

**CH. 26**  
**HOMICIDE**

- §26-1 [First Degree Murder \(CumDigest\)](#)
- §26-2 [Felony Murder \(CumDigest\)](#)
- §26-3 [Attempt Murder \(CumDigest\)](#)
- §26-4 **Second Degree Murder (Voluntary Manslaughter)**
  - (a) [Generally \(CumDigest\)](#)
  - (b) [Instructions \(CumDigest\)](#)
- §26-5 **Involuntary Manslaughter - Reckless Homicide**
  - (a) [Generally \(CumDigest\)](#)
  - (b) [Instructions \(CumDigest\)](#)
- §26-6 [Concealment of Homicidal Death](#)
- §26-7 **Justified Use of Force**
  - (a) [Generally \(CumDigest\)](#)
  - (b) [Instructions \(CumDigest\)](#)

[Top](#)

§26-1

**First Degree Murder**

[People v. Cooper, 194 Ill.2d 419, 743 N.E.2d 32 \(2000\)](#) In Illinois there is but one crime of first degree murder, which can be committed in more than one way. Where defendant is charged with first degree murder under one theory, the trier of fact is not precluded from considering liability under theories not specifically charged, so long as defendant was not prejudiced in preparing for trial or exposed to double jeopardy.

Where the trial court explicitly refused to consider felony murder, however, the double jeopardy clauses of both the federal and State constitutions prohibit either a trial for felony murder or a remand for the trial court to consider a felony murder theory.

[People v. Villarreal, 198 Ill.2d 209, 761 N.E.2d 1175 \(2001\)](#) Where defendant was charged with two counts of first degree murder (felony murder and knowledge of strong probability of death) and one count of second degree murder ("strong probability" murder where defendant acted with an unreasonable belief that the circumstances would have justified the killing), and raised self-defense, the trial court acted properly by instructing the jury that defendant was charged with two "types" of first degree murder and by refusing to give a general "not guilty" verdict form. The instructions provided a clear demarcation between the two types of first degree murder and prevented the jury from convicting of second degree murder based on felony murder.

In addition, a general "not guilty" verdict should not be given when a defendant is charged with felony murder and a second type of first degree murder. "Otherwise, the general 'not guilty' verdict would . . . appear to operate to absolve defendant" of all the charges, and would require the jury to return what appear to be inconsistent verdicts in order to convict of second degree murder.

[People v. Holmes, 67 Ill.2d 236, 367 N.E.2d 663 \(1977\)](#) Elements of murder include proof of death and proof of a criminal agency causing death. Both must be established beyond a reasonable doubt. After these elements (the corpus delicti) have been proved, the evidence must establish beyond a reasonable doubt that defendant was the criminal agency (or placed in motion the criminal agency) that caused the death.

[People v. Guest, 115 Ill.2d 72, 503 N.E.2d 255 \(1986\)](#) The murder statute requires proof of intent or knowledge. A killing constitutes murder when it is proven that defendant: (1) intentionally sought to bring about the death of another, or (2) had knowledge that his conduct was practically certain to cause death or create a strong probability that death would result. See also, [People v. Wright, 111 Ill.2d 18, 488 N.E.2d 973 \(1986\)](#).

[People v. Koshiol, 45 Ill.2d 573, 262 N.E.2d 446 \(1970\)](#) Specific intent is a state of mind and, if not admitted, can be shown by surrounding circumstances. Intent to take a life may be inferred from the character of the assault, use of a deadly weapon, and other circumstances.

[People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296 \(1994\)](#) Where the indictment alleged that defendant shot and killed the decedent, and at trial the State pursued the theory that defendant was the principal, the trial court erred by giving an accountability instruction on murder. Evidence showing that defendant agreed with two other persons to kill the decedent could not be used to sustain a conviction of murder on an accountability basis; the State's argument "confuses the legal concepts of conspiracy and accountability."

The improper accountability instruction was harmless, however, because the jury could only have concluded that defendant was guilty as a principal or not guilty at all.

[People v. Ceja, 204 Ill.2d 332, 789 N.E.2d 1228 \(2003\)](#) Defendant was charged with first degree murder as a principal. At trial, the State obtained instructions on guilt of first degree murder as an accomplice, arguing that defendant was accountable because he "agreed" to aid in the planning and commission of the offense. The trial court refused defendant's request to instruct on conspiracy to commit murder as a lesser included offense of first degree murder, finding that conspiracy was not a lesser included offense because the charge did not claim that defendant had "agreed" that another should commit the murder.

Because the indictment charged defendant with first degree murder only as a principal, and contained no reference to any "agreement" that could form the basis of a conspiracy instruction, conspiracy was not a lesser included offense in this case. The lesser included offense inquiry does not include the jury instructions requested by the State, even where those instructions expand the theory of culpability beyond that alleged in the indictment.

[People v. Ehlert, 211 Ill.2d 192, 811 N.E.2d 620 \(2004\)](#) To prove the murder of a newborn, the State must establish that the infant was born alive. Here, even if the fetus was born alive, the evidence was insufficient to establish that its death resulted from defendant's criminal acts.

The physical evidence was insufficient to determine the cause of death. Although defendant concealed her pregnancy, gave birth at home, placed the fetus in a plastic bag, and placed the bag next to a creek, the medical experts agreed that the child could have died of natural causes either during or after birth. Although defendant's fiancé believed that he might have heard a baby cry for a short period of time during the birthing process, the medical evidence established that even if the baby was alive at birth it could have died of natural causes.

[People v. Garrett, 62 Ill.2d 151, 339 N.E.2d 753 \(1975\)](#) Murder conviction reversed. Judge at bench trial improperly concluded that suicide was not possible. The coroner's pathological report and protocol and various scientific treatises were reviewed. Defendant's conduct in bringing the weapon to the scene (a motel) and hiding it afterwards did not support an inference of guilt, because the conduct was equally consistent with the actions of an innocent man acting in panic.

[People v. Coleman, 49 Ill.2d 565, 276 N.E.2d 721 \(1971\)](#) Indictment for murder need not allege the means used to accomplish the death. Such an allegation is a formal part of the indictment and may be added by amendment.

[People v. Fiddler, 45 Ill.2d 181, 258 N.E.2d 359 \(1970\)](#) A certified copy of a coroner's death certificate is not admissible to show cause of death.

[People v. Gleckler, 82 Ill.2d 145, 411 N.E.2d 849 \(1980\)](#) Compulsion defense is unavailable where defendant is charged with murder. Additionally, evidence of compulsion does not entitle defendant at murder trial to have jury instructed on voluntary manslaughter.

[People v. Love, 71 Ill.2d 74, 373 N.E.2d 1312 \(1978\)](#) Further medical testimony was not required to establish causal connection between defendant's actions (severe kicking of decedent) and death. When evidence suggests that acts unconnected to defendant might have caused the injury, medical testimony may be necessary to assist the trier of fact in determining whether defendant's acts constituted a contributing factor. Here, however, there was no evidence suggesting an act or cause of injury apart from defendant's conduct.

[People v. Brackett, 117 Ill.2d 170, 510 N.E.2d 877 \(1987\)](#) Defendant's acts need not be the "sole and immediate cause of death." Defendant may be convicted of murder if his acts contributed to the death. Where both defendant's acts and the victim's existing health condition contribute to a death, there is sufficient proof

of causation.

[People v. Crane, 145 Ill.2d 520, 585 N.E.2d 99 \(1991\)](#) Defendant was charged with murder for beating and burning the victim and thereby causing his death. In regard to the beating, defendant claimed he acted in self-defense. In regard to the burning, he claimed that he believed the victim was already dead. The trial judge instructed the jury on self-defense but refused to give an instruction on mistake of fact.

It was reversible error to refuse the mistake of fact instruction. The defense was supported by the evidence: two police officers testified that defendant told them he believed the victim was dead prior to the burning, the expert witnesses were unable to conclusively determine whether the victim was alive at the time of the burning, and one expert testified that a lay person seeing an unconscious body with the victim's injuries might reasonably conclude he was dead.

A mistake of act is a valid defense if it negates a mental state that is an element of the offense. Here, the mistake of fact, if believed by the jury, would have negated the mental state required for murder.

[People v. Rollins, 295 Ill.App.3d 412, 695 N.E.2d 61 \(5th Dist. 1998\)](#) Defendant argued that he was entitled to a "mistake of fact" instruction at his murder trial because if the jury believed that the death was caused by drowning, it might have found that defendant lacked intent to kill because he thought the decedent was already dead when he placed her in the water. In support, defendant cited [People v. Crane, 145 Ill.2d 520, 585 N.E.2d 99 \(1991\)](#), which held that defendant was entitled to a "mistake of fact" instruction where he beat the decedent in self-defense and then burned the body in the mistaken belief that death had already occurred.

In [Crane](#), the critical consideration was that the actions which injured the decedent were justified. Here, by contrast, defendant's beating of the decedent was not justified. The "mistake of fact" defense is unavailable where the injuries which lead to a mistaken conclusion that death has occurred were inflicted without justification.

[People v. Payton, 356 Ill.App.3d 674, 826 N.E.2d 1011 \(1st Dist. 2005\)](#) The judge gave contradictory and confusing instructions regarding the relationship between first degree intentional or knowing murder, first degree felony murder, and second degree murder based on provocation, and also erred in giving any felony murder instructions at all.

Where a defendant is charged with both first degree felony murder and first degree intentional or knowing murder, and the jury is to be instructed as well on second degree murder, the IPI instructions distinguish between the first degree felony murder count, as to which second degree murder is not in issue (because guilt of felony murder renders irrelevant the factors which mitigate first degree murder to second degree murder), and the first degree intentional and knowing counts, as to which conviction may not occur unless the jury first considers whether the mitigating factors justifying a conviction of second degree murder are present.

Thus, as to the first degree felony murder count, the judge should have given [IPI Criminal 4th 7.02](#) (issues in first degree murder when second degree murder is not also in issue), an instruction that omits any references to second degree murder and first degree intentional and knowing murder. As to the first degree intentional and knowing murder counts, the judge should have given [IPI 7.04X](#) (issues where jury instructed on first degree murder and second degree murder (provocation)), which includes language regarding second degree murder but omits any reference to first degree felony murder. Also, the judge should have given [IPI 7.01X](#), an instruction that explains to the jury the reason for designating first degree intentional and knowing murder with one label (type A murder), and first degree felony murder with another (type B murder).

[People v. Amigon, 388 Ill.App.3d 26, 903 N.E.2d 843 \(1<sup>st</sup> Dist. 2009\)](#) To obtain a murder conviction, the State must prove beyond a reasonable doubt that defendant's actions caused the victim's death, but it need not prove that defendant's acts were the sole and immediate cause of death. Instead, a murder conviction will lie if the prosecution proves that defendant's criminal acts proximately contributed to the death.

Thus, a defendant will be found criminally liable where his criminal act set in motion a chain of events which culminated in death. By contrast, an intervening cause that is completely unrelated to defendant's criminal act relieves defendant of criminal liability.

Where defendant fired a shot which severed the victim's spinal cord and left him with a weakened immune system and a compromised ability to expel air, and the victim died several years later from pneumonia which according to expert testimony was more likely to occur in a quadriplegic, the State proved sufficient causation to support a murder conviction.

[People v. Brown, 57 Ill.App.3d 528, 373 N.E.2d 459 \(1st Dist. 1978\)](#) Defendant stabbed the deceased, who had surgery and was released from the hospital. The decedent died eleven days after the incident, after experiencing pains and receiving treatment from a physician. The medical expert surmised that death was caused by blood clots originating from the site of the stabbing injury. However, the expert gave no "foundations of fact and reasons" for his opinion.

Evidence was insufficient to prove that act of stabbing caused the death. Without supporting facts, the connection between defendant's act and the subsequent death is mere inference and speculation. Murder conviction reduced to attempt murder.

[People v. Caldwell, 295 Ill.App.3d 172, 692 N.E.2d 448 \(4th Dist. 1998\)](#) Decedent's decision to be taken off life support was not an intervening event so that defendant's infliction of injuries requiring life support was not the cause of death. To be a "supervening cause," a subsequent event must be a "new effective cause which, operating independently of anything else, becomes proximate cause" of the death.

Decedent's decision to remove "artificial life support" was a natural and foreseeable result of defendant's wrongful acts that caused the injury. "The cause of . . . death was not the removal of the ventilator, but the criminal act that defendant performed which generated the need for the life support in the first instance." See also, [People v. Pinkney, 322 Ill.App.3d 707, 750 N.E.2d 673 \(1st Dist. 2000\)](#) (trial court erred by giving a "cause of death" instruction where there was no evidence of an intervening and alternate explanation for the cause of death, such as malpractice by medical personnel who attempt to treat the decedent for injuries caused by defendant).

[People v. Dillon, 28 Ill.App.3d 11, 327 N.E.2d 225 \(1st Dist. 1975\)](#) Whether there is a causal relationship between defendant's conduct and the death is a question for the trier of fact. When the State shows the existence, through the acts of defendant, of a sufficient cause of death, the death is presumed to have resulted from such act unless death appears to have been caused by a supervening act unconnected to any act of defendant.

[People v. Humble, 18 Ill.App.3d 446, 310 N.E.2d 51 \(5th Dist. 1974\)](#) Defendant could be convicted of a homicide though the blow would not have killed a person in good health.

[People v. Gillespie, 276 Ill.App.3d 495, 659 N.E.2d 12 \(1st Dist. 1995\)](#) Actual knowledge of the mother's pregnancy is an essential element of the offense of intentional homicide of an unborn child ([720 ILCS 5/9-1.2](#)).

[People v. Kent, 111 Ill.App.3d 733, 444 N.E.2d 570 \(1st Dist. 1982\)](#) Defendant was convicted of the murder of her month-old daughter, on the theory she fed the child alcoholic beverages knowing that her actions created a strong probability of death or great bodily harm. The conviction was reversed because the medical evidence was insufficient to prove that defendant's acts were the cause of death.

[People v. Smith, 3 Ill.App.3d 64, 278 N.E.2d 551 \(1st Dist. 1971\)](#) Murder conviction reversed. The circumstantial evidence of guilt came from a witness whose testimony was weak, contradictory, impeached

and refuted. Also, the witness was uncorroborated though the State was aware of numerous other occurrence witnesses. See also, [People v. Newson, 133 Ill.App.2d 511, 273 N.E.2d 478 \(1st Dist. 1971\)](#) (murder conviction reversed; State's testimony contained many contradictions and inconsistencies as well as discrepancies concerning description of the assailant).

[People v. Howard, 74 Ill.App.3d 870, 393 N.E.2d 1084 \(2d Dist. 1979\)](#) Defendant's conviction for the murder of her four-year-old son was reversed. The evidence was entirely circumstantial, and there was no substantial evidence connecting defendant with the killing. The fact that defendant had an opportunity to commit the offense was not sufficient to establish guilt beyond a reasonable doubt, particularly where there was no showing that defendant had any motive for the killing and the State's own evidence "lends credence to the intruder theory relied upon by the defense."

[People v. Calhoun, 4 Ill.App.3d 683, 281 N.E.2d 363 \(1st Dist. 1972\)](#) Murder conviction reversed. State's circumstantial case showed that defendant shot decedent but not that defendant acted with the requisite mental state.

[People v. Holsapple, 30 Ill.App.3d 976, 333 N.E.2d 683 \(5th Dist. 1975\)](#) Defendant's conviction for murder was reversed. The evidence was wholly circumstantial and there was a time factor:

"It is difficult to believe the defendant could have done so much in so little time; that human hair matching neither the deceased nor defendant was found on the dress and torn, blood-stained underpants of the deceased; no blood of defendant was found in the blood-splattered cabin; and no fingerprints of defendant were found."

Though the jury was justified in disregarding defendant's alibi testimony (since it was "just not believable"), "an incredible explanation denying guilt is not an admission of guilt - even though it may not aid the defendant, it does not supplement the proof required of the State."

[People v. Mostafa, 5 Ill.App.3d 158, 274 N.E.2d 846 \(1st Dist. 1971\)](#) Conviction for murder by accountability reversed where evidence consisted of impeached, contradicted and uncorroborated testimony of accomplice witness.

[People v. Price, 21 Ill.App.3d 665, 316 N.E.2d 289 \(1st Dist. 1974\)](#) Conviction for murder (following bench trial) reversed. Uncorroborated testimony of accomplice witnesses was discredited, contradicted and filled with inconsistencies and improbabilities.

[People v. Ephraim, 133 Ill.App.2d 310, 273 N.E.2d 225 \(1st Dist. 1971\)](#) Murder conviction reversed. Testimony of witnesses who identified defendant was conflicting, confusing, and impeached; in addition, there was poor opportunity to observe.

[People v. Hughes, 17 Ill.App.3d 404, 308 N.E.2d 137 \(1st Dist. 1974\)](#) Convictions for murder and voluntary manslaughter reversed. Two State witnesses identified defendant as the perpetrator, but their testimony was doubtful. One witness failed to tell her friends or the police shortly afterwards that she had witnessed the incident when "it would have been natural to assert it"; in addition, she identified defendant only after twice viewing him in a lineup.

[People v. McKibben, 24 Ill.App.3d 692, 321 N.E.2d 362 \(1st Dist. 1974\)](#) Conviction for murder (following bench trial) reversed. The sole identification witness was a narcotic addict who was blind in one eye and "high" at the time of the incident. Also, the witness made a prior statement that contradicted portions of his trial testimony and identified defendant from viewing a single photograph.

[People v. Amigon, 239 Ill.2d 71, 940 N.E.2d 63 \(2010\)](#)

The issue of the proximate cause of death is a question for the jury. The common-law year-and-a-day rule, under which murder charges were barred if the victim died more than a year and a day after the date of the offense, was abolished by the criminal code. The length of time between the offense and the victim's death is not determinative of whether defendant is liable for the murder based on the foreseeability of the death, even where the victim apparently recovers from the injuries.

A rational trier of fact could find that the shooting committed by defendant was the proximate cause of death. The victim had been shot in the neck, causing a spinal cord injury that left him capable of moving only his head and biceps. He died of community-acquired bacterial pneumonia five-and-a-half years after the shooting. In the interim between the shooting and his death, he attended college.

The medical examiner was unable to establish actual damage to the victim's immune system or the specific type of bacteria involved due to the removal of some of the victim's organs and a delay in the autopsy. But the medical examiner testified that the victim's injuries affected his lung function and compromised his immune system, making him susceptible to the infection that caused death. The cause of death was pneumonia due to quadriplegia due to a gunshot wound to the neck.

[People v. Davis, 231 Ill.2d 349, 899 N.E.2d 238 \(2008\)](#)

Under the "one good count" rule, a conviction on an indictment or information charging multiple types of murder is presumed to be for the most serious offense charged. Where the most serious offense charged was intentional murder, and the evidence was overwhelming on that charge, defendant was not prejudiced by an erroneous instruction that defendant could be convicted of felony murder predicated on an aggravated battery that was inherent in the first degree murder charge. (See also **JURY**, §32-4(c)(2)).

[People v. Domagala, 2013 IL 113688 \(No. 113688, 4/18/13\)](#)

Illinois courts have held that an intervening cause completely unrelated to the acts of the defendant will relieve the defendant of criminal responsibility for an offense. Gross negligence or intentional medical maltreatment constitutes such an intervening cause, and therefore may constitute a valid defense to a murder charge.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

[People v. Casciaro, 2015 IL App \(2d\) 131291 \(No. 2-13-1291, 9/17/15\)](#)

1. Defendant was convicted of felony murder based on the alternative theories that he either killed Brian Carrick while committing the forcible felony of intimidation, or was accountable for the actions of Shane Lamb who killed Carrick while committing intimidation. A defendant commits intimidation when, with the intent to cause someone to perform an act, he communicates a threat to inflict physical harm to that person. 720 ILCS 5/12-6(a)(1). Intimidation is a specific-intent crime, and thus requires proof that a threat be communicated with the specific intent to coerce someone to do something against his will.

2. Lamb testified at defendant's trial that defendant fronted marijuana to Lamb and Carrick expecting them to pay him after they sold it. At the time of the incident, Carrick owed defendant money for the fronted marijuana. Defendant asked Lamb, who had been incarcerated as a juvenile for attempted murder and was larger than Carrick, to come talk to Carrick about the money he owed defendant. Lamb went to the grocery store where all three men worked and found defendant and Carrick arguing about the owed money.

Lamb began arguing with Carrick about the money and when defendant told them to quiet down, Lamb "muffed" Carrick by placing the heel of his hand against Carrick's face and shoving him into the produce cooler. Lamb and Carrick continued arguing while defendant stood behind Lamb "not doing or saying anything." When Carrick said that he didn't have the money, Lamb lost his temper and hit Carrick.

Carrick fell straight back and Lamb believed he had knocked Carrick unconscious. Defendant told Lamb to leave the store. Carrick was never seen again. Defendant made statements to former friend that his cousin's had taken Carrick's body to a river in Iowa.

3. The Appellate Court reversed defendant's conviction finding that the State failed to prove that either defendant (as a principal) or Lamb (under a theory of accountability) committed intimidation.

a. The court first found that defendant did not commit intimidation as a principal. The court rejected the State's theory that defendant used Lamb's mere presence as intimidation. Lamb specifically testified that defendant did not ask him to threaten or harm Carrick. Given Lamb's denial, the State theory was built entirely on an unsupported inference that defendant's request that Lamb speak to Carrick was a solicitation for Lamb to threaten harm to Carrick. Such a tenuous inference could not support a conviction and hence the State failed to prove that defendant committed intimidation as a principal.

b. The State also failed to prove that Lamb committed intimidation himself, and thus defendant could not have been guilty under a theory of accountability. Lamb denied that he intended to threaten or harm Carrick. And there was no evidence Lamb communicated any threat of physical harm to Carrick. Instead, Lamb punched Carrick after he suddenly lost his temper during the argument. Engaging in an argument or committing a battery are not necessarily acts of intimidation since intimidation is a specific intent crime requiring evidence of an intent to coerce someone to do something against his will.

Since the State failed to prove the predicate felony of intimidation, the court reversed defendant's conviction for felony murder.

#### [People v. Colbert, 2013 IL App \(1st\) 112935 \(No. 1-11-2935, 11/8/13\)](#)

1. A person commits the offense of felony murder when, without lawful justification, he causes a person's death while "attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3). Mob action consists of the use of force or violence disturbing the public peace by two or more persons acting together and without authority of law. 720 ILCS 5/25-1(a)(1). Mob action is not listed among the offenses classified as forcible felonies, but falls within the purview of the statute's catch-all clause of "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8.

