jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was an impermissible conclusive presumption).

Illinois' proximate cause theory also violates the eighth amendment's prohibition on cruel and unusual punishment by imposing the same punishment (a 20-year sentence) against Givens as it would against a criminal defendant that committed intentional or knowing murder. U.S. Const., amends. VIII, XIV; *Robinson v. California*, 370 U.S. 660, 667 (1962). The U.S. Supreme Court has ruled that it violates the eighth amendment to sentence one convicted of felony murder as an aider and abettor to death, noting that it has "found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982). Similarly, sentencing Givens to the same range of penalties for intentional or knowing murder constituted cruel and unusual punishment where he did not intend, or even foresee, that Strong would be killed by police. 458 U.S. at 798-802; 730 ILCS 5/5-4.5-20(a) (West 2012).

The appellate court did not address the above arguments raised in Givens' briefs. *Givens*, 2018 IL App (1st) 152031-U, ¶¶19-30. As noted *supra* at page 3, note 2, the court addressed the co-defendant's arguments. Thus, Givens was

denied his right to a full and fair direct appeal on his actual claims. *See, e.g.*, *People v. White*, 117 Ill. 2d 194, 229 (1987) ("A reviewing court that decides an important question in a murder case without briefing or argument for the defendant ignores that directive [to hear the other side].") (Simon, J., concurring). Should this Court decline to grant this petition, it should enter a supervisory order remanding this case to the appellate court to reconsider Givens' claims and to hold oral argument.

II. This Court should grant leave to appeal because Givens was denied his constitutional right to present a defense, the CPD's general order on the use of deadly force against a vehicle, and because the jury instructions were legally improper.

Givens asserted that he was denied his constitutional right to present a defense, namely General Order 03-02-03, to refute the element of causation for felony murder. He argued that the officers' failure to follow their own order was an intervening cause of Strong's death, and he attempted to supplement the record on appeal with discovery materials in support of his claim that counsel was ineffective for failing to make an offer of proof which showed that the officers did not follow the order. As with Givens' constitutional challenges, the appellate court did not squarely address this claim, and ruled that the order was not relevant to whether Strong's death was foreseeable because there was no evidence that Givens was aware of the order. *People v. Givens*, 2018 IL App (1st) 152031-U, ¶¶32-35.

But the issue of foreseeability depends on what a "reasonable person" would see as a likely result of his conduct, not on whether Givens was aware of the order. *Hudson*, 222 Ill. 2d at 401. No reasonable person would have contemplated that

the front-seat passenger of the van would be killed by officers firing off 77 rounds. Moreover, its decision is contrary to this Court's jurisprudence on the right to present a defense in cases involving proximate cause determinations. *People v. Domagala*, 2013 IL 113688, ¶¶39-42 (petitioner made a substantial showing of counsel's ineffectiveness for failing to present evidence of gross medical negligence as an intervening cause of death); *People v. Way*, 2017 IL 120023, ¶¶28-31 (trial court erred in preventing defendant from introducing evidence of unforeseeable medical condition in defense to aggravated DUI). At least one court recognized that a police department's standard operating procedures and an officer's compliance with those procedures were admissible in defense of a felony murder charge. *People v. Sago*, 2016 IL App (2d) 131345, ¶¶3-5. Multiple cases have held that a defendant is entitled to cross-examine an officer to show bias, interest, or motive, and on prior instances of misconduct. *People v. Phillips*, 95 Ill. App. 3d 1013, 1022-23, 1029 (1st Dist. 1981); *People v. Banks*, 192 Ill. App. 3d 986, 993-94 (1st Dist. 1989). As the lower courts erred in their rulings on this issue, this Court should grant review.

Additionally, the pattern jury instructions provided in Givens' case were legally improper. IPI-Crim. 5.03, 5.03A, and 7.02 (West 2015). The court gave a standalone accountability instruction, an accountability in felony murder instruction, and a first degree murder instruction modified to include accountability language. (C. 183, 185-86) Accountability was not in issue because Givens was charged as a principle for felony murder based on his commission of a burglary, and Strong was shot by the officers who were not Givens' accomplices.

(C. 75, 334) The cases cited by the appellate court do not support the validity of Givens' instructions, as one involved a felony murder where the killing was committed by an accomplice, and another involved modified instructions that reflected the proximate cause theory. 2018 IL App (1st) 152031-U, at ¶¶54-56 (citing *People v. Ramey*, 151 Ill. 2d 498, 537 (1992), and *People v. Nash*, 2012 IL App (1st) 093233, ¶25).

Further, the two causation instructions, one to be given in felony murder and one to be given in cases excluding felony murder, were improper. IPI-Crim. 7.15 & 7.15A (West 2015). Both instructions are proper only when the defendant is also charged with intentional or knowing murder. IPI-Crim. 7.15A, comm. cmt. The instructions watered down the admittedly low burden of proof on causation, allowing the jury to find Givens guilty of felony murder as long as Strong was killed by a cause "not unconnected" from the defendant. Even under Illinois' proximate cause theory, the jury was still required to find that Strong's death was a direct and foreseeable consequence of the burglary. *Burrage v. U.S.*, 571 U.S. 204, 215-19 (2014). The lower courts' errors resulted in a fundamentally unfair trial, and alternatively, counsel was ineffective for failing to object to the instructions in this case. This Court should grant review.

CONCLUSION

For the foregoing reasons, John Givens respectfully requests that this Court grant leave to appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Rachel M. Kindstrand, certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 315(d). The length of this petition, excluding pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the petition under Rule 315(c) is 5738 words.

/s/Rachel M. Kindstrand
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