Felony murder is unique in that defendant need only have the intent to commit the predicate forcible felony, rather than the intent to commit a knowing or intentional killing. This raises the concern that the State might use a felony murder charge to avoid the burden of proving a knowing or intentional killing and to eliminate the alternative of a second degree murder conviction. To address this concern, the Supreme Court adopted the rule that where the acts constituting the forcible felony arise from and are inherent in the act of murder itself, those acts cannot serve as the predicate felony for felony murder. To support a charge of felony murder, the predicate felony must have an independent motivation or purpose apart from the murder itself. Whether the forcible felony is inherent in the murder itself is determined by reviewing the factual context surrounding the murder.

2. Defendant was properly convicted of felony murder based on the predicate felony of mob action. Viewing the factual context surrounding the murder, the Appellate Court determined that defendant's conduct did not arise from and was not inherent in the murder. The evidence indicated that the defendant participated in the mob action with the independent felonious purpose of physically intimidating and harassing fellow students from a rival neighborhood, which escalated to the point where defendant and his codefendants struck the victim multiple times, causing his death.

3. The Appellate Court rejected the defendant's argument that the court should have instructed the jury that to convict of felony murder it had to find the acts comprising the predicate felony of mob action had an independent felonious purpose. The issue of whether a forcible felony can serve as a predicate felony to felony murder is a question of law for the trial judge based on an examination of whether the evidence is sufficient to show that the predicate felony has an independent felonious purpose apart from the murder itself.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

[People v. Cowart, 2015 IL App \(1st\) 113085 \(No. 1-11-3085, 2/9/15\)](#)

Under the common design rule of accountability, where two or more people engage in a common criminal design, any acts in furtherance of that common design are considered to be the acts of all the members, and they are all legally responsible for the consequences of those acts. The Appellate Court reversed defendant's conviction for first degree murder holding that there was no evidence that defendant or anyone he was accountable for under a theory of common design fired the shot that killed Lee, the deceased victim.

The evidence showed that a fight broke out at a large street party attended by 100 - 200 people. During the fight, which involved numerous individuals, defendant punched a woman in the face, and later fired shots at some of the women he was fighting with. Several men associated with defendant also fired shots at the women. Many other men at the party who were not associated with defendant had guns and fired shots.

At some point during the melee, Lee was shot in the back and killed. Several people were standing near Lee and fired guns, but the person who fired the fatal shot was never identified. The State's evidence thus showed that defendant and his associates shot at the group of women they were fighting with, but did not show that any of these shots hit Lee by accident.

To establish a common criminal design resulting in murder, however, the State had to prove that Lee's unknown shooter shared defendant's common design to shoot at the women, but instead shot Lee by accident. The State failed to show this and thus failed to prove that defendant was accountable for Lee's murder.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

[People v. Hill, 2014 IL App \(2d\) 120506 \(No. 2-12-0506, 3/31/14\)](#)

The defendant is presumed to have been convicted of the least serious offense where the jury returns a general verdict after the trial court denies a defense request for specific verdicts on multiple counts of first degree murder which carry sentencing and "one-act, one-crime" ramifications. (**People v. Smith**, 233 Ill. 2d 1, 906 N.E.2d 529 (2009)). Thus, where the jury returned a general verdict after the trial court refused a request for specific verdict forms, and a consecutive sentence would be required for the predicate of felony murder if the conviction was for intentional or knowing murder, the trial court must vacate the conviction for the predicate of felony murder.

The court noted that **Smith** has been limited to situations in which the trial court refuses a defense request for separate verdict forms. Thus, the failure to request separate verdicts cannot form the basis for a finding of ineffective assistance.

Defendant's convictions for first degree murder and aggravated arson were affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

[People v. Lengyel, 2015 IL App \(1st\) 131022 \(No. 1-13-1022, 8/5/15\)](#)

1. First degree murder occurs when a defendant kills another person and either intends his acts to cause death or great bodily harm, or knows that his acts create a strong probability of death or great bodily harm. Second degree murder shares the same elements as first degree murder but involves the presence of a mitigating factor, such as provocation or unreasonable belief in self-defense.

Involuntary manslaughter by contrast involves a less culpable mental state than first or second degree murder. Involuntary manslaughter occurs when a defendant's actions are likely to cause death or great bodily harm and are performed recklessly. A defendant acts recklessly when he consciously disregards a substantial and unjustifiable risk that death or great bodily harm will result.

2. Defendant, who was 22 years old, lived with and acted as a caretaker for his 55-year-old father, Richard, who suffered from multiple health problems. Defendant and Richard had a contentious relationship,

arguing daily over all sorts of mundane things. Defendant had “issues” with Richard and his “inner rage” had been building for years.

One day they had an argument that quickly turned into a physical altercation. Richard got up from where he was sitting and grabbed defendant’s shirt with both hands. Defendant punched Richard four or five times in the head trying to “disentangle himself” and get away. As soon as defendant saw blood, he stopped hitting Richard and went back to his bedroom, locked the door, and told his girlfriend that they had to leave. Richard broke through the bedroom door. Defendant pushed him out of the room and Richard fell to the ground. Richard got up and went to get a towel. At Richard’s request, defendant called for an ambulance.

The paramedics arrived and transported Richard to the hospital. Richard could not speak and was slipping in and out of consciousness. At the hospital, Richard died from a stroke caused by an increase in blood pressure which in turn had been brought on by stress from injuries.

The jury acquitted defendant of first degree murder, but found him guilty of second degree murder based on an unreasonable belief in self-defense.

3. The Appellate Court held that the State failed to prove defendant guilty of second degree murder. First, the court held that the evidence did not show that defendant intended to kill his father. Immediately after the altercation, defendant called for an ambulance, indicated concern for Richard’s condition, and told the police that he was angry at his father but was not trying to kill him. Under these circumstances, defendant did not act with the intent to kill.

The evidence also did not show that defendant knowingly killed his father. The court noted a long-standing principle in Illinois that while the intentional use of a deadly weapon presumes that a defendant knows his acts will create a strong probability of death or great bodily harm, “death is not normally a reasonable or probable consequence of a barehanded blow.”

The evidence showed that defendant and his father were of similar size and although Richard had multiple health problems, he still had enough strength to break open a locked door. Richard was conscious, coherent, and able to walk when defendant left. The fight only lasted a few minutes, defendant did not use a weapon, and stopped hitting Richard as soon as he saw blood.

Additionally, defendant’s punches did not directly cause Richard’s death, and thus he could not be practically certain that his actions would cause death or great bodily harm. The facts thus did not show that defendant knowingly caused his father’s death.

Instead the evidence showed that defendant acted recklessly by disregarding the risk that his punches could lead to a spike in Richard’s blood pressure, which eventually could have caused a stroke resulting in death. Since defendant acted recklessly, the court reduced his conviction to involuntary manslaughter.

(Defendant was represented by Assistant Defender Pete Sgro, Chicago.)

### [People v. Mars, 2012 IL App \(2d\) 110695 \(No. 2-11-0695, modified 2/25/13\)](#)

When the State has shown the existence, through the act of the accused, of a sufficient cause of death, the death is presumed to have resulted from such act, unless it can be shown that the death was caused by a supervening act disconnected from any act of the accused. The injury inflicted by the accused need not be the sole or immediate cause of death in order to constitute the legal cause of death.

Once the State establishes a sufficient legal proximate cause of death through an act for which the defendant is responsible, a presumption arises that the death resulted from the culpable act of the defendant. The presumption can be rebutted by contrary evidence, such as that the sole cause of death was the intervening gross negligence of physicians. Gross negligence or intentional medical maltreatment constitutes a valid defense when it is disconnected from the culpable act of the defendant because the intervening conduct is abnormal and not reasonably foreseeable.

An intervening cause must be completely unrelated to the acts of the defendant to relieve the defendant of criminal liability. Therefore, for the defendant to show that the victim’s death was due to a supervening cause relieving him of responsibility, he must show that the victim’s medical treatment was grossly negligent and that the death was completely unrelated to any act of the defendant. The alleged act

or omission of the victim's physicians must be disconnected from the culpable act of the defendant.

The evidence at trial was that the cause of the victim's death was sepsis due to necrotizing fasciitis resulting from an incised injury to the arm inflicted by the defendant. Even assuming that it amounted to gross medical negligence, any delay in treatment of that infection would not qualify as an supervening cause because, but for the wound inflicted by the defendant, the infection would not have entered the body. The legal chain of causation connecting the stab wound inflicted by the defendant to the victim's ultimate death was unbroken.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

**[People v. O'Neal, 2016 IL App \(1st\) 132284 \(No. 1-13-2284, 9/29/16\)](#)**

1. There are three types of first-degree murder: (1) intentional murder (where defendant intends to kill or do great bodily harm or knows that his acts will cause death); (2) strong-probability murder (where defendant knows that his acts create a strong probability of death or great bodily harm); and (3) felony murder (where defendant commits or attempts to commit a forcible felony and a death occurs during the commission of that felony). Second degree murder occurs when the defendant commits either intentional, knowing, or strong-probability first-degree murder and the defendant either acted under a sudden and intense passion resulting from serious provocation by the victim or in an unreasonable belief that his actions were justified by self-defense.

Thus, a mitigating factor such as imperfect self-defense will reduce a charge of first-degree intentional or strong probability murder to second degree murder. Because second degree murder cannot be the predicate felony for felony murder, however, an unreasonable belief in self defense will not reduce felony murder to a lesser offense. The court noted that felony murder is not concerned with the defendant's state of mind in committing acts which lead to a death, but is intended to deter the commission of the predicate forcible felony by holding the wrongdoer liable for any foreseeable death that results from the commission of that felony.

2. Under Illinois Supreme Court case law, a conviction for felony murder will be upheld only if the act resulting in death was not inherent in the murder itself. **[People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#)**. Because every fatal shooting involves conduct which constitutes aggravated discharge of a firearm, the State could charge every fatal shooting as felony murder predicated on aggravated discharge of a firearm and obtain a first degree murder conviction without proving an intentional or knowing murder. In other words, by charging every fatal shooting as felony murder predicated on aggravated discharge of a firearm, the State could nullify the second degree murder statute.

A conviction for felony murder will stand, however, where the predicate felony was based on an act which is not the same act on which the murder charge is based. For example, felony murder could be predicated on mob action where the defendant committed several acts toward the decedent and the mob action charge was based on acts that were distinct from the acts which caused death. **[People v. Davison, 236 Ill.2d 232, 923 N.E.2d 781 \(2010\)](#)**.

3. Defendant was charged with intentional first-degree murder, strong-probability first degree murder, felony murder predicated on aggravated discharge of a firearm, and aggravated discharge of a firearm. All of the offenses involved shooting at a van which drove slowly past a party at which defendant was acting as security. A bystander seated in a car that was parked across the street was killed by one of the shots.

Defendant raised a defense of unreasonable belief in self-defense. The jury convicted of second-degree murder on the counts alleging intentional and strong probability murder, but convicted defendant of felony murder.

The court concluded that the act which constituted the predicate felony - shooting at the van - was inherent in the offense of felony murder. Firing at the van was the only act which defendant was alleged to have performed, and the State did not attempt to differentiate between the various shots as the cause of the bystander's death. In addition, the State conceded that every shot defendant fired was intended for the

occupants of the van. Under these circumstances, permitting a conviction for felony murder would nullify the second degree murder statute, particularly where the jury convicted defendant of second degree murder on the two counts on which a claim of imperfect self-defense could be raised.

4. In addition, under Illinois Supreme Court precedent, a conviction for felony murder will be upheld only if defendant had independent felonious purposes in committing the predicate felony and the murder. The court concluded that this requirement was not satisfied because defendant acted with only one purpose - firing at the van.

In the course of its holding, the court noted that under the doctrine of transferred intent, if a defendant shoots at one person with intent to kill but inadvertently kills a bystander, he may be convicted of murder for the death of the bystander. The court concluded that under the same doctrine, if the defendant acts in self-defense in shooting at an intended target, he also acts in self-defense concerning the unintentional shooting of the bystander.

The first degree murder conviction for felony murder was reversed and the cause remanded for sentencing on second degree murder.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

**People v. Perry**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (1st Dist. 2011) (No. 1-08-1228, 3/31/11)

1. An instruction on the lesser-included offense of involuntary manslaughter is warranted when there is some credible evidence to support the instruction. Although not dispositive, certain factors are relevant to the decision whether to give the instruction: (1) the disparity in size and strength between the defendant and the victim; (2) the brutality and duration of the beating, including the severity of the victim's injuries; and (3) whether the defendant used his bare fists or a weapon. Generally, an involuntary manslaughter instruction should not be given where the nature of the killing, demonstrated by either multiple wounds or the victim's defenselessness, shows that the defendant did not act recklessly.

The court did not err in refusing an involuntary manslaughter instruction even though the court instructed the jury on the definition of recklessness and allowed defense counsel to argue to the jury that defendant acted recklessly, rather than knowingly or intentionally. Defendant attacked the deceased with a group of eight or nine boys, severely beat the deceased for five minutes, punching and stomping on his head, even as he lay defenseless and motionless on the ground. Defendant also used a liquor bottle as a weapon. The court found that the severity and duration of the beating, resulting in 17 distinct injuries, belied defendant's argument that he would not necessarily have known of the severity of the injuries because they were internal, and thus he had no reason to suspect that they would be fatal.

2. The second paragraph of IPI Crim. 4th, No. 5.01B defines knowledge as conscious awareness that a result is practically certain to be caused by defendant's conduct. It is applicable where the offense is defined in terms of a prohibited result. A charge of first degree murder pursuant to [720 ILCS 5/9-1\(a\)\(2\)](#) requires that defendant act with knowledge that his actions create a strong probability of death or great bodily harm to the deceased. Therefore, the second paragraph of 5.01B is applicable because the charge requires knowledge of the result of defendant's conduct.

The committee notes to 5.01B indicate that the committee took no position whether the definition should be routinely given absent a specific jury request. The Appellate Court interpreted this note to mean that "knowingly" has a plain meaning commonly understood by jurors. The jury made no specific request for an additional instruction indicating confusion about mental states, though it did inquire whether it could find defendant guilty of another charge, such as second degree murder. Therefore, the court did not abuse its discretion in refusing the defense request for the instruction. The court also found no error because the jury otherwise received correct definitional and issues instructions on first degree murder. In addition, any error was harmless because the jury returned a valid general verdict of guilty that could be presumed to be based on the intentional murder count.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

[People v. Quevedo, 403 Ill.App.3d 282, 932 N.E.2d 642 \(2d Dist. 2010\)](#)

[720 ILCS 5/9-1\(a\)\(2\)](#) provides that a person commits first degree murder if he performs the acts which cause death with knowledge that those acts “create a strong probability of death or great bodily harm.” The court found that under §9-1(a)(2), the requisite mental state is knowledge that there is a strong probability of death *or* knowledge that there is a strong probability of great bodily harm. The State did not charge defendant improperly by alleging in one count that he acted with knowledge of the strong probability of death, and in a second count that he acted with knowledge of the strong probability of great bodily harm.

However, the court criticized the State for bringing two counts rather than one. “Deviating from the statute when drafting charging instruments is unnecessary and should be avoided.”

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

[Top](#)

§26-2

**Felony Murder**

[People v. Johnson, 55 Ill.2d 62, 302 N.E.2d 20 \(1973\)](#) Where a murder is committed during a robbery, all participants are deemed equally guilty of murder regardless who fired the fatal shot. Defendant need not be actually present at the killing to be guilty under the felony-murder doctrine. If a killing is committed in the course of an escape, all participants are guilty of murder.

[People v. Hickman, 59 Ill.2d 89, 319 N.E.2d 511 \(1974\)](#) Defendants were properly convicted of felony murder for the death of a policeman who was shot by another policeman while pursuing defendants from the scene of a burglary.

[People v. Lowery, 178 Ill.2d 462, 687 N.E.2d 973 \(1997\)](#) Under Illinois law, culpability attaches "for any death proximately resulting from the unlawful activity - notwithstanding the fact that the killing was [committed] by one resisting the crime."

Here, defendant was properly convicted of felony murder where a bystander was killed by a shot fired by the intended victim of a robbery. Although defendant was attempting to flee when the shot was fired and the victim may have acted unreasonably, "it was, nonetheless, defendant's action that set in motion the events leading to [the] death."

[People v. Auilar, 59 Ill.2d 95, 319 N.E.2d 514 \(1974\)](#) Felony murder applies when, under the facts of a particular case, "it is contemplated that violence might be necessary to enable the conspirators to carry out their common purpose."

[People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#) A conviction for felony murder is proper only if the predicate felony involves "conduct with a felonious purpose other than the killing itself." In other words, a felony murder conviction will not lie if the predicate felony consists of conduct that is inherent in the killing.

A new trial was not required, however, because the jury returned only a general verdict on first degree murder, thus it is presumed to have intended to convict of intentional murder, the most serious crime alleged.

[People v. Pelt, 207 Ill.2d 434, 800 N.E.2d 1193 \(2003\)](#) Defendant's felony murder conviction predicated on aggravated battery must be vacated. Under [People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#): (1) the

predicate felony for a charge of felony murder must involve conduct committed with a felonious purpose other than the killing itself, and (2) a forcible felony cannot serve as the predicate for felony murder if the acts constituting the forcible felony "arise from and are inherent in the act of murder itself."

**Morgan** precludes a conviction for felony murder here. Defendant testified that he became upset when his son would not stop crying and tried to throw the infant on a bed, but threw him so hard that he hit a dresser. Because the act of throwing the infant was both the basis for aggravated battery and the act underlying the killing, "it is difficult to conclude that the predicate felony underlying the charge of felony murder involved conduct with a felonious purpose other than the conduct which killed the infant."

[People v. Davis, 213 Ill.2d 459, 821 N.E.2d 1154 \(2004\)](#) Mob action, the predicate offense for felony murder in this case, is not an offense that is inherent in the acts which caused the decedent's death. "[T]o convict defendant of mob action, it was not necessary to prove the defendant struck [the decedent], much less performed the act that caused the killing." Because the predicate was not inherent in the act which caused the murder, Morgan did not apply.

[People v. Smith, 56 Ill.2d 328, 307 N.E.2d 353 \(1974\)](#) When defendant entered the apartment of the deceased, the latter jumped from the window, causing fatal injuries. Defendant's burglary provoked the conduct of the deceased; "it is unimportant that the defendant did not anticipate the precise sequence of events that followed upon his entry into the apartment." Murder conviction upheld.

[People v. Belk, 203 Ill.2d 187, 784 N.E.2d 825 \(2003\)](#) Under [720 ILCS 5/9-1\(a\)\(3\)](#), felony murder occurs where a person causes death while attempting or committing a "forcible felony" other than second degree murder. A forcible felony is defined as "treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." ([720 ILCS 5/2-8](#)) (emphasis added). A nonviolent felony may serve as a predicate offense for felony murder if, under the facts of a particular case, the perpetrator contemplated that violence might be necessary to enable him to carry out his purpose.

Where the evidence showed that defendant was intoxicated, stole a van, and in an attempt to elude capture drove at an excessive rate of speed through an area where he was likely to encounter other traffic, aggravated possession of a stolen motor vehicle was not a "forcible felony" for purposes of a felony murder doctrine. Defendant was not armed, and there was no evidence that he or his companion contemplated or were willing to use force or violence to make their escape.

[People v. Maxwell, 148 Ill.2d 116, 592 N.E.2d 960 \(1992\)](#) It is not reversible error to instruct the jury on felony murder though the indictment alleges only intentional or knowing murder unless the variance between the charge and proof prejudiced defendant in the preparation of his defense or exposed him to the risk of double jeopardy. Although it would be better for the State to allege each theory in the charge, there is only one offense of murder, and the precise statutory theory "is not a matter that must be specifically alleged."

[People v. Dekens, 182 Ill.2d 247, 695 N.E.2d 474 \(1998\)](#) A defendant may be convicted of felony murder where the decedent is a co-felon killed by the intended victim of the underlying felony.

[People v. Hudson, 222 Ill.2d 392, 856 N.E.2d 1078 \(2006\)](#) Defendant was convicted of felony murder after his codefendant was shot and killed by an off-duty policeman who was part of a group which defendant and the codefendant attempted to rob. The parties submitted different instructions concerning felony murder. The use of the State's non-IPI instruction was proper; the IPI instructions on felony murder were inappropriate where a codefendant was killed by the intended victim of the underlying felony.

The court suggested that the following instruction be used in similar future cases:  
"A person commits the offense of first degree murder when he commits the offense of attempt to commit armed robbery 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 attempt to commit armed robbery. It is immaterial whether the killing is intentional or accidental, or committed by a confederate without the connivance of the defendant or by a third person trying to prevent the commission of the offense of attempt to commit armed robbery."

[People v. Klebanowski, 221 Ill.2d 538, 852 N.E.2d 813 \(2006\)](#) Defendant could be found guilty of felony murder where he was the getaway driver for a codefendant who was killed by an off-duty policeman during an attempted armed robbery.

Defendant may be responsible for a death that occurs during the escape following a commission of a forcible felony. Defendant may be convicted of felony murder regardless of whether the killing was performed by defendant or one of his confederates in the underlying felony or by a third party.

[People v. Villarreal, 198 Ill.2d 209, 761 N.E.2d 1175 \(2001\)](#) Felony murder cannot be the basis of a second degree murder conviction.

[People v. Land, 169 Ill.App.3d 342, 523 N.E.2d 711 \(4th Dist. 1988\)](#) The predicate felony upon which the murder conviction is based must involve an intentional or knowing state of mind.

[People v. Payton, 356 Ill.App.3d 674, 826 N.E.2d 1011 \(1st Dist. 2005\)](#) It was reversible error for the court to give felony murder instructions, because that charge was based on the aggravated battery which caused the death of the victim. Under [People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#), where the acts constituting the underlying forcible felony "arise from and are inherent in the act of murder itself," a felony murder charge is impermissible. Here, the underlying forcible felony was aggravated battery, an act that was inherent in and arose out of the fatal beating of the decedent.

[People v. Battle, 378 Ill.App.3d 817, 882 N.E.2d 1088 \(1st Dist. 2008\)](#) If defendant requests a separate verdict form for felony murder when charged with both felony murder and knowing or intentional murder, and there is a basis in the evidence to convict of felony murder, the failure to give the specific verdict form precludes consecutive sentences for murder and the predicate offense for felony murder. See also, [People v. Smith, 233 Ill.2d 1, 906 N.E.2d 529 \(2009\)](#) (general guilty verdict interpreted as verdict on felony murder; conviction for underlying felony vacated).

[People v. Falkner, 61 Ill.App.3d 84, 377 N.E.2d 824 \(2d Dist. 1978\)](#) Defendant went to a bar, purchased a drink and became involved in a quarrel with the bartender. Defendant claimed he had been short-changed, pulled a gun and demanded more money. A struggle ensued, and a person was shot and killed.

Evidence failed to prove that defendant intended to rob, because it was equally probable that defendant intended only to recover his correct change. However, defendant's conduct in pulling a loaded gun in a crowded bar was reckless and likely to cause death or great bodily harm. Felony murder conviction was reduced to involuntary manslaughter.

[People v. Moore, 375 Ill.App.3d 234, 873 N.E.2d 381 \(1st Dist. 2007\)](#) Defendant's conviction for felony murder based upon burglary was reversed where the offense of burglary was completed on the day before a fatal accident which occurred as defendant was attempting to flee police in the car which had been burglarized. The officers were responding to a report of two men with a gun in a vehicle, and did not know

that the vehicle which defendant was driving had been stolen.

Although a killing which occurs during an escape from a forcible felony is within the operation of the felony murder rule, the escape is complete once the offender has reached a place of temporary safety. Where defendant was seen sitting in the stolen vehicle at least twice between the time of the burglary and the crash, defendant had clearly reached a place of temporary safety before the fatal crash occurred.

[People v. Toney, 337 Ill.App.3d 122, 785 N.E.2d 138 \(1st Dist. 2003\)](#) Under the circumstances of this case, felony murder could be predicated on aggravated discharge of a firearm. Under [People v. Morgan, 192 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#), the predicate offense for felony murder must be a forcible felony which neither arises from nor is inherent in the murder itself. Where the evidence showed that defendant and his codefendant committed aggravated discharge of a firearm while attempting to fire at rival gang members, but the decedent died in a different location and likely as a result of return fire by the intended victims, aggravated discharge of a firearm was not inherent in the killing and could properly serve as the predicate for felony murder.

[People v. Rosenthal, 387 Ill.App.3d 858, 900 N.E.2d 1241 \(1st Dist. 2008\)](#) A felony murder conviction predicated on aggravated battery with a firearm was precluded by [People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#), where defendant killed the decedent in what he believed was self-defense. The court rejected the State's argument that the act of firing the gun had an "independent felonious purpose" from the felony murder because defendant intended to shoot a person other than the decedent, the only person against whom defendant allegedly acted in self-defense. The charge named only the decedent as the victim of the aggravated battery with a firearm, without mentioning the second person.

Further, because the State did not charge defendant with an offense against the second person, and based the entire prosecution on defendant's acts against the decedent, a conviction of aggravated battery with a firearm could not be entered based on the inadvertent wounding of the second person.

[People v. Jeffrey, 94 Ill.App.3d 455, 418 N.E.2d 880 \(5th Dist. 1981\)](#) Indictment for felony murder was not fatally defective for failing to set forth the elements of the underlying felony.

[People v. Serrano, 286 Ill.App.3d 485, 676 N.E.2d 1011 \(1st Dist. 1997\)](#) A criminal defendant may raise a compulsion defense to felony murder where he was compelled to assist in the underlying felony.

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## Cumulative Digest Case Summaries §26-2

[People v. Bailey, 2013 IL 113690 \(No. 113690, 3/21/13\)](#)

Where specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, the trial court abuses its discretion when it refuses a request for specific verdict forms. Refusal of separate verdict forms is not harmless when it is not possible to determine from a general verdict that the jury actually found the defendant guilty of each count and this lack of specificity has adverse sentencing consequences for the defendant. The appropriate remedy in such a case is to interpret the general verdict as a finding that would result in the more favorable sentencing consequence for the defendant.

Defendant was charged with intentional, knowing, and felony murder. He elected to have the court determine his eligibility for a death sentence after the State announced its intention to seek the death penalty. At trial, the court refused defendant's request for separate verdict forms on felony murder. The jury returned a general verdict of guilty on the murder charges. The court sentenced defendant to natural life based on its finding that defendant was death eligible because the murder was committed in the course of an inherently violent felony while defendant acted with the intent to kill or knowledge that his acts created a strong probability of death or great bodily harm.

Relying on **Beck v. Alabama**, 447 U.S. 625 (1980), and **Bullington v. Missouri**, 451 U.S. 430

(1981), the Illinois Supreme Court concluded that where a jury in a capital case renders a verdict in the guilt phase that contradicts a fact necessary for a finding of eligibility at the sentencing phase, neither the jury nor the court can make an eligibility finding contradicting the jury's verdict. Therefore, if the jury in defendant's case had been given separate verdict forms and had acquitted defendant of intentional or knowing murder, the court would have been foreclosed from finding defendant death eligible because the jury's verdict would have negated an essential element of the death eligibility factor.

Because the defendant's request for separate verdict forms had sentencing consequences, the court abused its discretion in denying the request. The error is not harmless. Even though there is evidence that could support a finding that the murder was committed knowingly or intentionally, it cannot be ascertained from the jury's general verdict whether the jury actually found defendant guilty of intentional or knowing murder or only of felony murder. The general verdict must be interpreted as a verdict of guilty of felony murder only and as an acquittal of intentional and knowing murder. Because such a verdict foreclosed the court from finding defendant death eligible and sentencing him to natural life, the court vacated defendant's sentence and remanded for resentencing of defendant to a term of years.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

### [People v. Davis, 231 Ill.2d 349, 899 N.E.2d 238 \(2008\)](#)

Under the "one good count" rule, a conviction on an indictment or information charging multiple types of murder is presumed to be for the most serious offense charged. Where the most serious offense charged was intentional murder, and the evidence was overwhelming on that charge, defendant was not prejudiced by an erroneous instruction that defendant could be convicted of felony murder predicated on an aggravated battery that was inherent in the first degree murder charge. (See also **JURY**, §32-4(c)(2)).

### [People v. Davison, 236 Ill.2d 232, 923 N.E.2d 781 \(2010\)](#) (No. 107091, 2/4/10)

1. Under [People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#) and [People v. Pelt, 207 Ill.2d 434, 800 N.E.2d 1193 \(2003\)](#), acts which are inherent in a murder cannot serve as the predicate for felony murder. Furthermore, the predicate for felony murder must have an "independent felonious purpose" that is separate from the murder. The **Morgan** and **Pelt** cases stem from a concern that because many murders are accompanied by violent acts and felony murder does not require proof of intent to kill, the State could unfairly obtain a first degree murder conviction for felony murder while eliminating both the possibility of a second degree murder conviction and the burden of proving an intentional or knowing murder.

2. Under the circumstances of this case, felony murder could be predicated on mob action. The court found that the acts constituting mob action were not inherent in the offense of murder and had an independent felonious purpose.

The evidence showed that defendant engaged in an altercation with the victim, during which he chased the victim and threw a bat. Defendant also stabbed the victim, but then retreated while three co-defendants repeatedly stabbed and struck the victim. Thus, the evidence showed that the defendant committed mob action by acting with other persons to use force or violence to disturb the public peace.

However, because the evidence showed that the victim died as a result of cumulative blood loss from 20 stab wounds inflicted by the defendant and his three co-defendants, rather than by any particular wound inflicted by the defendant alone, the conduct constituting mob action was not inherent in the murder itself. Furthermore, because defendant claimed that he did not intend to kill the decedent, the acts which constituted mob action had an independent felonious purpose from the acts which constituted murder. Under these circumstances, mob action was a permissible predicate for felony murder conviction.

Defendant's conviction for felony murder predicated on mob action was affirmed.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

### [People v. Calhoun, 404 Ill.App.3d 362, 935 N.E.2d 663 \(1st Dist. 2010\)](#)

In [People v. Smith, 233 Ill.2d 1, 906 N.E.2d 529 \(2009\)](#), the Illinois Supreme Court found reversible error where the court refused defendant's request for special verdict forms so it could be determined whether the jury found defendant guilty of intentional or knowing murder, or just felony murder, in which circumstance defendant could not be sentenced to an additional consecutive sentence for the underlying felony. The one-good-count rule, which allows a court to presume from a general verdict form that the jury convicted on all counts for which there was sufficient evidence, did not defeat defendant's argument.

The Appellate Court concluded that **Smith** did not create a *sua sponte* duty on the part of the court to give special verdict forms absent a request. Nor did it disturb the vitality of the one-good-count rule. Where the defendant was charged with intentional, knowing, and felony murder, special verdict forms were not requested, and the jury returned a general verdict form, the one-good-count rule allowed the court to enter judgment on the intentional murder count and impose a separate consecutive sentence for the underlying felony.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

#### [People v. Hill, 2014 IL App \(2d\) 120506 \(No. 2-12-0506, 3/31/14\)](#)

The defendant is presumed to have been convicted of the least serious offense where the jury returns a general verdict after the trial court denies a defense request for specific verdicts on multiple counts of first degree murder which carry sentencing and "one-act, one-crime" ramifications. (**People v. Smith**, 233 Ill. 2d 1, 906 N.E.2d 529 (2009)). Thus, where the jury returned a general verdict after the trial court refused a request for specific verdict forms, and a consecutive sentence would be required for the predicate of felony murder if the conviction was for intentional or knowing murder, the trial court must vacate the conviction for the predicate of felony murder.

The court noted that **Smith** has been limited to situations in which the trial court refuses a defense request for separate verdict forms. Thus, the failure to request separate verdicts cannot form the basis for a finding of ineffective assistance.

Defendant's convictions for first degree murder and aggravated arson were affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

#### [People v. Lefler, 2016 IL App \(3d\) 140293 \(No. 3-14-0293, 1/21/16\)](#)

Jury verdicts are legally inconsistent when the offenses arise out of the same set of facts and a jury finds that an essential element of the offense both exists and does not exist.

The victim caught defendant breaking into his car and during an ensuing struggle, defendant stabbed the victim, killing him. At trial defendant argued that he was acting in self-defense when he stabbed the victim. The jury found defendant guilty of both felony murder and second degree murder.

The Appellate Court held that the verdicts for felony murder and second degree murder were not legally inconsistent. A defendant commits first degree murder if he kills another and he: (1) intends to kill or do great bodily harm; (2) knows that his acts create a strong probability of death or great bodily harm; or (3) is attempting or committing a forcible felony. 720 ILCS 5/9-1.

Second degree murder is a mitigated form of first degree murder, but only as to the first two forms of first degree murder. The jury first determines that defendant killed another with intent or knowledge and then determines whether mitigating factors exist that would reduce the offense to second degree murder. But second degree murder does not apply to the third form of first degree murder, felony murder. 720 ILCS 5/9-2.

The jury clearly found that mitigating factors existed and properly returned a verdict reducing first degree murder based on intent or knowledge to second degree murder. But since second degree murder does not apply to felony murder, the jury's finding of mitigation was not legally inconsistent with a guilty verdict as to felony murder.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

[People v. O'Neal, 2016 IL App \(1st\) 132284 \(No. 1-13-2284, 9/29/16\)](#)

1. There are three types of first-degree murder: (1) intentional murder (where defendant intends to kill or do great bodily harm or knows that his acts will cause death); (2) strong-probability murder (where defendant knows that his acts create a strong probability of death or great bodily harm); and (3) felony murder (where defendant commits or attempts to commit a forcible felony and a death occurs during the commission of that felony). Second degree murder occurs when the defendant commits either intentional, knowing, or strong-probability first-degree murder and the defendant either acted under a sudden and intense passion resulting from serious provocation by the victim or in an unreasonable belief that his actions were justified by self-defense.

Thus, a mitigating factor such as imperfect self-defense will reduce a charge of first-degree intentional or strong probability murder to second degree murder. Because second degree murder cannot be the predicate felony for felony murder, however, an unreasonable belief in self defense will not reduce felony murder to a lesser offense. The court noted that felony murder is not concerned with the defendant's state of mind in committing acts which lead to a death, but is intended to deter the commission of the predicate forcible felony by holding the wrongdoer liable for any foreseeable death that results from the commission of that felony.

2. Under Illinois Supreme Court case law, a conviction for felony murder will be upheld only if the act resulting in death was not inherent in the murder itself. [People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#). Because every fatal shooting involves conduct which constitutes aggravated discharge of a firearm, the State could charge every fatal shooting as felony murder predicated on aggravated discharge of a firearm and obtain a first degree murder conviction without proving an intentional or knowing murder. In other words, by charging every fatal shooting as felony murder predicated on aggravated discharge of a firearm, the State could nullify the second degree murder statute.

A conviction for felony murder will stand, however, where the predicate felony was based on an act which is not the same act on which the murder charge is based. For example, felony murder could be predicated on mob action where the defendant committed several acts toward the decedent and the mob action charge was based on acts that were distinct from the acts which caused death. [People v. Davison, 236 Ill.2d 232, 923 N.E.2d 781 \(2010\)](#).

3. Defendant was charged with intentional first-degree murder, strong-probability first degree murder, felony murder predicated on aggravated discharge of a firearm, and aggravated discharge of a firearm. All of the offenses involved shooting at a van which drove slowly past a party at which defendant was acting as security. A bystander seated in a car that was parked across the street was killed by one of the shots.

Defendant raised a defense of unreasonable belief in self-defense. The jury convicted of second-degree murder on the counts alleging intentional and strong probability murder, but convicted defendant of felony murder.

The court concluded that the act which constituted the predicate felony - shooting at the van - was inherent in the offense of felony murder. Firing at the van was the only act which defendant was alleged to have performed, and the State did not attempt to differentiate between the various shots as the cause of the bystander's death. In addition, the State conceded that every shot defendant fired was intended for the occupants of the van. Under these circumstances, permitting a conviction for felony murder would nullify the second degree murder statute, particularly where the jury convicted defendant of second degree murder on the two counts on which a claim of imperfect self-defense could be raised.

4. In addition, under Illinois Supreme Court precedent, a conviction for felony murder will be upheld only if defendant had independent felonious purposes in committing the predicate felony and the murder. The court concluded that this requirement was not satisfied because defendant acted with only one purpose - firing at the van.

In the course of its holding, the court noted that under the doctrine of transferred intent, if a defendant shoots at one person with intent to kill but inadvertently kills a bystander, he may be convicted

of murder for the death of the bystander. The court concluded that under the same doctrine, if the defendant acts in self-defense in shooting at an intended target, he also acts in self-defense concerning the unintentional shooting of the bystander.

The first degree murder conviction for felony murder was reversed and the cause remanded for sentencing on second degree murder.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

**[People v. Reed, 405 Ill.App.3d 279, 938 N.E.2d 199 \(1st Dist. 2010\)](#)**

Where a general verdict is delivered for a defendant charged with murder in multiple counts alleging intentional, knowing, and felony murder, the conviction is presumed to be for the most serious offense – intentional murder. Under **[People v. Smith, 233 Ill.2d 1, 906 N.E.2d 529 \(2009\)](#)**, however, a general verdict form cannot be presumed to be a finding of intentional murder when the trial court refused a request for separate verdict forms, there was a basis in the evidence for the request, and there are sentencing ramifications of convictions on separate counts. Under such circumstances, the appropriate remedy is to interpret the general verdict as a conviction for felony murder.

Here, defendant was charged with two counts of felony murder based on the predicate felonies of armed robbery and residential burglary. Because the trial court refused a request for specific verdict forms, the general verdict must be interpreted as a verdict on felony murder. Furthermore, because a defendant may not be convicted of both felony murder and the underlying predicate, defendant’s convictions for armed robbery and residential burglary were reversed.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

**[People v. Schmidt, 392 Ill.App.3d 689, \\_\\_\\_ N.E.2d \\_\\_\\_ \(1st Dist. 2009\)](#)**

1. A conviction for felony murder requires that the homicide occur during a “forcible felony” other than second degree murder. **[720 ILCS 5/9-1\(a\)\(3\)](#)**. Aggravated battery is a forcible felony if the offense “results in great bodily harm or permanent disability or disfigurement” **[720 ILCS 5/2-8](#)**.

Where defendant was not charged with “great bodily harm” aggravated battery, but was charged on three alternate theories for aggravated battery against an officer (i.e., use of a deadly weapon (a vehicle which struck the officer’s arm), the battery of a police officer engaged in official duties, and battery on a public way), the State conceded that the aggravated battery involving the officer did not result in great bodily harm, disability or disfigurement.

However, the prosecution argued that the felony murder charge was saved by the residual clause of the “forcible felony” statute, which provides that felony murder can be predicated on any non-specified felony “which involves the use or threat of physical force or violence against any individual.” **[720 ILCS 5/2-8](#)**. The Appellate Court rejected this argument, finding that the legislature’s decision to specifically include one form of aggravated battery as a forcible felony excludes those forms of aggravated battery which are not enumerated.

The court noted that before 1990, all aggravated batteries were clarified as “forcible felonies.” However, a legislative amendment passed that year added the limiting language set forth above. “[W]e agree with defendant that by enacting the 1990 amendment, the legislature expressed its intent to limit the number and types of aggravated batteries that qualify as forcible felonies.”

2. The court also reversed aggravated battery convictions based on injuries to four bystanders who were struck by the stolen SUV defendant was driving. The court found that defendant’s conduct was reckless and not “within the purview of the felony murder statute.”

(Defendant was represented by Assistant Defender Christopher Buckley, Chicago.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

**[People v. Walker, 2012 IL App \(2d\) 110288 \(No. 2-11-0288, 12/31/12\)](#)**

1. Generally, a party which desires a specific instruction must offer that instruction and ask that the

trial court give it. The court usually has no obligation to instruct on its own motion. There are exceptions to this rule in criminal cases, because the court has the burden of seeing that the jury is instructed on the elements of the crime, the presumption of innocence, and the burden of proof. In addition, the trial court must give adequate guidance to the jury in its evaluation of the evidence.

2. The court concluded that no error occurred in a felony murder case where the trial court failed to *sua sponte* give IPI Crim. 4th No. 7.15A, which states that a person is guilty of first degree murder where he sets forth a chain of events by committing a felony and the death in question is a direct and foreseeable consequence of that chain. In its argument on a motion for a directed verdict and on appeal, the defense claimed that there was an intervening cause of death - the refusal of the decedent, a Christian Scientist, to consent to a blood transfusion that doctors said was necessary to save his life. Defendant did not make that claim before the jury, however, claiming instead that the evidence did not show that he had perpetrated the injuries to the decedent. Defendant also did not ask the trial court to give IPI Crim. 4th No. 7.15A.

The court found that the trial court adequately instructed the jury concerning the presumption of innocence, the burden of proof, and the elements of the offense. Furthermore, the causation instruction of IPI Crim. 4th No. 7.15A is not an essential element of felony murder, and is given only when causation is at issue. In addition, the trial court gave IPI Crim. 4th No. 7.15, which is not as "specialized" as No. 7.15A but which states that the prosecution has the burden to prove that the defendant's acts were a contributing cause of the death and that death did not result from a cause unconnected to the defendant. Where the defense failed to claim before the jury that the decedent's refusal of a blood transfusion was an unforeseeable intervening cause sufficient to relieve the defendant from liability for the death, the court found that the instructions that were given provided sufficient direction to the jury to apply the law and evaluate the evidence.

The court stated, however, that had defense counsel's theory of the case been that the refusal to undergo a blood transfusion was an unforeseeable, intervening cause, the trial court might have been required to give IPI Crim. 4th No. 7.15A in support of that theory.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

[Top](#)

## §26-3

### Attempt Murder

[People v. Lopez, 166 Ill.2d 441, 655 N.E.2d 864 \(1995\)](#) The offense of attempt second degree murder does not exist under Illinois law.

Attempt requires specific intent to commit a specific offense. Second degree murder, by contrast, requires that defendant act either in sudden and intense passion resulting from serious provocation or in the unreasonable belief that self-defense is justified. Because one cannot intend to act in sudden and intense passion or with an unreasonable belief, the state of mind that would be required for second degree murder, there is no such offense under Illinois law. See also, [People v. Reagan, 99 Ill.2d 238, 457 N.E.2d 1260 \(1983\)](#) (there is no offense of attempt voluntary manslaughter; "it is impossible to intend an unreasonable belief").

[People v. Harris, 72 Ill.2d 16, 377 N.E.2d 28 \(1978\)](#) An attempt murder indictment is defective if it does not allege intent to kill. Also, attempt murder jury instructions are defective if they allow the jury to convict when the evidence does not show intent to kill.

[People v. Jones, 81 Ill.2d 1, 405 N.E.2d 343 \(1979\)](#) The failure to correctly instruct the jury on the mental state required for attempt murder (i.e. specific intent to kill) was error, but harmless. Intent to kill was

"blatantly evident from the circumstances" and "even admitted by defense counsel"; the only question was whether defendant was one of the perpetrators.

[People v. Walker, 83 Ill.2d 306, 415 N.E.2d 1021 \(1980\)](#) Defendant was charged by information with attempt murder, and pleaded guilty. On appeal, defendant argued for the first time that the information was defective because it failed to allege intent to kill.

The information was defective, but defendant was not prejudiced. There was no merit to defendant's suggested defense, and the intent to kill was clear.

[People v. Barker, 83 Ill.2d 319, 415 N.E.2d 404 \(1980\)](#) Defendant was charged by indictment with attempt murder, and pleaded guilty. The indictment did not allege that defendant had the "intent to kill," but alleged that he acted "with intent to commit the offense of murder." During the plea proceedings defendant was not admonished that "intent to kill" was an essential element of attempt murder. In addition, at his sentencing hearing defendant stated, "I never had no intention of taking no one's life." Inclusion of "intent to kill" language in the indictment would have been redundant of the language charging that defendant intended "to commit the offense of murder" and was therefore unnecessary.

[People v. Mitchell, 105 Ill.2d 1, 473 N.E.2d 1270 \(1984\)](#) Defendant was convicted of two counts of attempt murder and two counts of aggravated battery arising from beatings inflicted on defendant's 16-month-old daughter on two separate days.

Evidence was insufficient to prove attempt murder. The evidence of guilt was based primarily on defendant's statements, in which she admitted "repeatedly" striking the child. "We do not believe that the circumstances of this striking, without more, are sufficient to establish the required intent [to kill], particularly in view of defendant's explanations for her behavior [that she struck the child out of anger and frustration and when she was 'nervous']. There was ample opportunity for her to complete her crime if, in fact, she intended to kill the child. Further, following [the child's] loss of consciousness, defendant applied a cool cloth and ultimately took her to the hospital for emergency medical attention, actions which are not consistent with an intent to murder."

[People v. Myers, 85 Ill.2d 281, 422 N.E.2d 620 \(1981\)](#) Though a conviction for attempt murder "must be supported by proof that the defendant has a specific intent to kill," such intent was proved in this case where defendant cut the victim's throat and left him, bleeding severely, without transportation on a side road at night.

[People v. Viser, 62 Ill.2d 568, 343 N.E.2d 903 \(1975\)](#) Defendants' convictions for attempt murder were reversed because they were, in part, charged with attempt felony murder. The felony murder ingredient of the offense of murder cannot be made the basis of an indictment charging attempt murder - attempt requires specific intent, whereas felony murder does not involve intent to kill.

[People v. Parker, 311 Ill.App.3d 80, 724 N.E.2d 203 \(1st Dist. 1999\)](#) Attempt murder occurs where, with intent to kill, defendant commits a substantial step toward the commission of murder. In view of the extensive injuries to the complainant, a reasonable trier of fact could have concluded that the individuals who beat him and placed him in the trunk of a car acted with intent to kill.

Lack of intent to kill was not shown by the fact that defendants had an opportunity to kill the complainant, but instead allowed him to leave. If defendants intended to kill the complainant when they placed him in the trunk, the fact that they later changed their minds and allowed him to leave would not be a defense to attempt murder.

[People v. Jones, 184 Ill.App.3d 412, 541 N.E.2d 132 \(1st Dist. 1989\)](#) Evidence was insufficient to prove

intent to kill the victim, where the victim "was hit several times in the head with a gun" and "kicked repeatedly," and "one of the defendants stomped on the back of his head several times." Also, defendants threatened that the victim and his family would be killed. Defendants had a gun and knife in their possession but did not use the knife and did not fire the gun (they did use it to beat the victim). The victim suffered several lacerations to the head, a broken nose, and injuries requiring 25 stitches. These injuries were serious, but there was no evidence they were life-threatening.

[People v. Ayala, 142 Ill.App.3d 93, 491 N.E.2d 154 \(1st Dist. 1986\)](#) The attempt murder instruction did not allow the jury to convict defendant based on something less than a specific intent to kill. This instruction permits a conviction "on the basis of defendant's belief that death would follow from the conduct in question."

[People v. Wagner, 189 Ill.App.3d 1041, 546 N.E.2d 283 \(4th Dist. 1989\)](#) Conviction for attempt murder based on defendant's intent to do great bodily harm to the victim must be vacated. Attempt murder requires a specific intent to kill.

[People v. Nuno, 206 Ill.App.3d 160, 563 N.E.2d 1165 \(1st Dist. 1990\)](#) Attempt murder requires specific intent to kill; intent to do great bodily harm is not sufficient. Where jury instructions allowed the jury to find defendant guilty of attempt murder if he either intended to kill or to cause great bodily harm, they were erroneous.

The erroneous instructions were not harmless; the jury showed confusion when it asked the judge to clarify.

[People v. Henry, 3 Ill.App.3d 235, 278 N.E.2d 547 \(1st Dist. 1972\)](#) Attempt murder reversed. Firing a gun (at night) in the direction of unmarked police car was insufficient to prove "specific intent to take life."

[People v. Mass, 31 Ill.App.3d 759, 334 N.E.2d 452 \(2d Dist. 1975\)](#) An attempt murder information was valid though it failed to allege that defendant took any substantial step toward the commission of murder.

[People v. Garrett, 216 Ill.App.3d 348, 576 N.E.2d 331 \(1st Dist. 1991\)](#) Defendant's conviction for attempt murder was reversed due to insufficient evidence to prove specific intent to kill. Though the victim was beaten into unconsciousness, lost two teeth and required 15 stitches, the character of the attack did not warrant an inference of intent to kill.

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**Cumulative Digest Case Summaries §26-3**

[People v. Anderson, 2012 IL App \(1st\) 103288 \(No. 1-10-3288, 8/24/12\)](#)

1. The sole function of instructions is to convey to the minds of the jury the correct principles of law applicable to the evidence so that the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence. Jury instructions should not be misleading or confusing, and their correctness depends on whether ordinary persons acting as jurors would fail to understand them. Defendant must show that the claimed instructional error created a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.

2. Under Supreme Court Rule 451(c), claims of error related to substantial defects in jury instructions are not subject to forfeiture on appeal. An erroneous instruction constitutes a substantial defect, or plain error, when it creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law, so as to threaten the fundamental fairness of the trial. Defendant need not

prove that the error in the instruction actually misled the jury.

Plain error arises in two circumstances: (1) where the evidence is closely balanced, or (2) where the flaw in the instruction is grave or so serious that it denies the defendant a substantial right and undermines the integrity of the judicial process. Where there is error in a close case, courts err on the side of fairness, so as not to convict an innocent person.

3. Defendant was charged with first-degree murder of one person and attempt murder of another person. The attempt-murder instruction did not name the victim. It informed the jury that it could find defendant guilty of attempting to murder “an individual.”

4. The Appellate Court found that it was probable that the ordinary juror would not understand that the subject of the attempt-murder instruction was only the alleged victim of the attempt murder, rather than the murder victim. Even though the court read the indictment to the jury at the beginning of trial and the State correctly identified the subject of the attempt-murder charge for the jury in closing argument, the jury was instructed that the indictment and closing arguments were not to be considered as evidence against the defendant. Defense counsel’s argument never addressed to whom the attempt-murder instruction applied.

5. The defective instruction was plain error because the evidence on the attempt-murder charge was closely balanced. The alleged victim of the attempt murder testified that he saw defendant commit the murder and that he heard more shots fired after that shooting, but he did not know in which direction they were fired as he ran to his car and fled from the scene. There were no bullet holes in his car. Defendant’s companion made a statement that defendant shot at “another person,” but he did not identify that person as the alleged attempt-murder victim, and he recanted this statement at trial. Therefore, the defendant may have been convicted of attempt murder based on the error in the instruction rather than the evidence.

The Appellate Court reversed defendant’s conviction for attempt murder and remanded for a new trial.

Garcia, J., dissented in part on the ground that the evidence on the attempt-murder charge was so lacking that a retrial on that charge would violate defendant’s constitutional right against double jeopardy. (Defendant was represented by Assistant Defender Alison Shah, Chicago.)

#### **[People v. Brown, 2015 IL App \(1st\) 131873 \(No. 1-13-1873, 5/29/15\)](#)**

1. The offense of attempt is committed where, with intent to commit a specific offense, an individual performs any act which constitutes a substantial step toward the commission of that offense. To prove attempt murder, the State must establish beyond a reasonable doubt that the defendant acted with specific intent to kill. Intent can be established by proof of surrounding circumstances, including the character of the assault, the use of a deadly weapon, or other matters from which intent to kill may be inferred.

2. The court concluded that even viewing the evidence in a light most favorable to the State, there was insufficient evidence to prove beyond a reasonable doubt that defendant intended to kill his live-in girlfriend. The defendant cut the girlfriend four times in the back with a knife or other sharp instrument, but there was no evidence of any struggle before or after the attack or of threats by the defendant toward the complainant. Furthermore, the lacerations were superficial and not life threatening. In addition, when the complainant left the apartment, the defendant did not attempt to pursue her or cause any further injury. Finally, the complainant testified only that she felt “punching” and “pressure” on her back and did not know that she had been cut until she felt something moist running down her back.

Although the complainant suffered serious injuries that could have resulted in permanent scarring, not every assault involving serious bodily injury necessarily supports an inference that the assailant intended to kill. Defendant’s conviction for attempt first degree murder was reversed and the cause remanded for resentencing on the remaining counts.

(Defendant was represented by Assistant Defender Tonya Joy Reedy, Chicago.)

#### **[People v. Guyton, 2014 IL App \(1st\) 110450 \(No. 1-11-0450, 7/15/14\)](#)**

The State charged defendant with first degree murder of one man and attempt first degree murder

of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second.

On appeal, defendant argued that the jury's verdict of second degree murder showed that he was acting in imperfect self-defense when he shot the two men, and since he shot both men at the same time with no change in his mental state, he could not have had the requisite intent to commit attempt first degree murder. The Appellate Court rejected this argument.

Once the State has proven the elements of first degree murder, the burden shifts to the defendant to prove by a preponderance of the evidence a mitigating factor, such as imperfect self defense, that will mitigate the offense to second degree murder. A defendant acts in imperfect self defense where he actually but unreasonably believes that he is acting in self-defense. If the defendant carries his burden, he will be convicted of second degree rather than first degree murder.

There is, however, no offense of attempt second degree murder in Illinois. **People v. Lopez**, 166 Ill. 2d 441 (1995). Even though the jury's verdict on second degree murder showed that it found defendant acted in imperfect self defense, the jury could not have been instructed on and could not have found defendant guilty of attempt second degree murder. The jury's verdict thus does not invalidate the attempt conviction.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

#### [People v. Smith, 2012 IL App \(1st\) 102354 \(No. 1-10-2354, 9/28/12\)](#)

Attempt first degree murder is generally a Class X felony which carries a sentence of six to 30 years. However, 720 ILCS 5/8-4(c)(1)(A) authorizes an enhanced Class X sentence of 20 to 80 years for the attempt first degree murder of a peace officer.

In addition, 720 ILCS 5/8-4(c)(1)(B), (C) and (D) authorize mandatory terms of 15 years, 20 years, and 25 years to natural life to be added to the sentence imposed by the trial court for attempt first degree murder. The additional terms are required where the defendant committed attempt first degree murder while armed with a firearm, while personally discharging a firearm, or while personally discharging a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under the plain language of §5/8-4, the 20-year enhancement for personally discharging a firearm applies to the enhanced Class X sentence under subsection (A) for attempt murder of a peace officer. The court rejected the reasoning of **People v. Douglas**, 371 Ill. App. 3d 21, 861 N.E.2d 1096 (1st Dist. 2007), which concluded that in the absence of some indication that the legislature intended otherwise, the firearm enhancements of subsections (B), (C) and (D) do not apply to the offense of attempt murder of a peace officer.

Thus, where the defendant was convicted of attempt murder of a police officer, the trial court properly applied the 20-year firearm sentencing enhancement for discharging a firearm to the defendant's enhanced 35-year enhanced sentence for attempt murder of a peace officer.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

#### [People v. Taylor, 2016 IL App \(1st\) 141251 \(No. 1-14-1251, 10/18/16\)](#)

Attempt murder is generally subject to a Class X sentence. However, [720 ILCS 5/8-4\(c\)\(1\)\(E\)](#) provides that if a person convicted of attempt murder:

proves by a preponderance of the evidence . . . that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony.

The Appellate Court concluded that §5/8-4(c)(1)(E) is intended to apply where the defendant

attempts to kill a person who has provoked him but negligently or accidentally kills a third person (i.e., “transferred intent”). The court rejected the trial court’s finding that the statute applies only where the defendant unsuccessfully attempts to kill his provoker, but had he succeeded the killing would have been negligent or accidental. The Appellate Court noted that under the trial judge’s interpretation it would be impossible for a defendant convicted of attempt murder to obtain a reduction classification based upon provocation, because specific intent to kill is required for attempt murder but is fundamentally incompatible with the requirement that had the provoker died the death would have been negligent or accidental.

2. In addition, the trial court abused its discretion by finding that defendant was not acting under a sudden and intense passion sufficient to entitle him to a reduction in classification. Defendant fired a weapon at the driver of a car which struck a vehicle in which defendant’s child was a passenger. The trial court found that defendant did not act in a sudden and intense passion because the car at which defendant fired had come to a stop at the time of the shooting.

The Appellate Court concluded that because the events took place in quick succession, there was little time for defendant’s anger to subside. Under these circumstances, defendant was acting under a sudden and intense passion.

3. To obtain a sentence classification reduction under §8-4(c)(1)(E), defendant was also required to show that his passion was the result of serious provocation by the person whom he shot. The trial court did not reach this issue because it concluded the defendant was not acting under a sudden and intense passion. The cause was remanded to allow the lower court to make this determination.

(Defendant was represented by Assistant Defender Michael Gentithes, Chicago.)

[Top](#)

## §26-4

### Second Degree Murder (Voluntary Manslaughter)

#### §26-4(a)

##### Generally

Note: The offense of Voluntary Manslaughter was abolished by [PA 84-1450](#) (eff. July 1, 1987). Voluntary manslaughter was replaced by Second Degree Murder, which is defined essentially the same but which places the burden of proof on defendant to prove that he is guilty of that offense instead of First Degree Murder.

[People v. Jeffries, 164 Ill.2d 104, 646 N.E.2d 587 \(1995\)](#) Second degree murder statute which requires defendant to disprove an element of first degree murder and that his belief in self-defense was unreasonable is constitutional. The State still has the burden to prove: (1) the elements of first degree murder beyond a reasonable doubt, and (2) the absence of self-defense when raised as an affirmative defense to first degree murder.

Furthermore, current law requires that the jury be instructed that it must find that first degree murder has been proven beyond a reasonable doubt before it considers whether defendant has proven provocation or unreasonable belief. Thus, defendant's burden to prove mitigation does not arise until the State has proven both first degree murder and the absence of a reasonable belief in self-defense.

Under current law, the same mental state - intent or knowledge - applies to both first and second degree murder. Thus, second degree murder is properly viewed not as a lesser included offense of first degree murder, but as a "lesser mitigated offense" that includes a factor reducing defendant's culpability.

[People v. Lopez, 166 Ill.2d 441, 655 N.E.2d 864 \(1995\)](#) The offense of attempt second degree murder does not exist under Illinois law.

Attempt requires specific intent to commit a specific offense. Second degree murder, by contrast, requires that defendant act either in sudden and intense passion resulting from serious provocation or in the

unreasonable belief that self-defense is justified. Because one cannot intend to act in sudden and intense passion or with an unreasonable belief, the state of mind that would be required for second degree murder, there is no such offense under Illinois law. See also, [People v. Reagan, 99 Ill.2d 238, 457 N.E.2d 1260 \(1983\)](#) (there is no offense of attempt voluntary manslaughter; "it is impossible to intend an unreasonable belief").

[People v. Fausz, 95 Ill.2d 535, 449 N.E.2d 78 \(1983\)](#) Defendant, a tavern owner, was charged with murder for shooting a person who was attempting to steal two bottles of whiskey. The jury was instructed on murder, voluntary manslaughter and involuntary manslaughter. Defendant was found guilty of voluntary manslaughter.

Evidence was insufficient to support the voluntary manslaughter conviction because there was no evidence showing that defendant either acted in "heat of passion" or acted with an unreasonable belief that the killing was justified.

[People v. Pierce, 52 Ill.2d 7, 284 N.E.2d 279 \(1972\)](#) Conviction of voluntary manslaughter upheld. Although the evidence was conflicting, there is sufficient evidence to establish that deceased attempted to strike defendant while they were engaged in a quarrel and defendant then struck and repeatedly kicked the deceased.

[People v. Garcia, 165 Ill.2d 409, 651 N.E.2d 100 \(1995\)](#) The only categories of provocation recognized under the second degree murder statute are substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. The decedent's mere words, "no matter how vile," are never "provocation" sufficient to reduce an offense to second degree murder.

[People v. Chevalier, 131 Ill.2d 66, 544 N.E.2d 942 \(1989\)](#) Adultery with a spouse is sufficient provocation for voluntary manslaughter in "those instances where the parties are discovered in the act of adultery or immediately before or after such an act, and the killing immediately follows such discovery." A "verbal communication that adultery has occurred or will occur falls within the rule that mere words are insufficient provocation." Thus, a confession of adultery by a spouse is not adequate provocation.

[People v. McCarthy, 132 Ill.2d 331, 547 N.E.2d 459 \(1989\)](#) The Supreme Court declined to determine whether the "spousal adultery" rule should be enlarged to include unmarried persons who share a marital-type relationship. Here, defendant and the victim had broken off their relationship, and the victim had moved out two months before the killing. Therefore, just "as divorced persons may not claim the benefit of the voluntary manslaughter instruction, there would be no reason to afford the same instruction to unmarried persons whose relationship has ended."

[People v. Romero, 387 Ill.App.3d 954, 901 N.E.2d 399 \(2d Dist. 2008\)](#) Where defendant argues that he presented sufficient evidence to prove a mitigating factor in a first or second degree murder case, the applicable standard of review is whether, viewing the evidence most favorably to the prosecution, any rational trier of fact could have found that the mitigating factors were not present.

[People v. Burks, 189 Ill.App.3d 782, 545 N.E.2d 782 \(3d Dist. 1989\)](#) A defendant may be charged with second degree murder; in such a charge the State "is alleging that it can prove the elements of first degree murder, but is conceding the presence of mitigating factors." Under these circumstances defendant has no burden to prove any mitigating factors.

[People v. Swanson, 211 Ill.App.3d 510, 570 N.E.2d 503 \(1st Dist. 1991\)](#) A trial judge is not precluded from convicting a defendant of second degree murder where defendant does not request consideration of that charge.

[People v. Newbern, 219 Ill.App.3d 333, 579 N.E.2d 583 \(4th Dist. 1991\)](#) A defendant who is charged with first degree murder but convicted of second degree murder may not be prosecuted for first degree murder if the cause is remanded for a new trial. Accord, [People v. Timberson, 213 Ill.App.3d 1037, 573 N.E.2d 374 \(5th Dist. 1991\)](#) (a conviction for second degree murder is an implied acquittal of first degree murder; therefore, a second prosecution for first degree murder is barred by double jeopardy).

[People v. Hawkins, 296 Ill.App.3d 830, 696 N.E.2d 16 \(1st Dist. 1998\)](#) Once the State has proven first degree murder beyond a reasonable doubt, to obtain a second degree murder conviction defendant must show by a preponderance of the evidence that he either acted under a sudden and intense passion resulting from serious provocation or unreasonably believed that the circumstances justified self-defense.

To establish that actions are justified by self-defense, defendant must show that: (1) unlawful force was threatened against him, (2) there was an imminent danger of harm, (3) he was not the aggressor, (4) he had actual beliefs that a threat existed, force was necessary to overcome the threat, and the type and amount of force used were necessary, and (5) those beliefs were reasonable. Once defendant meets this burden, the State must prove beyond a reasonable doubt that defendant did not act in self-defense.

The evidence here showed that defendant had an actual but unreasonable belief that he was justified in using deadly force. There was evidence that the decedent pulled a knife on defendant three days before the stabbing, had fought with defendant a few months earlier, and had once struck defendant with a brick. There was also evidence that the decedent and defendant had been smoking marijuana laced with cocaine just before the incident, and both alcohol and cocaine were found in the decedent's blood.

In addition, the only evidence concerning the events just before the stabbing was presented by defendant, who claimed that after he refused a request to lend the decedent \$2.00, the decedent reached into defendant's pockets, punched him on the left side of his head, and knocked him to the floor. The decedent then threw a brick, just missing defendant's head and hitting the glass in the back door, before approaching defendant and threatening to kill him. Although defendant drew a knife, the decedent continued forward and blocked defendant's path of escape. Finally, the decedent grabbed defendant and tried to hit him with his fist. Defendant testified that although he did not know whether the decedent had a weapon, he was "terrified and scared."

Considering the evidence most favorably to the prosecution, the State proved the elements of first degree murder beyond a reasonable doubt. However, the evidence presented by the defense established, by a preponderance of the evidence, that defendant believed the circumstances justified use of deadly force in self-defense. Defendant's belief was unreasonable in this case, however, because the decedent had no visible weapon and had not inflicted bodily harm on defendant in any of their previous altercations. Defendant's conviction was reduced to second degree murder.

[People v. Harling, 29 Ill.App.3d 1053, 331 N.E.2d 653 \(1st Dist. 1975\)](#) Voluntary manslaughter conviction (after bench trial) reversed. The State produced no eyewitnesses to the occurrence and defendant presented strong proof of self-defense.

[People v. Honey, 69 Ill.App.2d 429, 217 N.E.2d 371 \(1st Dist. 1966\)](#) Voluntary manslaughter conviction reversed. The only eyewitness was defendant, who testified that deceased had previously threatened him with a gun and on this occasion rushed toward defendant with a hand in a pocket and saying, "I'm going to kill you."

[People v. Curwick, 33 Ill.App.3d 757, 338 N.E.2d 468 \(3d Dist. 1975\)](#) Defendant is precluded from challenging the sufficiency of the evidence to support voluntary manslaughter conviction when, at trial, he argued for and obtained an instruction defining voluntary manslaughter.

[People v. McMurry, 64 Ill.App.2d 248, 212 N.E.2d 7 \(2d Dist. 1965\)](#) Conviction for voluntary manslaughter

reversed since the only evidence of provocation was words between defendant and deceased, and "mere words" can never amount to the required provocation.

[People v. Thompson, 11 Ill.App.3d 752, 297 N.E.2d 592 \(1st Dist. 1973\)](#) Defendant was charged with murder, and following a bench trial was convicted of voluntary manslaughter. Although the evidence might sustain a murder conviction, the voluntary manslaughter conviction could not stand where there was no evidence of sudden and intense passion resulting from provocation.

[People v. Shipp, 51 Ill.App.3d 470, 367 N.E.2d 966 \(2d Dist. 1977\)](#) Defendant's conviction of voluntary manslaughter for the shooting of her ex-husband was reversed. The deceased had been convicted for killing his first wife and for the attempt murder of defendant a few years earlier. Also, the deceased brutally assaulted defendant on numerous occasions and had threatened her. Consequently, defendant's belief that deadly force was necessary to protect herself from great bodily harm was justified.

Furthermore, the fact defendant shot the deceased five times was not crucial, since "defendant's terror was both reasonable and complete and only a matter of seconds elapsed between the firing of the first and last round." The evidence does not show that defendant continued to fire after she reasonably should have realized that the deceased was disabled.

[People v. Ellis, 107 Ill.App.3d 603, 437 N.E.2d 409 \(2d Dist. 1982\)](#) Defendant was convicted, by a jury, of murder arising out of an argument and shooting. There were no witnesses to the shooting (though neighbors heard arguing), and defendant testified that he acted in self-defense.

Evidence was insufficient to prove the required intent for murder. Defendant's version of the circumstances of the shooting was not improbable, and was not "impeached by the State's evidence."

However, defendant's belief he was in danger of losing his life or suffering great bodily harm was unreasonable. Thus, the conviction for murder was reduced to voluntary manslaughter and the cause remanded for resentencing.

[People v. Hamilton, 48 Ill.App.3d 456, 363 N.E.2d 193 \(4th Dist. 1977\)](#) Defendant's conviction for voluntary manslaughter was reduced to involuntary manslaughter. The State failed to introduce sufficient evidence to overcome defendant's explanation of the shooting, which was consistent with the physical evidence. However, defendant's testimony indicated that he acted recklessly by drawing a loaded weapon during a quarrel.

[People v. Newberry, 127 Ill.App.2d 322, 262 N.E.2d 282 \(1st Dist. 1970\)](#) Defendant's conviction for voluntary manslaughter was upheld. The trier of fact could reasonably find that defendant, already in a depressed emotional state and having contemplated suicide, became so aroused and impassioned by the deceased's attitude and reply to his efforts at reconciliation that he immediately drew a gun from his pocket and shot her.

[People v. Hudson, 165 Ill.App.3d 375, 519 N.E.2d 28 \(3d Dist. 1988\)](#) A defendant may be convicted of voluntary manslaughter based on accountability.

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**Cumulate Digest Case Summaries 26-4(a)**

[People v. Goods, 2016 IL App \(1st\) 140511 \(No. 1-14-0511, 9/12/16\)](#)

A defendant is entitled to an instruction of self-defense if there is some evidence on each of the following elements: (1) force was threatened against defendant; (2) defendant was not the aggressor; (3)

danger of harm was imminent; (4) the threatened force was unlawful; (5) defendant actually and subjectively believed a danger existed which required the use of force; and (6) defendant's beliefs were objectively reasonable. When evidence supports a self-defense instruction, a second-degree murder instruction must be given as a mandatory counterpart.

The court held that defense counsel was ineffective for not presenting a claim of self-defense. The evidence showed that prior to the night of the shooting, the victim had acted in a menacing fashion towards defendant and had displayed a gun. In response to this menacing behavior defendant armed himself with a gun. On the night of the shooting, the victim drove defendant to an apartment complex in order to rob two acquaintances of defendant's, including co-defendant. They both got out of the car and defendant saw the victim fumbling in his waist. Defendant feared that the victim might be getting ready to shoot him.

The two men walked through the parking lot when co-defendant, an acquaintance of defendant's who also knew about the victim's threatening behavior, came out of nowhere, knocked the victim to the ground and then shot him. The co-defendant's actions frightened defendant, who also fell to the ground. When defendant got up, he shot the victim several times as he lay on the ground. Co-defendant took the victim's gun and shot him again. Defendant was convicted of first-degree murder.

The court held that the evidence showed defendant believed he was in danger and that the victim threatened defendant with force when he showed defendant his gun and acted in a menacing manner. On the night of the shooting, defendant saw the victim fumbling in his waistband and knew that the victim intended to commit a robbery. The record thus provided slight evidence warranting a jury instruction on self-defense. And since this defense was consistent with the defense actually presented, counsel's failure to raise self-defense amounted to deficient representation.

The failure to raise this defense was also prejudicial. In making this finding, the court noted that co-defendant was convicted of second degree murder. Even if defendant's belief in self-defense had been unreasonable the jury could have found him guilty of second degree murder.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

#### **[People v. Guyton, 2014 IL App \(1st\) 110450 \(No. 1-11-0450, 7/15/14\)](#)**

The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second.

On appeal, defendant argued that the jury's verdict of second degree murder showed that he was acting in imperfect self-defense when he shot the two men, and since he shot both men at the same time with no change in his mental state, he could not have had the requisite intent to commit attempt first degree murder. The Appellate Court rejected this argument.

Once the State has proven the elements of first degree murder, the burden shifts to the defendant to prove by a preponderance of the evidence a mitigating factor, such as imperfect self defense, that will mitigate the offense to second degree murder. A defendant acts in imperfect self defense where he actually but unreasonably believes that he is acting in self-defense. If the defendant carries his burden, he will be convicted of second degree rather than first degree murder.

There is, however, no offense of attempt second degree murder in Illinois. **People v. Lopez**, 166 Ill. 2d 441 (1995). Even though the jury's verdict on second degree murder showed that it found defendant acted in imperfect self defense, the jury could not have been instructed on and could not have found defendant guilty of attempt second degree murder. The jury's verdict thus does not invalidate the attempt conviction.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

#### **[People v. Harris, 2013 IL App \(1st\) 110309 \(No. 1-11-0309, 11/6/13\)](#)**

1. Second degree murder is defined as first degree murder accompanied by one of two mitigating

factors - serious provocation or unreasonable belief in the need for self-defense. Under Illinois law, the crime of attempt second degree murder does not exist. **People v. Lopez**, 166 IL 2d 441, 655 NE 2d 864 (1995). Under **Lopez**, the failure to recognize the offense of attempt second degree murder creates the possibility that a perpetrator could be punished more severely for attempt first degree murder than if the victim had died and a second degree murder conviction resulted.

2. In 720 ILCS 5/8-4(c)(1)(E), the legislature removed this possible disparity in sentencing by providing that attempt murder carries only a Class 1 sentence if the defendant proves by a preponderance of the evidence at sentencing that at time of an attempt murder, he or she was acting under a sudden and intense passion resulting from serious provocation. Here, the court concluded that the phrase “serious provocation” carries the same meaning under §8-4(c)(1)(E) as for second degree murder. Thus, the only categories of serious provocation recognized under Illinois law are for substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

3. Defendant failed to prove by a preponderance of the evidence that he was acting under a sudden and intense passion resulting from serious provocation when he stabbed a man whom he believed was reaching for a gun from under a car seat. The court noted that defendant was not injured, was not engaged in a mutual quarrel, and in fact had no interaction at all with the victim before the stabbing occurred. Furthermore, there is no evidence of an illegal arrest or adultery. Under these circumstances, the evidence failed to show any of the recognized classes of serious provocation.

4. The court rejected the argument that the act of brandishing a deadly weapon should be held to constitute serious provocation where the offender responds in the belief that self defense is justified. The court noted that in enacting §8-4(c)(1)(E), the legislature chose to recognize only one of the mitigating factors that reduce a first degree murder to second degree - the presence of serious provocation. Had the legislature intended to also recognize an unreasonable belief in the need for self defense as a factor under §8-4(c)(1)(E), it would have done so explicitly. In light of the legislature’s failure to act, the court declined to expand the definition of “serious provocation” to include an unreasonable belief in the need for self-defense.

Defendant’s Class X sentence of eight years for attempt murder was affirmed.  
(Defendant was represented by Assistant Defender Phillip Payne, Chicago.)

### [People v. Lefler, 2016 IL App \(3d\) 140293 \(No. 3-14-0293, 1/21/16\)](#)

Jury verdicts are legally inconsistent when the offenses arise out of the same set of facts and a jury finds that an essential element of the offense both exists and does not exist.

The victim caught defendant breaking into his car and during an ensuing struggle, defendant stabbed the victim, killing him. At trial defendant argued that he was acting in self-defense when he stabbed the victim. The jury found defendant guilty of both felony murder and second degree murder.

The Appellate Court held that the verdicts for felony murder and second degree murder were not legally inconsistent. A defendant commits first degree murder if he kills another and he: (1) intends to kill or do great bodily harm; (2) knows that his acts create a strong probability of death or great bodily harm; or (3) is attempting or committing a forcible felony. 720 ILCS 5/9-1.

Second degree murder is a mitigated form of first degree murder, but only as to the first two forms of first degree murder. The jury first determines that defendant killed another with intent or knowledge and then determines whether mitigating factors exist that would reduce the offense to second degree murder. But second degree murder does not apply to the third form of first degree murder, felony murder. 720 ILCS 5/9-2.

The jury clearly found that mitigating factors existed and properly returned a verdict reducing first degree murder based on intent or knowledge to second degree murder. But since second degree murder does not apply to felony murder, the jury’s finding of mitigation was not legally inconsistent with a guilty verdict as to felony murder.

Defendant’s conviction for felony murder was affirmed.  
(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

[People v. Lengyel, 2015 IL App \(1st\) 131022 \(No. 1-13-1022, 8/5/15\)](#)

1. First degree murder occurs when a defendant kills another person and either intends his acts to cause death or great bodily harm, or knows that his acts create a strong probability of death or great bodily harm. Second degree murder shares the same elements as first degree murder but involves the presence of a mitigating factor, such as provocation or unreasonable belief in self-defense.

Involuntary manslaughter by contrast involves a less culpable mental state than first or second degree murder. Involuntary manslaughter occurs when a defendant's actions are likely to cause death or great bodily harm and are performed recklessly. A defendant acts recklessly when he consciously disregards a substantial and unjustifiable risk that death or great bodily harm will result.

2. Defendant, who was 22 years old, lived with and acted as a caretaker for his 55-year-old father, Richard, who suffered from multiple health problems. Defendant and Richard had a contentious relationship, arguing daily over all sorts of mundane things. Defendant had "issues" with Richard and his "inner rage" had been building for years.

One day they had an argument that quickly turned into a physical altercation. Richard got up from where he was sitting and grabbed defendant's shirt with both hands. Defendant punched Richard four or five times in the head trying to "disentangle himself" and get away. As soon as defendant saw blood, he stopped hitting Richard and went back to his bedroom, locked the door, and told his girlfriend that they had to leave. Richard broke through the bedroom door. Defendant pushed him out of the room and Richard fell to the ground. Richard got up and went to get a towel. At Richard's request, defendant called for an ambulance.

The paramedics arrived and transported Richard to the hospital. Richard could not speak and was slipping in and out of consciousness. At the hospital, Richard died from a stroke caused by an increase in blood pressure which in turn had been brought on by stress from injuries.

The jury acquitted defendant of first degree murder, but found him guilty of second degree murder based on an unreasonable belief in self-defense.

3. The Appellate Court held that the State failed to prove defendant guilty of second degree murder. First, the court held that the evidence did not show that defendant intended to kill his father. Immediately after the altercation, defendant called for an ambulance, indicated concern for Richard's condition, and told the police that he was angry at his father but was not trying to kill him. Under these circumstances, defendant did not act with the intent to kill.

The evidence also did not show that defendant knowingly killed his father. The court noted a long-standing principle in Illinois that while the intentional use of a deadly weapon presumes that a defendant knows his acts will create a strong probability of death or great bodily harm, "death is not normally a reasonable or probable consequence of a barehanded blow."

The evidence showed that defendant and his father were of similar size and although Richard had multiple health problems, he still had enough strength to break open a locked door. Richard was conscious, coherent, and able to walk when defendant left. The fight only lasted a few minutes, defendant did not use a weapon, and stopped hitting Richard as soon as he saw blood.

Additionally, defendant's punches did not directly cause Richard's death, and thus he could not be practically certain that his actions would cause death or great bodily harm. The facts thus did not show that defendant knowingly caused his father's death.

Instead the evidence showed that defendant acted recklessly by disregarding the risk that his punches could lead to a spike in Richard's blood pressure, which eventually could have caused a stroke resulting in death. Since defendant acted recklessly, the court reduced his conviction to involuntary manslaughter.

(Defendant was represented by Assistant Defender Pete Sgro, Chicago.)

[People v. Nibbe, 2016 IL App \(4th\) 140363 \(No. 1-14-0363, 2/10/16\)](#)

Second degree murder is first degree murder plus a mitigating factor. Defendant was charged with first degree murder under a knowing murder theory in that he killed with knowledge that his actions created a strong probability of death or great bodily harm.

The court reversed the conviction for second degree murder, finding that the evidence was insufficient to prove knowledge on defendant's part that a single punch to the decedent's face would create a strong probability of death or great bodily harm. The decedent's death was caused by hitting his head on the sidewalk as he fell.

The court stressed that under Illinois law, the striking of a blow with the fist on the side of the face or head is not considered likely to result in death or great bodily harm. Although courts have recognized exceptions to this principle where there is a great disparity in size and strength between the defendant and the decedent, or where the defendant inflicted multiple blows, neither situation applied here. Although defendant was slightly larger and slightly younger than the decedent, the disparity was not great enough that defendant should have known that striking the decedent in the face with his fist would cause death.

The court noted that the State did not cite any cases in which one blow with a bare hand by a single assailant was deemed sufficient to sustain a first degree murder conviction. In addition, death was caused by the decedent's head striking the concrete and not the blow to the face. Finally, defendant had been drinking and was in an excitable due to the decedent's attempt to enter the apartment occupied by defendant and his friends.

Because a second degree murder conviction requires proof of first degree murder, the court vacated the second degree murder conviction and remanded the cause for resentencing on aggravated battery.

(Defendant was represented by Assistant Defender Warner Brockett, Springfield.)

### [People v. O'Neal, 2016 IL App \(1st\) 132284 \(No. 1-13-2284, 9/29/16\)](#)

1. There are three types of first-degree murder: (1) intentional murder (where defendant intends to kill or do great bodily harm or knows that his acts will cause death); (2) strong-probability murder (where defendant knows that his acts create a strong probability of death or great bodily harm); and (3) felony murder (where defendant commits or attempts to commit a forcible felony and a death occurs during the commission of that felony). Second degree murder occurs when the defendant commits either intentional, knowing, or strong-probability first-degree murder and the defendant either acted under a sudden and intense passion resulting from serious provocation by the victim or in an unreasonable belief that his actions were justified by self-defense.

Thus, a mitigating factor such as imperfect self-defense will reduce a charge of first-degree intentional or strong probability murder to second degree murder. Because second degree murder cannot be the predicate felony for felony murder, however, an unreasonable belief in self defense will not reduce felony murder to a lesser offense. The court noted that felony murder is not concerned with the defendant's state of mind in committing acts which lead to a death, but is intended to deter the commission of the predicate forcible felony by holding the wrongdoer liable for any foreseeable death that results from the commission of that felony.

2. Under Illinois Supreme Court case law, a conviction for felony murder will be upheld only if the act resulting in death was not inherent in the murder itself. [People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#). Because every fatal shooting involves conduct which constitutes aggravated discharge of a firearm, the State could charge every fatal shooting as felony murder predicated on aggravated discharge of a firearm and obtain a first degree murder conviction without proving an intentional or knowing murder. In other words, by charging every fatal shooting as felony murder predicated on aggravated discharge of a firearm, the State could nullify the second degree murder statute.

A conviction for felony murder will stand, however, where the predicate felony was based on an act which is not the same act on which the murder charge is based. For example, felony murder could be predicated on mob action where the defendant committed several acts toward the decedent and the mob action charge was based on acts that were distinct from the acts which caused death. [People v. Davison, 236 Ill.2d 232, 923 N.E.2d 781 \(2010\)](#).

3. Defendant was charged with intentional first-degree murder, strong-probability first degree murder, felony murder predicated on aggravated discharge of a firearm, and aggravated discharge of a

firearm. All of the offenses involved shooting at a van which drove slowly past a party at which defendant was acting as security. A bystander seated in a car that was parked across the street was killed by one of the shots.

Defendant raised a defense of unreasonable belief in self-defense. The jury convicted of second-degree murder on the counts alleging intentional and strong probability murder, but convicted defendant of felony murder.

The court concluded that the act which constituted the predicate felony - shooting at the van - was inherent in the offense of felony murder. Firing at the van was the only act which defendant was alleged to have performed, and the State did not attempt to differentiate between the various shots as the cause of the bystander's death. In addition, the State conceded that every shot defendant fired was intended for the occupants of the van. Under these circumstances, permitting a conviction for felony murder would nullify the second degree murder statute, particularly where the jury convicted defendant of second degree murder on the two counts on which a claim of imperfect self-defense could be raised.

4. In addition, under Illinois Supreme Court precedent, a conviction for felony murder will be upheld only if defendant had independent felonious purposes in committing the predicate felony and the murder. The court concluded that this requirement was not satisfied because defendant acted with only one purpose - firing at the van.

In the course of its holding, the court noted that under the doctrine of transferred intent, if a defendant shoots at one person with intent to kill but inadvertently kills a bystander, he may be convicted of murder for the death of the bystander. The court concluded that under the same doctrine, if the defendant acts in self-defense in shooting at an intended target, he also acts in self-defense concerning the unintentional shooting of the bystander.

The first degree murder conviction for felony murder was reversed and the cause remanded for sentencing on second degree murder.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

#### [People v. Viramontes, 2014 IL App \(1st\) 130075 \(No. 1-13-0075, 9/24/14\)](#)

1. Second degree murder occurs where at the time of the killing, the defendant is acting under sudden and intense passion resulting from serious provocation by the decedent or by another whom the defendant endeavors to kill when he negligently or accidentally causes the death of the decedent. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. Illinois law recognizes four categories of serious provocation: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the defendant's spouse.

Passion, no matter how extreme, is not recognized as provocation unless it fits into one of the above categories. Furthermore, mere words are not recognized as provocation even where they are abusive, aggravated, or indecent. A defendant is entitled to a second degree jury instruction where there is some evidence, even if slight, to support a claim of serious provocation.

2. The court found that as a matter of law, defendant's discovery of his wife's infidelity by reading text messages and seeing nude photographs on her phone did not constitute serious provocation. Under Illinois law, a spouse's adultery constitutes provocation only where the parties are discovered in the act of adultery or immediately before or after such an act, and the killing immediately follows that discovery. The court analogized defendant's discovery of evidence of adultery on his wife's cell phone as similar to a confession of adultery by a spouse, which has been recognized as insufficient provocation to reduce first degree murder to second degree.

3. The court rejected the argument that a second degree murder instruction was justified based on mutual combat between defendant and the decedent. Mutual combat is "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." Provocation by mutual combat will not be found if the accused retaliates in a manner that is out of proportion to the provocation. A defendant may not instigate a

fight and then rely on the victim's response as evidence of mutual combat. Mutual combat will not be found if sufficient time elapsed between the alleged provocation and the homicide to permit the "voice of reason" to be heard.

Because the record showed that defendant was the aggressor and inflicted a brutal beating on the decedent, and that his actions were "completely disproportionate" to the decedent's actions of striking him in the chest, the trial court properly declined to give a second degree murder instruction based on mutual conduct.

Defendant's conviction for first degree murder was affirmed.

**[People v. Yeoman, 2016 IL App \(3d\) 140324 \(No. 3-14-0324, 6/17/16\)](#)**

One element of second-degree murder under a knowing murder theory is that defendant knew his acts created a strong probability of death or great bodily harm to the decedent. To act with a "knowing" mental state, the defendant must possess a conscious awareness that his conduct is practically certain to cause the result in question.

There is a general rule in Illinois law that death is not ordinarily contemplated as a natural consequence of a blow or blows from a bare fist, unless there is a great disparity in size and strength between the defendant and the victim. The court concluded that the evidence was insufficient to establish that defendant knew that his acts created a strong probability of death or great bodily harm where after a road-rage incident, defendant struck the decedent one time in the face with his bare fist. The decedent hit his head on the pavement and subsequently died.

The court concluded that striking a person of approximately equal size one time in the face with a bare fist is not the type of conduct that would create a strong probability of death or great bodily harm. Under these circumstances, defendant could not have known that death or great bodily harm was practically certain to occur. The Appellate Court reversed the conviction for second degree murder.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

**[Top](#)**

**§26-4(b)  
Instructions**

**[Gilmore v. Taylor, 508 U.S. 333, 113 S.Ct. 2112, 124 L.Ed.2d 306 \(1993\)](#)** **[Falconer v. Lane, 905 F.2d 1129 \(7th Cir. 1990\)](#)**, which held that former IPI Crim. 2d Nos. 7.02 and 7.04 were unconstitutional because they permitted a jury to convict of murder without determining whether the evidence of provocation was sufficient to reduce the offense to manslaughter, was a "new rule" because it was not dictated by prior federal precedent. Under **[Teague v. Lane, 489 U.S. 288 \(1989\)](#)**, therefore, Falconer cannot be applied on federal habeas corpus where the conviction in question was already final when Falconer was decided.

**[People v. Latimer, 35 Ill.2d 178, 220 N.E.2d 314 \(1966\)](#)** If the evidence at a murder trial, if believed by the jury, would reduce the crime to manslaughter, an instruction defining that crime should be given. However, where the evidence clearly demonstrates that the killing was murder, it is error to give a manslaughter instruction.

**[People v. Pastorino, 91 Ill.2d 178, 435 N.E.2d 1144 \(1982\)](#)** At defendant's trial, the jury was instructed on both murder and voluntary manslaughter. In his oral comments to the jury, the judge stated that defendant can't be guilty of both offenses; thus, he told the jury to consider the murder verdict first —"If you find the defendant guilty of murder you do not have to do anything else (but if) you find her not guilty of murder, then you will consider the voluntary manslaughter." Defendant waived the issue concerning the above comments

because he failed to object to them at trial.

[People v. Flowers, 138 Ill.2d 218, 561 N.E.2d 674 \(1990\)](#) The trial judge did not err by refusing to accept the jury's verdicts of guilty for both murder and voluntary manslaughter or by ordering further deliberations.

[People v. Parker, 223 Ill.2d 494, 861 N.E.2d 936 \(2006\)](#) Where defendant is charged with first degree murder and the jury is also instructed on second degree murder, no error occurs where the jury receives a specific "not guilty of first degree murder" verdict form, but does not get a general "not guilty" verdict form.

[People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756 \(1972\)](#) Trial judge erred in failing to give an instruction on voluntary manslaughter at a murder trial. The difference between a killing justified by self-defense and one that is not justified (amounting to voluntary manslaughter) is that in the former instance defendant reasonably believes that the use of force is necessary, and in the latter instance such a belief is unreasonable.

[People v. Leonard, 83 Ill.2d 411, 415 N.E.2d 358 \(1980\)](#) At defendant's trial for murder, the trial court refused to give defendant's tendered instruction on voluntary manslaughter. The manslaughter instruction should have been given because there was evidence of mutual combat between defendant and the deceased.

[People v. Moore, 95 Ill.2d 404, 447 N.E.2d 1327 \(1983\)](#) At defendant's trial for murder, the trial court refused defendant's tendered instruction on voluntary manslaughter, though it had given an instruction on justified use of force.

Any error was harmless. The overwhelming weight of evidence established that defendant was guilty of felony murder; thus, it made no difference if the killing was done with the unreasonable belief that it was justified in self-defense.

[People v. Austin, 133 Ill.2d 118, 549 N.E.2d 331 \(1989\)](#) Refusal to give voluntary manslaughter instructions upheld. The killing arose out of an incident on a CTA bus. Defendant got on the bus, paid an insufficient fare, and was told to leave the bus by the driver. Defendant claimed that she reached for a transfer and the driver hit her hand with a transfer punch. Blows were exchanged, and defendant pulled a gun which discharged into the floor. The parties struggled off the bus, and defendant shot and killed the driver.

There was no evidence of "mutual combat" that would reduce the conviction to voluntary manslaughter. "Mutual combat" involves "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms." Here, however, the bus driver did not enter the struggle willingly and the fight was not on equal terms. Instead, defendant instigated the fight by attempting to take a transfer, and the driver hit defendant's hand to prevent the stealing of the transfer. Thus, the driver was merely responding to defendant's illegal act and did not willingly enter into combat. Furthermore, the fight was not on equal terms; defendant shot and killed an unarmed person who provoked defendant by speaking gruffly and striking her hand with a transfer punch.

[People v. Lockett, 82 Ill.2d 546, 413 N.E.2d 378 \(1980\)](#) Where the evidence supports an instruction on justifiable use of force, tendered instructions on voluntary manslaughter based upon unreasonable belief should also be given. When defendant presents evidence of a subjective belief that he was acting in self-defense, it is for the jury to decide whether he in fact had that subjective belief and, if so, whether that subjective belief was reasonable.

[People v. Sloan, 111 Ill.2d 517, 490 N.E.2d 1260 \(1986\)](#) The trial judge did not err by refusing to instruct the jury on self-defense and voluntary manslaughter. Because defendant was clearly the aggressor, and the victim's "slight display of force, or resistance, was provoked by the defendant's own conduct," defendant's use of force was precluded.

[People v. Tenner, 157 Ill.2d 341, 626 N.E.2d 138 \(1993\)](#) The evidence showed that defendant went to the business of his former business partner and held four people at gunpoint. After tying the victims' hands and feet with ropes he had brought with him, defendant moved them to his business in the same building.

When the victims arrived in defendant's business, they discovered that ropes tied into nooses had been strung across overhead beams. The nooses were placed over the victims' necks, and duct tape was placed over their mouth. Defendant then made several charges against the victims and removed the duct tape so they could respond. Eventually, he removed the noose from the neck of one victim (his former girlfriend) and took her outside. He then returned inside and shot the other three victims, fatally wounding two of them.

Defendant testified that when his former girlfriend lived with him, she claimed that she had been held at the apartment of the former partner for a week and forced to participate in sexual activities. Defendant claimed that on the day of the offense he thought he had seen his former girlfriend struggling with his former partner, and that he went to the partner's business because he believed that the girlfriend had been abducted again. He said that he took rope restraints with him because he knew that his former partner owned guns. Finally, defendant testified that twice within the past two weeks he had overheard his former partner plotting to kill him.

Defendant was not entitled to an instruction on "sudden and intense passion" second degree murder. Only certain categories of provocation are recognized as giving rise to sudden and intense passion: substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. Although defendant testified that two of the victims intended to kill him, neither the alleged threats nor defendant's relationships to the victims were within the recognized categories of provocation.

Furthermore, any claim of sudden and intense passion was contradicted by the fact that defendant prepared restraints and nooses before the offense, claimed that he was "rescuing" his former girlfriend, and held the victims at gunpoint for two hours before shooting them.

Defendant was also not entitled to an instruction on second degree murder based on an unreasonable belief of self-defense. Use of force is not justified by one who is "attempting to commit, committing, or escaping after the commission of, a forcible felony." Thus, "unreasonable belief of self-defense" second degree murder may not be claimed by one who is the aggressor in a forcible felony. By arming himself with a shotgun and preparing rope restraints, defendant was attempting the forcible felony of unlawful restraint.

[People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 \(2001\)](#) A defendant who raises self-defense is not entitled to second degree murder instructions on a felony murder charge even where there is evidence that he formed the intent to kill or use deadly force only after the decedent committed serious provocation. The legislature did not intend to permit second degree murder instructions on felony murder charges.

[People v. Mohr, 228 Ill.2d 53, 885 N.E.2d 1019 \(2008\)](#) The State may charge a defendant with second degree murder even where it does not charge first degree murder. By doing so, the State alleges that it can prove the elements of first degree murder, but concedes that a mitigating factor is present and that the only possible conviction is second degree murder. Where the State files only second degree charges, the jury should not be informed of the provocation element. Instead, the trial court should treat the case as a first degree murder case, except that if a guilty verdict is returned a conviction for second degree murder will be entered.

[People v. Majors, 308 Ill.App.3d 1021, 721 N.E.2d 753 \(4th Dist. 1999\)](#) Under Illinois law, provocation that may constitute second degree murder includes substantial physical injury or physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. Here, the evidence showed that: (1) the decedent repeatedly shouted "Rape" while walking away from defendant, (2) defendant followed the decedent to see what she was shouting, and (3) defendant killed the decedent in a panic to stop her from yelling. Because there was no evidence suggesting any recognized form of provocation, the trial court did not abuse its discretion by refusing to give a second degree murder instruction.

[People v. Ayers, 331 Ill.App.3d 742, 771 N.E.2d 1041 \(1st Dist. 2002\)](#) As a matter of plain error, reversible error occurred where the trial court gave contradictory first and second degree murder instructions, some of which omitted the element of justifiable use of force. Under the instructions, the jury could have convicted defendant of first degree murder without ever considering whether he was justified in using force. Reversal is required where the jury is "presented with two self-contained, inherently contradictory and inconsistent issues instructions defining the elements requisite for a finding of guilty."

[People v. Truss, 254 Ill.App.3d 767, 626 N.E.2d 1175 \(1st Dist. 1993\)](#) Defendant was convicted of first degree murder based on evidence he stabbed a man whom his girlfriend brought to their home. At trial, he claimed to have acted in self-defense.

The jury received three separate instructions concerning murder. The first instruction directed the jury to convict of first degree murder if it found that the State had sustained its burden with respect to the elements of that offense, including that defendant had not been justified in using force. This instruction did not refer to second degree murder.

The second instruction was the general definition of first degree murder, and did not refer to second degree murder or to any issue concerning the justifiable use of force. The third instruction [IPI 7.06A](#) directed that if the jury found that the State had proven first degree murder, it should then decide whether defendant had an unreasonable belief in self-defense which would reduce the offense to second degree murder.

Under [Falconer v. Lane, 905 F.2d 1129 \(7th Cir. 1990\)](#), the instructions violated due process. Neither of the first two instructions mentioned the duty to consider second degree murder, thus there was no way to tell whether the jury followed the third instruction, which correctly required consideration of second degree murder, or whether it stopped deliberating upon finding first degree murder. This problem would not have existed had the instruction requiring consideration of second degree murder preceded the first degree murder instructions or had the trial court followed the Committee Note for [IPI 7.06A](#), which specifically states that the first degree murder instructions given here are not to be used when second degree murder is an issue.

The error was not harmless - the trial court found that there was sufficient evidence to submit second degree murder instructions, and there was a basis in the evidence for the jury to conclude that defendant had an unreasonable belief that he was justified in using self-defense.

Also, the trial judge erred by giving the following non-IPI instruction:

"The law does not permit one who instigates an assault on another to then rely on the victim's response to that assault as evidence of mutual combat sufficient to mitigate a subsequent killing from murder to manslaughter."

An instruction referring to manslaughter was improper where, at the time of the offense, the name of the offense had been changed to second degree murder. In addition, there was no evidence of mutual combat. Here, the evidence established that defendant stabbed the deceased either as the latter sat passively in a chair or because he anticipated that the deceased was about to attack.

[People v. Toney, 337 Ill.App.3d 122, 785 N.E.2d 138 \(1st Dist. 2003\)](#) Where the trial court properly found that the evidence supported an instruction on self-defense in a prosecution for "knowing and intentional" murder, it was error to refuse to give a second degree murder instruction. Giving a self-defense instruction allows the jury to determine whether defendant's actions were excused because he reasonably believed that they were justified in self-defense, but the refusal to instruct on second degree murder prevents the jury from determining whether defendant's subjective belief that the use of force was justified was unreasonable.

[People v. Dortch, 20 Ill.App.3d 911, 314 N.E.2d 324 \(1st Dist. 1974\)](#) Trial court erred in refusing instruction on voluntary manslaughter; if defendant's evidence was accepted as true, he committed justifiable homicide or voluntary manslaughter. It is a settled rule that "where there is evidence which if believed by a jury would reduce a crime to a lesser included offense, an instruction defining that offense should be given."

[People v. Stewart, 143 Ill.App.3d 933, 494 N.E.2d 1171 \(1st Dist. 1986\)](#) The State's evidence was that the deceased and her three sons were walking down a hallway in the building in which they lived. Defendant, who had previously lived with the deceased, attempted to talk to her. When she kept walking, defendant pulled out a knife and stabbed her three times. The sons testified that no one else was in the hallway.

Defendant testified that when he saw the deceased in the hallway, two men approached and said "We don't allow nobody to be messing with our women in this building." The men shoved defendant to the ground and struck him in the head, causing his vision to blur. Defendant took out his knife and struck out at the assailants. He said he forgot about the deceased standing behind him. When the men ran, he realized he had stabbed the deceased.

Defendant's testimony constituted some evidence of self-defense. Thus, the trial judge erred by refusing voluntary manslaughter and self-defense instructions. "While a jury might not believe defendant's version, weighing his credibility is for the jury, not the court." Reversed and remanded for a new trial. See also, [People v. Barnes, 107 Ill.App.3d 262, 437 N.E.2d 848 \(1st Dist. 1982\)](#) (instruction could not be refused because defendant's "assertion was incredible and was rebutted" by other evidence).

[People v. Mocaby, 194 Ill.App.3d 441, 551 N.E.2d 673 \(5th Dist. 1990\)](#) Following a jury trial, defendant was convicted of the murder of his adult son. The incident occurred at a family gathering after the victim and defendant had consumed beer and after the victim had attacked other members of the family, including a brother and sister. Ultimately, defendant stabbed and killed the victim.

Immediately before the stabbing, the victim had been arguing with and hitting various family members. Defendant testified that he felt the need to help a daughter whom the victim was pushing and shoving. Defendant further stated that the victim was a big person, he could not fight the victim, and the victim had previously threatened to break defendant's neck. Additionally, defendant was intoxicated, which "may contribute to a . . . mistaken belief of self-defense."

Because the evidence was sufficient to raise the question whether defendant stabbed the victim in the unreasonable belief that deadly force was necessary to protect his daughter and himself from death or great bodily harm, voluntary manslaughter instructions should have been given.

[People v. Robinson, 189 Ill.App.3d 323, 545 N.E.2d 268 \(1st Dist. 1989\)](#) Following a jury trial, defendant was convicted of the murder of a woman with whom he shared an apartment. Because there was evidence of a heated argument and an exchange of blows, the trial court erred in refusing to give defendant's voluntary manslaughter instruction. Defendant was entitled to the instruction even though his defense was that he did not commit the homicide.

[People v. Healy, 168 Ill.App.3d 349, 522 N.E.2d 749 \(1st Dist. 1988\)](#) Mutual combat is recognized as adequate provocation to reduce a homicide to voluntary manslaughter, and the intoxication of the parties may contribute to such a finding. Here, there was evidence of a fight and that the participants were intoxicated, but there was no evidence as to how the fight started, who had been the initial aggressor, or who first introduced a knife into the fight. Because there was evidence from which defendant could have argued that mutual combat occurred or that the deceased was the aggressor (i.e., a knife cut sustained by defendant, a bruise on the face of defendant's companion, and the fact that the deceased, after initially being knocked down, got back up and resumed the struggle), the jury should have been permitted to decide whether the homicide was murder or manslaughter.

[People v. Johnson, 215 Ill.App.3d 713, 575 N.E.2d 1247 \(1st Dist. 1991\)](#) At defendant's trial for first-degree murder, the trial judge erred by refusing to instruct the jury on second degree murder. There was sufficient evidence of provocation to warrant a second degree murder instruction where two State witnesses testified that defendant and the decedent were involved in mutual combat, one witness testified that defendant said the decedent "lunged" at him before the stabbing, and there was evidence that the decedent started the fight

and that defendant's hands were "swollen and cut and bruised" on the following morning.

[People v. March, 95 Ill.App.3d 46, 419 N.E.2d 1212 \(4th Dist. 1981\)](#) Where the evidence warrants, the jury should be instructed on both unreasonable belief in self-defense and sudden and intense passion.

[People v. Kauffman, 308 Ill.App.3d 1, 719 N.E.2d 275 \(1st Dist. 1999\)](#) A second degree murder instruction need not be requested by the defense to be properly given. The evidence justified second degree instructions here. By raising self-defense, defendant placed in question the reasonableness of her belief that the use of force was justified; thus, a reasonable trier of fact could have determined that defendant's belief was unreasonable.

[People v. Boothe, 7 Ill.App.3d 401, 287 N.E.2d 289 \(2d Dist. 1972\)](#) When defendant's testimony at his trial for murder was sufficient, if believed, to support a conviction for voluntary manslaughter, instructions on that offense should have been given though defendant's trial testimony was inconsistent with a statement he allegedly made shortly after the incident.

[People v. McMurry, 64 Ill.App.2d 248, 212 N.E.2d 7 \(2d Dist. 1965\)](#) Where evidence showed that defendant was guilty of murder or nothing, it was error to give the jury instruction on manslaughter over defense objection. Conviction for voluntary manslaughter reversed.

[People v. Lockett, 339 Ill.App.3d 93, 790 N.E.2d 865 \(1st Dist. 2003\)](#) A second degree murder instruction must be given whenever the evidence justifies a self-defense instruction in a first degree murder case, and second degree murder instructions should be given where the evidence is conflicting and would support findings that defendant committed intentional murder, felony murder or second degree murder.

Because the evidence conflicted as to whether defendant committed felony murder or knowing and intentional murder, and would have allowed the jury to convict of second degree murder based on an unreasonable belief in self-defense concerning the latter theory, defendant was entitled to second degree murder instructions on the charge alleging knowing or intentional murder.

[People v. Payton, 356 Ill.App.3d 674, 826 N.E.2d 1011 \(1st Dist. 2005\)](#) The judge gave contradictory and confusing instructions regarding the relationship between first degree intentional or knowing murder, first degree felony murder, and second degree murder based on provocation, and also erred in giving any felony murder instructions at all.

Where a defendant is charged with both first degree felony murder and first degree intentional or knowing murder, and the jury is to be instructed as well on second degree murder, the IPI instructions distinguish between the first degree felony murder count, as to which second degree murder is not in issue (because guilt of felony murder renders irrelevant the factors which mitigate first degree murder to second degree murder), and the first degree intentional and knowing counts, as to which conviction may not occur unless the jury first considers whether the mitigating factors justifying a conviction of second degree murder are present.

Thus, as to the first degree felony murder count, the judge should have given [IPI Criminal 4th 7.02](#) (issues in first degree murder when second degree murder is not also in issue), an instruction that omits any references to second degree murder and first degree intentional and knowing murder. As to the first degree intentional and knowing murder counts, the judge should have given [IPI 7.04X](#) (issues where jury instructed on first degree murder and second degree murder (provocation)), which includes language regarding second degree murder but omits any reference to first degree felony murder. Also, the judge should have given [IPI 7.01X](#), an instruction that explains to the jury the reason for designating first degree intentional and knowing murder with one label (type A murder), and first degree felony murder with another (type B murder).

**People v. McDonald, 2016 IL 118882 (No. 118882, 12/15/16)**

1. Noting a conflict in its own authority, the court clarified the standard to be used in determining whether sufficient evidence exists to warrant giving a jury instruction on a lesser included offense. The court found that a lesser included offense instruction should be given where there is evidence in the record which, if believed by the jury, would reduce the crime charged to the lesser offense. The court rejected its precedent stating that a lesser included offense instruction is justified if *credible* evidence in the record would support the lesser charge, noting that the trial court is not to weigh the evidence or determine credibility in determining whether a lesser included instruction should be given.

2. The abuse of discretion standard of review is applied when determining whether the trial court erred by failing to give a lesser included offense instruction. The trial court abuses its discretion by failing to give a lesser included offense instruction if there is some evidence which, if believed, would justify a verdict finding that the lesser offense occurred.

3. The court concluded that the trial court did not abuse its discretion by refusing to instruct the jury on involuntary manslaughter. Involuntary manslaughter occurs where a person unintentionally kills an individual without lawful justification if the acts which caused the death were likely to cause death or great bodily harm and were performed recklessly. [720 ILCS 5/9-3\(a\)](#). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. [720 ILCS 5/4-6](#). The difference between first degree murder and involuntary manslaughter lies in the defendant's mental state.

Because there was a "dearth" of evidence showing recklessness, the trial court did not abuse its discretion by refusing to give an instruction on involuntary manslaughter.

4. Furthermore, the trial court did not abuse its discretion by refusing to instruct the jury on second degree murder based on serious provocation. Serious provocation is defined as conduct sufficient to excite an intense passion in a reasonable person. [720 ILCS 5/9-2\(b\)](#). Recognized categories of serious provocation include substantial physical injury or physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

Mutual combat occurs where two parties willingly enter a fight or struggle or where two persons mutually fight on equal terms. Where the evidence showed that on the day of the incident defendant was holding a knife and threatening to kill the decedent, the decedent was unarmed, and defendant suffered only superficial injuries while the decedent suffered three knife wounds, it was not an abuse of discretion for the trial court to find insufficient evidence of serious provocation to warrant an instruction on second degree murder.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Debra Nall, Chicago.)

**People v. Washington, 2012 IL 110283 (No. 110283, 1/20/12)**

1. The question of whether sufficient evidence exists to support the giving of a jury instruction is a question of law subject to *de novo* review.

Both self-defense and second-degree murder instructions must be given on request when any evidence is presented showing the defendant's subjective belief that the use of force was necessary. Once presented with evidence of an actual belief in the need for the use of force in self-defense, it is for the jury to determine whether the subjective belief existed, and whether it was objectively reasonable or unreasonable. To obtain a jury instruction on second-degree murder, it is not necessary for a defendant to also produce evidence that his subjective belief was unreasonable.

Because the court granted defendant's request for self-defense instructions, it was error to deny his

request for second-degree murder instructions.

2. An instructional error such as the denial of a second-degree murder instruction is harmless only if it is demonstrated that the result of the trial could not have been different had the jury been properly instructed.

Refusing defendant's request for a second-degree murder instruction was not harmless error. The court rejected the argument that because the jury rejected defendant's claim of self-defense, it would not have believed that he had an unreasonable belief in the need for use of force in self-defense. The evidence in the case was conflicting and diametrically opposed as to what transpired before and after the shooting. By refusing the second-degree murder instruction, the trial court took the determination of whether defendant's belief in self-defense was reasonable or unreasonable from the jury. The court could not say that the result of the trial would not have been different had the jury received a second-degree murder instruction.

The court affirmed the judgment of the Appellate Court reversing and remanding for a new trial. (Defendant was represented by Rachel Moran, *pro bono*.)

### [People v. Wilmington, 2013 IL 112938 \(No. 112938, 2/7/13\)](#)

1. Under Illinois law, five decisions ultimately belong to the defendant after consultation with his attorney: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether defendant will testify, (4) whether to appeal, and (5) whether to submit an instruction on a lesser included offense. The latter decision is left to the defendant because electing to submit a lesser included offense instruction exposes the defendant to possible criminal liability which he might otherwise avoid and amounts to a stipulation that the jury could rationally convict of the lesser included offense.

2. The court concluded that the same rationale does not apply where defense counsel requests an instruction on second degree murder. Second degree murder is not a lesser included offense of first degree murder, but rather a lesser-mitigated offense requiring that all of the elements of first degree murder, plus a mitigating factor, have been proved. The court concluded that because the defendant is not exposing himself to potential criminal liability which he might otherwise avoid, he does not have the right to decide whether an instruction on second degree murder should be submitted.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

### [People v. Billups, 404 Ill.App.3d 1, 935 N.E.2d 1046 \(1st Dist. 2010\)](#) (No. 1-08-1383, 8/23/10)

In [People v. Lockett, 82 Ill.2d 546, 413 N.E.2d 378 \(1980\)](#), the Illinois Supreme Court held that both self-defense and voluntary manslaughter (now second degree murder) instructions must be given whenever there is evidence that defendant subjectively believed that his use of force was necessary.

Defendant testified that as deceased left the van in which they had been riding, he attempted to rob the defendant and his brother. When the defendant wrestled the gun from the deceased, the deceased pulled defendant's sweatshirt over his head, forcing the defendant to his knees. Defendant fired the gun in the direction of the deceased without looking, then shot the deceased in the head after the deceased loosened his grip and defendant saw the deceased fall on one knee outside the van. The defendant's brother testified that shots were fired seconds after defendant and the deceased exited the van, and that defendant admitted to him that he had the gun the whole time. The medical examiner found three wounds on the deceased: in the right chest and left hip (neither at close range) and a final contact wound in the back of his head. The court gave the jury self-defense instructions but refused second degree murder instructions.

The Appellate Court concluded that **Lockett** does not hold that a second degree murder instruction is a mandatory counterpart to a self-defense instruction. Unlike **Lockett**, a defendant's subjective belief is not an issue if the evidence only permits the jury to find defendant guilty of first degree murder because he had no subjective belief that his use of force was necessary, or not guilty by reason of self-defense because he possessed an objectively reasonable belief in self-defense. The jury in this case was required to chose between two irreconcilable versions of fact, neither of which presented an issue of imperfect self-defense. Either the shooting was justified because the deceased was committing an armed robbery, or defendant was

guilty of first degree murder. Therefore the court correctly refused the second degree murder instruction.

Relying on [People v. Crespo, 203 Ill.2d 335, 788 N.E.2d 1117 \(2001\)](#), the Appellate Court rejected an argument that the jury could find second degree murder based on the final shot fired to the head. Just as the State is barred from treating defendant's conduct as multiple acts supporting multiple convictions unless the charging instrument differentiates between the acts, defendant cannot "apportion his beliefs among the separate shots he fired."

#### [People v. Viramontes, 2014 IL App \(1st\) 130075 \(No. 1-13-0075, 9/24/14\)](#)

1. Second degree murder occurs where at the time of the killing, the defendant is acting under sudden and intense passion resulting from serious provocation by the decedent or by another whom the defendant endeavors to kill when he negligently or accidentally causes the death of the decedent. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. Illinois law recognizes four categories of serious provocation: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the defendant's spouse.

Passion, no matter how extreme, is not recognized as provocation unless it fits into one of the above categories. Furthermore, mere words are not recognized as provocation even where they are abusive, aggravated, or indecent. A defendant is entitled to a second degree jury instruction where there is some evidence, even if slight, to support a claim of serious provocation.

2. The court found that as a matter of law, defendant's discovery of his wife's infidelity by reading text messages and seeing nude photographs on her phone did not constitute serious provocation. Under Illinois law, a spouse's adultery constitutes provocation only where the parties are discovered in the act of adultery or immediately before or after such an act, and the killing immediately follows that discovery. The court analogized defendant's discovery of evidence of adultery on his wife's cell phone as similar to a confession of adultery by a spouse, which has been recognized as insufficient provocation to reduce first degree murder to second degree.

3. The court rejected the argument that a second degree murder instruction was justified based on mutual combat between defendant and the decedent. Mutual combat is "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." Provocation by mutual combat will not be found if the accused retaliates in a manner that is out of proportion to the provocation. A defendant may not instigate a fight and then rely on the victim's response as evidence of mutual combat. Mutual combat will not be found if sufficient time elapsed between the alleged provocation and the homicide to permit the "voice of reason" to be heard.

Because the record showed that defendant was the aggressor and inflicted a brutal beating on the decedent, and that his actions were "completely disproportionate" to the decedent's actions of striking him in the chest, the trial court properly declined to give a second degree murder instruction based on mutual conduct.

Defendant's conviction for first degree murder was affirmed.

#### [People v. Washington, 399 Ill.App.3d 664, 926 N.E.2d 899 \(1st Dist. 2010\)](#)

1. First degree murder occurs where the defendant kills an individual without lawful justification and with intent to kill or inflict bodily harm, knowledge that his acts will cause death, or knowledge that his acts create a strong probability of death or bodily harm. Second degree murder occurs when first degree murder was committed and the offender unreasonably believed that the circumstances justified the use of deadly force or acted under serious provocation.

2. Under [People v. Lockett, 82 Ill.2d 546, 413 N.E.2d 378 \(1980\)](#), a second degree murder instruction is required whenever there is sufficient evidence to give a self-defense instruction on a first degree murder charge. The trial court may not weigh the evidence and deny a second degree instruction based on its determination that defendant's subjective belief in the need for self-defense was reasonable or

unreasonable.

The court also rejected the argument that a second degree murder instruction is required in a first degree murder case only if there is independent evidence that defendant's belief concerning the use of deadly force was unreasonable. (Rejecting [People v. Anderson, 266 Ill.App.3d 947, 641 N.E.2d 591 \(1st Dist. 1994\)](#)).

3. Because the trial court properly found that there was sufficient evidence to justify a self-defense instruction, it erred by refusing to also give defendant's tendered second degree murder instruction.

## [Top](#)

### §26-5

#### **Involuntary Manslaughter – Reckless Homicide**

#### §26-5(a)

##### **Generally**

[People v. McCollough, 57 Ill.2d 440, 313 N.E.2d 462 \(1974\)](#) The offense of reckless homicide is upheld over the contention that it violates due process and equal protection because the reckless driving of motor vehicle, if it causes death, may be punished either as involuntary manslaughter or as reckless homicide.

[People v. Wilson, 143 Ill.2d 236, 572 N.E.2d 937 \(1991\)](#) Conviction for reckless homicide upheld. Defendant fell asleep while driving his car, crossed into another lane, and struck a vehicle going in the opposite direction. Further, defendant was aware that for many years he had suffered from excessive drowsiness and that he had frequently fallen asleep under circumstances in which a normal person could stay awake. By choosing to operate an automobile with knowledge that he suffered from a drowsiness condition which made it dangerous for him to drive, defendant acted recklessly.

[People v. Smith, 149 Ill.2d 558, 599 N.E.2d 888 \(1992\)](#) Following a jury trial, defendant was found guilty of involuntary manslaughter for the shooting death of his wife. The evidence indicated that as defendant and his wife were packing to move, a handgun discharged as defendant was attempting to unload it. The State introduced evidence that defendant had been drunk, but defense witnesses testified that he was not intoxicated.

Intoxication is not an element of reckless homicide, but is merely one way in which the State may prove the element of recklessness. Despite the conflicting evidence of intoxication, there was sufficient evidence of recklessness to sustain the conviction where defendant waited more than 15 minutes to call police, there were indications that he posed his wife's body before police arrived, he initially claimed that his wife had shot herself, he had been drinking, and he handled a loaded pistol in a careless fashion.

[People v. Smith, 99 Ill.2d 467, 459 N.E.2d 1357 \(1984\)](#) The information charging reckless homicide was defective. The information alleged in pertinent part that defendant drove "a motor vehicle at an excessive rate of speed resulting in a crash . . . and death." The information did not allege that the act was reckless; a reckless state of mind is an element of reckless homicide and "must be alleged in the body of the information." Conviction reversed.

[People v. Robinson, 232 Ill.2d 98, 902 N.E.2d 622 \(2008\)](#) [720 ILCS 5/9-3](#) creates a single offense of involuntary manslaughter which may carry either a Class 2 or Class 3 sentence, depending on other factors including the victim's status as a family or household member. A defendant convicted of involuntary

manslaughter may be sentenced for involuntary manslaughter of a family or household member regardless of whether that charge is contained in the indictment or defendant receives written, pretrial notice that such a sentence is possible.

[People v. Post, 39 Ill.2d 101, 233 N.E.2d 565 \(1968\)](#) Involuntary manslaughter reversed. Defendant's firing of a pistol to scare away intruder in his yard was not reckless conduct - he could not reasonably foresee that his act was likely to result in serious injury or death.

[People v. Schickel, 347 Ill.App.3d 889, 807 N.E.2d 1195 \(1st Dist. 2004\)](#) Although involuntary manslaughter may not be a lesser included offense of felony murder (see [People v. Williams, 315 Ill.App.3d 22, 732 N.E.2d 767 \(1st Dist. 2000\)](#)), the issue was waived where defense counsel and defendant invited the trial court, which was hearing a bench trial on charges of first and second degree murder, to consider involuntary manslaughter as a lesser included offense.

[People v. Spani, 46 Ill.App.3d 777, 361 N.E.2d 377 \(3d Dist. 1977\)](#) Defendant's conviction for involuntary manslaughter, following a bench trial, was reversed since the remarks of the trial judge show that he believed the shooting was an accident. "An act committed accidentally does not involve a mental state cognizable to the criminal offenses of murder and involuntary manslaughter."

[People v. Lemke, 349 Ill.App.3d 391, 811 N.E.2d 708 \(5th Dist. 2004\)](#) Under Illinois case law, pointing a loaded weapon has been held to be a reckless act which will support a conviction for involuntary manslaughter.

[People v. Burnette, 325 Ill.App.3d 792, 758 N.E.2d 391 \(1st Dist. 2001\)](#) The trial court erred by finding that the act of bringing a handgun to the decedent's home constituted recklessness.

To prove involuntary manslaughter, the State must show not only that defendant acted recklessly but also that the reckless act actually caused a death. Here, the decedent died not because defendant brought a gun to the decedent's apartment, but because the weapon fell from defendant's pocket and discharged as the men struggled to gain control. Under these circumstances, any recklessness in bringing the gun to the apartment "was too attenuated" from the act which caused the death to constitute involuntary manslaughter.

[People v. Hawn, 99 Ill.App.3d 334, 425 N.E.2d 1024 \(1st Dist. 1981\)](#) Defendant was convicted of reckless homicide arising out of a traffic accident in which his vehicle struck another vehicle, resulting in the death of a passenger in the other vehicle.

The only possible evidence tending to show recklessness was that defendant was driving over the speed limit. Operating a vehicle over the speed limit "does not constitute criminal negligence or willful and wanton misconduct in the absence of aggravating factors," and there were no such aggravating factors in this case. Conviction reversed. See also, [People v. Frary, 36 Ill.App.3d 111, 343 N.E.2d 233 \(5th Dist. 1976\)](#) (driving 10 to 15 mph in excess of the speed limit and failing to maintain a safe interval were "insufficient to prove willful or wanton conduct, recklessness or criminal negligence").

[People v. Richardson, 21 Ill.App.3d 859, 316 N.E.2d 37 \(1st Dist. 1974\)](#) Reckless homicide conviction (after bench trial) was reversed. Police testimony was "shaky" and other evidence indicated that auto may have been defective.

[People v. LaCombe, 104 Ill.App.3d 66, 432 N.E.2d 672 \(4th Dist. 1982\)](#) Defendant was driving his truck in circles on an athletic field. The deceased, a passenger, climbed out of the window of the truck, lost his grip and fell beneath the wheels of the truck.

To prove reckless homicide, the State must show that defendant caused the death by driving a vehicle

recklessly and in a manner likely to cause death or great bodily harm. Reckless conduct alone is not sufficient to prove guilt; the reckless conduct must be willful and wanton. Here, defendant's conduct was reckless, but there was a reasonable doubt whether it was also willful or wanton. Reckless homicide reversed.

[People v. Bauman, 34 Ill.App.3d 582, 340 N.E.2d 178 \(1st Dist. 1975\)](#) Where defendant shot another at a party where there was excessive drinking, the evidence was not sufficient to prove that defendant had the necessary intent or knowledge for murder. However, defendant's conviction was reduced to involuntary manslaughter because defendant engaged in reckless conduct by pointing a loaded revolver at another.

[People v. Campbell, 77 Ill.App.3d 805, 396 N.E.2d 607 \(2d Dist. 1979\)](#) Defendant was convicted of murder stemming from his presence in a van from which other passengers threw rocks onto the highway and at other vehicles. One of the rocks struck and killed the driver of a truck. The actions of the van's occupants constituted reckless conduct. Murder conviction vacated; conviction for involuntary manslaughter reinstated.

[People v. Hines, 31 Ill.App.3d 295, 334 N.E.2d 233 \(1st Dist. 1975\)](#) Defendant's conviction for voluntary manslaughter was reduced to involuntary manslaughter where the trial court erred in failing to submit to the jury a verdict form for involuntary manslaughter; the jury could have believed that defendant did not intend to shoot the deceased, but only to "scare" him.

[People v. Hancock, 113 Ill.App.3d 564, 447 N.E.2d 994 \(1st Dist. 1983\)](#) Where defendant threw her child into a lagoon, which resulted in drowning, the evidence, which was entirely circumstantial, was insufficient to prove the mental state necessary for murder. The evidence did, however, establish that defendant's conduct was reckless; therefore, the conviction was reduced to involuntary manslaughter and remanded for sentencing.

[People v. Miscichowski, 143 Ill.App.3d 646, 493 N.E.2d 135 \(2d Dist. 1986\)](#) Involuntary manslaughter may be based upon the theory of accountability.

[People v. Higgins, 86 Ill.App.2d 202, 229 N.E.2d 161 \(5th Dist. 1967\)](#) Aggravated battery is not a lesser included offense of involuntary manslaughter, and a lesser included offense instruction was reversible error. Aggravated battery reversed.

[People v. Rushton, 254 Ill.App.3d 156, 626 N.E.2d 1378 \(2d Dist. 1993\)](#) Defendant was convicted of reckless homicide and sentenced to five years under Ch. 38, ¶9-3(e) ([720 ILCS 5/9-3\(e\)](#)), which provides that the sentence for reckless homicide shall be increased to three to 14 years where:

"the defendant was determined to have been under the influence of alcohol or any other drug or drugs as an element of the offense, or in cases in which the defendant is proven beyond a reasonable doubt to have been under the influence of alcohol or any other drug or drugs."

[The evidence showed that defendant's car crossed the center line on a two-lane road and collided with an oncoming vehicle. According to expert testimony, defendant's blood alcohol content suggested that he had consumed 11 or 12 drinks; however, defendant claimed that he had consumed only three cans of beer several hours before the incident.](#)

The enhanced sentencing provisions of ¶9-3(e) apply in several situations: (1) where a defendant is charged with "a version of reckless homicide involving intoxication," in which case the jury "should be instructed that guilt is dependent upon finding all of the standard elements of reckless homicide plus an additional element of intoxication"; (2) where defendant is convicted at the same trial of a separate offense (such as DUI) which requires the jury to find that he was under the influence of alcohol or drugs; and (3) where intoxication is the sole allegation of recklessness, because the verdict necessarily means that the jury

found beyond a reasonable doubt that defendant was under the influence of drugs or alcohol.

Here, the jury was not instructed that it had to find that defendant was intoxicated, and defendant was not simultaneously convicted of an offense of which intoxication was an essential element. The fact that defendant was convicted of reckless homicide does not necessarily mean that the jury believed that he was intoxicated, as he could have acted recklessly by failing to keep his vehicle in his own lane. Therefore, because none of the three situations contemplated by ¶9-3 existed, the enhancement provisions were not applicable.

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**Cumulative Digest Case Summaries §26-5(a)**

**[People v. Almore, 241 Ill.2d 387, 948 N.E.2d 574 \(2011\)](#)**

Under [720 ILCS 5/9-3\(d\)](#), involuntary manslaughter is a Class 3 felony for which a term of two to five years imprisonment may be ordered. Where the victim was a “family or household member,” however, the offense is a Class 2 felony with an extended term of not less than three or more than 14 years. “Persons who share or formerly shared a common dwelling” are included within the definition of “family or household members.” ([725 ILCS 5/112A-3\(3\)](#)).

1. The court concluded that by authorizing an extended term based on the decedent’s status as a “family or household member,” the legislature intended to capture all types of past and present “familial” relationships as well as various forms of cohabitation and shared living arrangements. Whether persons are “family or household members” by virtue of having “shared a common dwelling” is decided on specific facts of each case. The factors to be considered include: (1) the amount of time the parties resided together, (2) the nature of the living arrangements, (3) whether the parties had other living accommodations, (4) whether the parties kept personal items at the shared residence, and (5) whether the parties shared in the privileges and duties of a common residence such as contributing to household expenses and helping with maintenance. Persons who have no real connection other than occasionally sleeping under the same roof, such as occupying the same homeless shelter, do not share a common dwelling. (See [People v. Young, 362 Ill.App.3d 843, 840 N.E.2d 825 \(2d Dist. 2005\)](#)).

2. The court concluded that on this record, the two-year-old child of the defendant’s girlfriend “shared a common dwelling” with the defendant. The mother and the defendant had dated for 18 months, and on several occasions lived together at her family’s residence or at the defendant’s temporary residence. Whenever the defendant and the mother stayed together, the child stayed as well. Furthermore, the defendant provided child care when the mother went to work.

The court also noted that for five days preceding the child’s death, the child and his mother stayed with the defendant at the latter’s temporary residence. During those five days, the child and his mother slept in the same room with the defendant. In addition, the child’s clothes, food, and medicine were kept at defendant’s residence.

Under these circumstances, the evidence showed that the child and defendant shared a common dwelling, although that dwelling was sometimes the mother’s family home and sometimes the defendant’s temporary residence. Defendant’s 12-year extended term for involuntary manslaughter was reinstated.

**[People v. Jones, 404 Ill.App.3d 734, 936 N.E.2d 1160 \(1st Dist. 2010\)](#)**

The difference between first degree murder and involuntary manslaughter is mental state. First degree murder is committed when one intends to kill or do great bodily harm, or knows his acts create a strong probability of death or great bodily harm. To be convicted of first degree murder, the defendant must be consciously aware that his conduct is practically certain to cause a particular result. Involuntary manslaughter occurs when one acts recklessly, i.e., consciously disregards a substantial and unjustifiable risk that circumstances exist or a result will follow, and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. A person acts recklessly when he

is aware that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur.

Defendant and the deceased engaged in a fist fight that included blows to the head of the deceased. Defendant then held the deceased on the ground with his foot placed between the neck and chest of the deceased. The deceased outweighed the defendant by 130 pounds, though they were of similar height. The deceased appeared to be breathing when defendant left the scene. He died of asphyxiation. The medical examiner testified that asphyxiation could result from only 4.4 pounds of pressure being applied to the deceased's jugular vein for a minute. The pressure need not be directly applied to the vein; it could be applied to soft tissue of the front and side of the neck, which would in turn result in pressure on the blood vessels. There was no evidence regarding the length of time that defendant held the deceased on the ground with his foot. The medical examiner testified that none of the other injuries that the deceased sustained in the fight individually or collectively caused the death.

The court concluded that the defendant acted recklessly. Because the deceased outweighed the defendant, defendant would have to apply some amount of pressure on the deceased to hold him on the ground. The evidence did not support the inference that defendant knew or should have known or was aware that applying only 4.4 pounds of pressure indirectly to the jugular vein would cause asphyxiation. Defendant's act of leaving when the deceased appeared to be alive was inconsistent with the mental state for first degree murder.

The court reduced defendant's conviction from first degree murder to involuntary manslaughter and remanded for resentencing.

(Defendant was represented by Assistant Defender LaRoi Williams, Chicago.)

### [People v. Lengyel, 2015 IL App \(1st\) 131022 \(No. 1-13-1022, 8/5/15\)](#)

1. First degree murder occurs when a defendant kills another person and either intends his acts to cause death or great bodily harm, or knows that his acts create a strong probability of death or great bodily harm. Second degree murder shares the same elements as first degree murder but involves the presence of a mitigating factor, such as provocation or unreasonable belief in self-defense.

Involuntary manslaughter by contrast involves a less culpable mental state than first or second degree murder. Involuntary manslaughter occurs when a defendant's actions are likely to cause death or great bodily harm and are performed recklessly. A defendant acts recklessly when he consciously disregards a substantial and unjustifiable risk that death or great bodily harm will result.

2. Defendant, who was 22 years old, lived with and acted as a caretaker for his 55-year-old father, Richard, who suffered from multiple health problems. Defendant and Richard had a contentious relationship, arguing daily over all sorts of mundane things. Defendant had "issues" with Richard and his "inner rage" had been building for years.

One day they had an argument that quickly turned into a physical altercation. Richard got up from where he was sitting and grabbed defendant's shirt with both hands. Defendant punched Richard four or five times in the head trying to "disentangle himself" and get away. As soon as defendant saw blood, he stopped hitting Richard and went back to his bedroom, locked the door, and told his girlfriend that they had to leave. Richard broke through the bedroom door. Defendant pushed him out of the room and Richard fell to the ground. Richard got up and went to get a towel. At Richard's request, defendant called for an ambulance.

The paramedics arrived and transported Richard to the hospital. Richard could not speak and was slipping in and out of consciousness. At the hospital, Richard died from a stroke caused by an increase in blood pressure which in turn had been brought on by stress from injuries.

The jury acquitted defendant of first degree murder, but found him guilty of second degree murder based on an unreasonable belief in self-defense.

3. The Appellate Court held that the State failed to prove defendant guilty of second degree murder. First, the court held that the evidence did not show that defendant intended to kill his father. Immediately after the altercation, defendant called for an ambulance, indicated concern for Richard's condition, and told

the police that he was angry at his father but was not trying to kill him. Under these circumstances, defendant did not act with the intent to kill.

The evidence also did not show that defendant knowingly killed his father. The court noted a long-standing principle in Illinois that while the intentional use of a deadly weapon presumes that a defendant knows his acts will create a strong probability of death or great bodily harm, “death is not normally a reasonable or probable consequence of a barehanded blow.”

The evidence showed that defendant and his father were of similar size and although Richard had multiple health problems, he still had enough strength to break open a locked door. Richard was conscious, coherent, and able to walk when defendant left. The fight only lasted a few minutes, defendant did not use a weapon, and stopped hitting Richard as soon as he saw blood.

Additionally, defendant’s punches did not directly cause Richard’s death, and thus he could not be practically certain that his actions would cause death or great bodily harm. The facts thus did not show that defendant knowingly caused his father’s death.

Instead the evidence showed that defendant acted recklessly by disregarding the risk that his punches could lead to a spike in Richard’s blood pressure, which eventually could have caused a stroke resulting in death. Since defendant acted recklessly, the court reduced his conviction to involuntary manslaughter.

(Defendant was represented by Assistant Defender Pete Sgro, Chicago.)

#### [People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 \(1st Dist. 2011\)](#)

1. The court rejected the State’s argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

2. However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant’s testimony. “Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant’s assertion that he or she did not intend to kill anyone.” ([People v. Jackson, 372 Ill.App.3d 605, 874 N.E.2d 123 \(4th Dist. 2007\)](#)). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent’s direction, and other than defendant’s testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

#### [People v. Olivieri, 2016 IL App \(1st\) 152137 \(No. 1-15-2137, 8/2/16\)](#)

1. To establish reckless discharge of a firearm, the State must prove that the defendant discharged a firearm in a reckless manner which endangered the bodily safety of an individual. [720 ILCS 5/24-1.5\(a\)](#). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise. An accident is not equated with recklessness.

2. The court concluded that the State failed to prove that defendant acted recklessly in discharging a firearm. Defendant had placed live rounds in his pistol when he went for a walk, and upon returning to his apartment attempted to unload the pistol but unintentionally fired a round when his finger “twitched.” The round went through the apartment wall and into an adjacent apartment.

The court noted that unlike precedent cited by the State, defendant was not intoxicated and was not threatening anyone. Instead, he was merely attempting to unload a pistol. Under these circumstances, defendant did not engage in any reckless conduct.

Because the element of recklessness was not proved beyond a reasonable doubt, defendant’s

conviction for reckless discharge of a firearm was reversed.

## [Top](#)

### §26-5(b)

#### Instructions

[People v. DiVincenzo, 183 Ill.2d 239, 700 N.E.2d 981 \(1998\)](#) The primary difference between involuntary manslaughter and first degree murder is defendant's mental state - involuntary manslaughter occurs when defendant recklessly performs acts that are likely to cause death or great bodily harm, while first degree murder (under these circumstances) requires a legally unjustifiable killing by acts which defendant knows are likely to create a strong probability of death or great bodily harm. Recklessness is defined as the conscious disregard of a "substantial and unjustifiable risk that circumstances exist or that a result will follow, . . . and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise."

Factors to be considered in determining whether defendant's acts were performed recklessly include: (1) any disparity in size and strength between defendant and the decedent; (2) the brutality and duration of the beating; (3) the severity of the decedent's injuries; and (4) whether defendant used a weapon to inflict the injuries.

There was sufficient evidence of recklessness to entitle defendant to involuntary manslaughter instructions. There was no disparity in size and strength between defendant and the victim, and the altercation was of short duration. Furthermore, three experts testified that the injury which caused death (a torn cerebral artery) was a "rare phenomenon." Defendant did not use a weapon, and there was a dispute whether he kicked the decedent while the latter was lying on the ground.

Such evidence, if believed, suggested that defendant acted recklessly but without knowledge of the strong probability of death or great bodily harm. Furthermore, involuntary manslaughter instructions were not precluded because defendant deliberately provoked the confrontation. See also, [People v. Tainter, 304 Ill.App.3d 847, 710 N.E.2d 158 \(1st Dist. 1999\)](#) (although several factors militated against an involuntary manslaughter instruction, including the discrepancy in size between defendant and the decedent, the brutality and duration of the beating, and the severity of the decedent's injuries, a manslaughter instruction was required where defendant testified that the beating occurred as part of a jealous rage, the decedent was able to return home after the incident, defendant used his bare fists rather than a weapon, and defendant was under the effect of alcohol at the time of the offense).

[People v. Davis, 213 Ill.2d 459, 821 N.E.2d 1154 \(2004\)](#) Although defendant was originally charged with both knowing and felony murder, at the jury instruction conference the State dismissed the count charging knowing murder. Under these circumstances, the trial court properly refused to instruct the jury on voluntary manslaughter.

Involuntary manslaughter is not a lesser included offense of felony murder. Because felony murder involves no mental state and involuntary manslaughter requires that defendant acted recklessly, the court concluded that the felony murder charge here did not set forth the "broad foundation" of involuntary manslaughter. Thus, involuntary manslaughter is not a lesser included offense.

[People v. Jones, 219 Ill.2d 1, 845 N.E.2d 598 \(2006\)](#) Involuntary manslaughter occurs where defendant unintentionally kills an individual by recklessly performing acts that are likely to cause death or great bodily harm. The record contained no evidence to support an involuntary manslaughter instruction. Defendant's statements indicated either that he was not involved in the offense or that the decedent suffered a heart attack. In addition, the evidence suggested that the decedent died of a skull fracture. Thus, the record did not

constitute a basis to find that defendant performed some act recklessly and that the decedent's death resulted.

[People v. Castillo, 188 Ill.2d 536, 723 N.E.2d 274 \(1999\)](#) Involuntary manslaughter occurs when, without lawful justification, an individual unintentionally kills another by recklessly performing acts that are likely to cause death or great bodily harm. A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that his acts are likely to cause death or great bodily harm."

Defendant's claim that he struggled with the decedent after the decedent drew a gun was not evidence of recklessness, but was "instead some evidence that defendant acted with regard to a justifiable risk of injuring the victim in order to protect himself." Because the risk was not unjustifiable, defendant did not act recklessly. Thus, an involuntary manslaughter instruction was not warranted.

[People v. Ward, 101 Ill.2d 443, 463 N.E.2d 696 \(1984\)](#) There was no evidence to show that defendant acted recklessly in beating death of four-year-old child. Thus, refusal to give involuntary manslaughter instructions was proper.

[People v. Simpson, 74 Ill.2d 497, 384 N.E.2d 373 \(1978\)](#) Trial judge at defendant's trial for murder did not err in refusing an involuntary manslaughter instruction since the record was devoid of evidence of recklessness. See also, [People v. Mocaby, 194 Ill.App.3d 441, 551 N.E.2d 673 \(5th Dist. 1990\)](#) (all the evidence showed that defendant acted intentionally in stabbing the victim).

[People v. Whitters, 146 Ill.2d 437, 588 N.E.2d 1172 \(1992\)](#) A defendant who claims self-defense, an intentional act, may also have the jury instructed on involuntary manslaughter, a reckless act. Where there is adequate evidentiary support, an involuntary manslaughter instruction must be given despite the claim of self-defense.

[People v. Arnold, 104 Ill.2d 209, 470 N.E.2d 981 \(1984\)](#) The trial court did not err, at defendant's trial for murder, by refusing to give a verdict form for "not guilty" of involuntary manslaughter. During closing argument, defense counsel told the jury that defendant was guilty of involuntary manslaughter. "A defendant who admits culpability for a crime cannot expect to have the jury instructed concerning his innocence of the crime.

[People v. Carlton, 26 Ill.App.3d 995, 326 N.E.2d 100 \(1st Dist. 1975\)](#) An involuntary manslaughter instruction may be given in a murder case if the act of defendant which caused death can reasonably be found to have been perilous to life and performed recklessly.

[People v. Farmer, 50 Ill.App.3d 111, 365 N.E.2d 177 \(5th Dist. 1977\)](#) Trial court erred at defendant's murder trial by refusing to give an involuntary manslaughter instruction. Defendant's testimony that he pointed the gun at deceased to scare him and that his hand slipped off the hammer was sufficient to require the manslaughter instruction, and "it matters not that defendant's testimony was impeached, contradicted and inconsistent with a prior statement concerning the incident."

[People v. Sibley, 101 Ill.App.3d 953, 428 N.E.2d 1143 \(1st Dist. 1981\)](#) Defendant was convicted of attempt murder arising out of an incident in which he pointed a shotgun at someone, a struggle ensued and a third party was shot. The trial court refused defendant's request that the jury be instructed on the charge of reckless conduct.

The trial judge erred. There was evidence that defendant handled the gun improperly, which may be reckless conduct, and a defendant is entitled to an instruction on a lesser included offense if there is any evidence fairly tending to bear upon it.

[People v. Santiago, 108 Ill.App.3d 787, 439 N.E.2d 984 \(1st Dist. 1982\)](#) Defendant testified that he returned to a party and saw a crowd gathered in the street and police swinging bats and sticks at his unarmed friends. He saw a friend clutch his throat as blood came from it, and heard a woman scream. He obtained a pistol from a friend's car and fired at the gas tank of a car, trying to ignite it and create a diversion to break up the fight. One person was shot and killed.

If defendant's testimony was believed, the jury could have found that his conduct constituted "recklessness." An instruction on involuntary manslaughter should have been given. Involuntary manslaughter is not inconsistent with self-defense or defense of others:

"A person may fire a weapon, not to kill, but to scare the assailant away or to direct his attention so that a third party may escape. . . . '[T]o say that a person claiming to have acted in self-defense may not be convicted of involuntary manslaughter, simply because of that claim, is to argue a proposition unsupported by reason or authority.'"

[People v. Banks, 192 Ill.App.3d 986, 549 N.E.2d 766 \(1st Dist. 1989\)](#) Defendant testified that he and the decedent started scuffling over a gun which defendant pulled out during an argument. Defendant said that he fired the gun three times while it was pointed at the ground, and that the decedent fell backwards. Another witness testified that he heard shots and ricocheting bullets. A doctor testified that the trajectory of the fatal bullets was upward, supporting the theory that the bullets that hit the decedent ricocheted upward from the ground.

A person does not point and fire a gun at the ground if he intends to kill. Thus, because there was some evidence that defendant caused the death by performing acts recklessly, the instruction on involuntary manslaughter should have been given.

[People v. Consago, 170 Ill.App.3d 982, 524 N.E.2d 989 \(1st Dist. 1988\)](#) The evidence showed that defendant, the owner of a tavern, became involved in a heated argument with the victim, a bartender, over defendant's suspicions that the victim was stealing money from the cash drawer. During the argument defendant pulled out a shotgun. The victim grabbed at the gun, which fired and killed the decedent. Defendant claimed that the shooting was accidental.

Courts have found the pointing of a loaded weapon at another during a struggle to constitute recklessness, "since such an act is a gross deviation from the standard of care exercised by a reasonable person." Thus, where there is evidence of an accidental discharge of a loaded weapon" there is evidence of recklessness and a basis for an involuntary manslaughter instruction.

[People v. Gibson, 197 Ill.App.3d 162, 553 N.E.2d 1128 \(2d Dist. 1990\)](#) The evidence showed that defendant and the victim, defendant's 18-year-old daughter, were arguing and scuffling. Thereafter, defendant went into the kitchen and returned to the living room carrying a knife. The victim was stabbed in the living room. Defendant testified that while she was carrying the knife, the victim ran into the room, bumped defendant, and knocked her off balance. Defendant uncrossed her arms trying to regain her balance, and the victim was stabbed.

A police officer testified about a statement made by defendant, in which she said that she had the knife because she was cutting ham and that the victim was stabbed during a struggle over the knife.

There was sufficient evidence to require an instruction on involuntary manslaughter, and defendant was entitled to the instruction although her "primary defense was accident."

[People v. Bolden, 103 Ill.App.2d 377, 243 N.E.2d 687 \(1st Dist. 1968\)](#) Involuntary manslaughter instruction which failed to define recklessness as an essential element was erroneous.

[People v. McCarroll, 168 Ill.App.3d 1020, 523 N.E.2d 150 \(1st Dist. 1988\)](#) Where the only murder charge

against defendant is based on felony murder, no instruction on involuntary manslaughter need be given.

[People v. Shackles, 44 Ill.App.3d 1024, 358 N.E.2d 1329 \(4th Dist. 1977\)](#) Trial court erred by giving a State instruction on DUI at defendant's trial for involuntary manslaughter. Testimony about smelling alcohol on defendant's breath and defendant's consumption of some alcohol was not sufficient to present an issue of intoxication to the jury.

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**Cumulative Digest Case Summaries §26-5(b)**

[People v. McDonald, 2016 IL 118882 \(No. 118882, 12/15/16\)](#)

1. Noting a conflict in its own authority, the court clarified the standard to be used in determining whether sufficient evidence exists to warrant giving a jury instruction on a lesser included offense. The court found that a lesser included offense instruction should be given where there is evidence in the record which, if believed by the jury, would reduce the crime charged to the lesser offense. The court rejected its precedent stating that a lesser included offense instruction is justified if *credible* evidence in the record would support the lesser charge, noting that the trial court is not to weigh the evidence or determine credibility in determining whether a lesser included instruction should be given.

2. The abuse of discretion standard of review is applied when determining whether the trial court erred by failing to give a lesser included offense instruction. The trial court abuses its discretion by failing to give a lesser included offense instruction if there is some evidence which, if believed, would justify a verdict finding that the lesser offense occurred.

3. The court concluded that the trial court did not abuse its discretion by refusing to instruct the jury on involuntary manslaughter. Involuntary manslaughter occurs where a person unintentionally kills an individual without lawful justification if the acts which caused the death were likely to cause death or great bodily harm and were performed recklessly. [720 ILCS 5/9-3\(a\)](#). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. [720 ILCS 5/4-6](#). The difference between first degree murder and involuntary manslaughter lies in the defendant's mental state.

Because there was a "dearth" of evidence showing recklessness, the trial court did not abuse its discretion by refusing to give an instruction on involuntary manslaughter.

4. Furthermore, the trial court did not abuse its discretion by refusing to instruct the jury on second degree murder based on serious provocation. Serious provocation is defined as conduct sufficient to excite an intense passion in a reasonable person. [720 ILCS 5/9-2\(b\)](#). Recognized categories of serious provocation include substantial physical injury or physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

Mutual combat occurs where two parties willingly enter a fight or struggle or where two persons mutually fight on equal terms. Where the evidence showed that on the day of the incident defendant was holding a knife and threatening to kill the decedent, the decedent was unarmed, and defendant suffered only superficial injuries while the decedent suffered three knife wounds, it was not an abuse of discretion for the trial court to find insufficient evidence of serious provocation to warrant an instruction on second degree murder.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Debra Nall, Chicago.)

[People v. Beasley, 2014 IL App \(4th\) 120774 \(No. 4-12-0774, 4/25/14\)](#)

1. A defendant is entitled to a lesser-included offense instruction if the evidence at trial would allow a rational jury to find the defendant guilty of the lesser offense while acquitting him of the greater offense.

The basic difference between involuntary manslaughter and first degree murder is the mental state accompanying conduct which resulted in another's death. For first degree murder, the defendant must know that his acts create a strong probability of death or great bodily harm. For involuntary manslaughter, the defendant must recklessly perform acts likely to cause death or great bodily harm.

Standing alone, defendant's testimony that he did not intend to shoot anyone does not provide a sufficient basis for giving an instruction on involuntary manslaughter. However, the court concluded that there was sufficient evidence to support an involuntary manslaughter instruction where a witness testified that defendant did not appear to be pointing the gun at any specific person before it went off, that defendant and the decedent knew each other, and that defendant would not have intentionally shot the decedent. In addition, several witnesses testified that defendant was not pointing the gun at anyone in particular when the shot was fired. The court also noted that there was a basis in the evidence to find that defendant was in a dispute with the decedent and thought the decedent was advancing and threatening to harm him. Finally, defendant testified that the gun went off accidentally and that he had an elevated sense of fear due to previous incidents in which he had been shot.

The court concluded that although the evidence supporting involuntary manslaughter was not as strong as the evidence supporting second degree murder, a rational jury could have accepted defendant's claim that he acted recklessly and did not intend to shoot the decedent. Therefore, the trial court abused its discretion by failing to instruct the jury on involuntary manslaughter. Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender, Daaron Kimmel, Springfield.)

**[People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 \(1st Dist. 2011\)](#)**

1. The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

2. However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (**[People v. Jackson, 372 Ill.App.3d 605, 874 N.E.2d 123 \(4th Dist. 2007\)](#)**). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent's direction, and other than defendant's testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

**[People v. Perry, \\_\\_\\_ Ill.App.3d \\_\\_\\_, \\_\\_\\_ N.E.2d \\_\\_\\_ \(1st Dist. 2011\) \(No. 1-08-1228, 3/31/11\)](#)**

1. An instruction on the lesser-included offense of involuntary manslaughter is warranted when there is some credible evidence to support the instruction. Although not dispositive, certain factors are relevant to the decision whether to give the instruction: (1) the disparity in size and strength between the defendant and the victim; (2) the brutality and duration of the beating, including the severity of the victim's injuries; and (3) whether the defendant used his bare fists or a weapon. Generally, an involuntary manslaughter instruction should not be given where the nature of the killing, demonstrated by either multiple wounds or the victim's defenselessness, shows that the defendant did not act recklessly.

The court did not err in refusing an involuntary manslaughter instruction even though the court instructed the jury on the definition of recklessness and allowed defense counsel to argue to the jury that defendant acted recklessly, rather than knowingly or intentionally. Defendant attacked the deceased with a group of eight or nine boys, severely beat the deceased for five minutes, punching and stomping on his

head, even as he lay defenseless and motionless on the ground. Defendant also used a liquor bottle as a weapon. The court found that the severity and duration of the beating, resulting in 17 distinct injuries, belied defendant's argument that he would not necessarily have known of the severity of the injuries because they were internal, and thus he had no reason to suspect that they would be fatal.

2. The second paragraph of IPI Crim. 4th, No. 5.01B defines knowledge as conscious awareness that a result is practically certain to be caused by defendant's conduct. It is applicable where the offense is defined in terms of a prohibited result. A charge of first degree murder pursuant to [720 ILCS 5/9-1\(a\)\(2\)](#) requires that defendant act with knowledge that his actions create a strong probability of death or great bodily harm to the deceased. Therefore, the second paragraph of 5.01B is applicable because the charge requires knowledge of the result of defendant's conduct.

The committee notes to 5.01B indicate that the committee took no position whether the definition should be routinely given absent a specific jury request. The Appellate Court interpreted this note to mean that "knowingly" has a plain meaning commonly understood by jurors. The jury made no specific request for an additional instruction indicating confusion about mental states, though it did inquire whether it could find defendant guilty of another charge, such as second degree murder. Therefore, the court did not abuse its discretion in refusing the defense request for the instruction. The court also found no error because the jury otherwise received correct definitional and issues instructions on first degree murder. In addition, any error was harmless because the jury returned a valid general verdict of guilty that could be presumed to be based on the intentional murder count.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

[People v. Smith, 2014 IL App \(1st\) 103436 \(No. 1-10-3436, 7/17/14\)](#)

1. Involuntary manslaughter occurs where the defendant recklessly performs acts that are likely to cause death or great bodily harm. A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

2. The trial court did not err by failing to give an involuntary manslaughter instruction at defendant's trial for first-degree murder, attempt first-degree murder, and armed robbery. Defendant testified that he and his former girlfriend struggled over a pistol that the girlfriend was holding, and that the decedent was shot when the gun discharged during the struggle. The Appellate Court found that such testimony, if believed, would not justify an involuntary manslaughter instruction because it would have resulted in an acquittal rather than in any type of conviction.

3. Furthermore, an involuntary manslaughter instruction was not justified based on the complainant's testimony that defendant brought a gun to her home and pointed it at the decedent. Defendant argued that the jury could have believed such testimony and that the decedent was unintentionally shot while defendant and the complainant struggled over the gun.

Illinois courts consider several factors in determining whether defendant acted recklessly: (1) the brutality and duration of the offense, (2) the severity of the victim's injuries, (3) the disparity in size between the defendant and the victim, (4) whether the defendant used a weapon, and (5) whether the defendant struck multiple times. An involuntary manslaughter instruction is not warranted where the nature of the killing, as indicated by multiple wounds or the victim's defenselessness, shows that the defendant acted intentionally rather than recklessly.

The court concluded that the totality of the evidence showed that defendant acted intentionally. The decedent's injuries were severe and inflicted by a weapon used by the defendant, and a second person besides the decedent was also wounded. In addition, the fact that three bullets struck two victims "belies defendant's assertion that the gun only went off while he and [the complainant] were struggling." The court also noted that both of the victims were defenseless when defendant burst into their bedroom with a firearm and that defendant tried to break the complainant's phone to keep her from calling for help. Furthermore, defendant stole a car which belonged to the complainant's mother, fled from the scene, and used a pseudonym both at

the hospital when seeking treatment for his injuries and when he was arrested.

Because the evidence indicated that defendant acted intentionally or knowingly rather than recklessly, an involuntary manslaughter instruction was not warranted.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

[People v. Williams, 391 Ill.App.3d 257, 908 N.E.2d 1079 \(1st Dist. 2009\)](#)

Where defendant was charged with first degree murder, and an instruction on the lesser included offense of involuntary manslaughter was requested by the defense and found to be appropriate based on the evidence, the trial court erred by giving a modified IPI instruction directing the jury to consider involuntary manslaughter only if it acquitted defendant of first degree murder.

However, the plain error rule did not apply. First, the evidence was not close. Second, Illinois Supreme Court precedent holds that the "fundamental fairness" prong of the plain error rule does not apply to an erroneous instruction concerning the order in which the jury is to consider pending offenses. (See [People v. Pastorino, 91 Ill.2d 178, 435 N.E.2d 1144 \(1982\)](#)).

[Top](#)

**§26-6**

**Concealment of Homicidal Death**

[People v. Mueller, 109 Ill.2d 378, 488 N.E.2d 523 \(1985\)](#) Defendant was charged with and acquitted of murder in Scott County. He was then charged with and convicted of concealment of a homicidal death (involving the same victim) in Cass County. The conviction was affirmed. Prosecution of the concealment offense was not barred by Ch. 38, ¶3-4(b)(1) or double jeopardy.

[People v. Wagener, 196 Ill.2d 269, 752 N.E.2d 430 \(2001\)](#) A conviction for concealment of a homicidal death does not merge with a murder conviction.

[People v. Nielson, 187 Ill.2d 271, 718 N.E.2d 131 \(1999\)](#) An extended term for concealment of a homicidal death may not be based on the "exceptionally brutal and heinous indicative of wanton cruelty" aggravating factor. Defendant's actions may have been "exceptionally brutal or heinous," which requires behavior that is "hatefully or shockingly evil" and "cruel and cold-blooded." However, actions indicate "wanton cruelty" only if defendant "consciously sought to inflict pain and suffering on the victim of the offense." One cannot consciously seek to inflict pain and suffering on a corpse.

[People v. Kirkman, 170 Ill.App.3d 106, 522 N.E.2d 588 \(1st Dist. 1988\)](#) To sustain the offense of concealing a homicidal death, the evidence must show that a homicidal death has occurred, defendant knew about the death and its cause, and defendant took affirmative steps to conceal the homicide or the body for the purpose of preventing or delaying its discovery.

[People v. Salinas, 365 Ill.App.3d 204, 848 N.E.2d 624 \(2d Dist. 2006\)](#) Concealment of a homicidal death occurs when a person "conceals the death of any other person with knowledge that such other person has died by homicidal means." Because the offense requires knowledge that a homicidal death has occurred, the State must prove that the victim was deceased at the time of the act of concealment.

Where an autopsy showed that the decedent had soot in his airways and carbon dioxide in his lungs, and therefore must have been alive when his car was set on fire, defendant could not be convicted of two

counts of concealment of a homicidal death based on setting the car on fire with knowledge that the two occupants had died by homicide.

[People v. Vath, 38 Ill.App.3d 389, 347 N.E.2d 813 \(5th Dist. 1976\)](#) Withholding knowledge of a death does not constitute concealment of homicidal death. Instead, the State must prove a situation where the "body itself is concealed or where the homicidal nature of death is actively concealed, as in making a homicide appear an accident."

[People v. Hummel, 48 Ill.App.3d 1002, 365 N.E.2d 122 \(4th Dist. 1977\)](#) In order to convict for concealment of a homicidal death there must be proof of: (1) an act of concealment, and (2) knowledge that the victim died as a result of a murderous attack. The act of concealment requires more than a failure to disclose knowledge of an offense (such as hiding the body, making a homicide appear as an accident, wiping fingerprints from the crime scene or disposing of the weapon).

Here, although defendant assisted another in disposing of the weapon, this may have been before defendant had knowledge of the homicidal death. Conviction based on guilty plea reversed.

## [Top](#)

### §26-7

#### **Justified Use of Force**

#### §26-7(a)

##### **Generally**

[People v. Benedik, 56 Ill.2d 306, 307 N.E.2d 382 \(1974\)](#) Murder conviction based on circumstantial evidence upheld. The fact that defendant claims to have acted in self-defense and testified to his version of the occurrence was not sufficient to elevate his claim to the level of reasonable doubt when his testimony is viewed in light of the other facts and circumstances of the case.

[People v. Givens, 26 Ill.2d 371, 186 N.E.2d 225 \(1962\)](#) Murder conviction (after bench trial) was reversed. Defendant shot a man who followed him into a room at rooming house. The evidence showed "the homicide was committed by defendant in his own habitation against one who unlawfully entered it and from whom defendant reasonably feared an assault, if not actual peril to his life."

[People v. Sawyer, 115 Ill.2d 184, 503 N.E.2d 331 \(1986\)](#) Defendant contended that his conviction for voluntary manslaughter should be reversed because the State failed to prove beyond a reasonable doubt that he was not justified in using deadly force in defense of a dwelling.

Use of deadly force in defense of a dwelling is justified when two factors are present. First, the victim's entry must be made in a violent, riotous, or tumultuous manner. Second, defendant must have a reasonable subjective belief that deadly force is necessary to prevent an assault upon, or an offer of personal violence to, himself or another in the dwelling.

Here, the victim's entry, although unlawful, was not violent, riotous or tumultuous. In addition, the jury properly found that defendant's belief (that stabbing the victim was necessary to prevent an assault) was unreasonable.

[People v. Woods, 81 Ill.2d 537, 410 N.E.2d 866 \(1980\)](#) Following a fight involving several people in a bar, defendant, who assisted in maintaining order in the bar, chased one of the combatants from the bar. Upon returning, defendant saw a man walking toward him in front of the bar. Thinking that the man might have been one of the combatants, defendant approached with his arm raised and his fist clenched, and said, "[Y]ou

are one of them too, ain't you." The man punched defendant in the face; defendant hit the man, knocked him into a gate, and hit him four or five times. The man subsequently died from the beating.

Defendant claimed self-defense, but was convicted of involuntary manslaughter. Based upon the totality of evidence the trial court could have found that defendant did not reasonably believe that the force he exercised was necessary to prevent imminent death or great bodily harm to himself.

Defendant, who was capable of handling himself in a fight, was larger (6 feet 3 inches tall and 200 pounds) than the victim (6 feet and 130 pounds) and took an aggressive, intimidating role in confronting the victim. Thus, the trial court could reasonably conclude that the victim was the one acting in self-defense though he delivered the first blow. See also, [People v. Hines, 31 Ill.App.3d 295, 334 N.E.2d 333 \(1st Dist. 1974\)](#) (the right of self-defense does not justify an act of retaliation and revenge, nor the pursuit of an original aggressor who has abandoned the quarrel).

[People v. Hawkins, 296 Ill.App.3d 830, 696 N.E.2d 16 \(1st Dist. 1998\)](#) To establish that actions are justified by self-defense, defendant must show that: (1) unlawful force was threatened against him, (2) there was an imminent danger of harm, (3) he was not the aggressor, (4) he actually believed that a threat existed, force was necessary to overcome the threat, and the type and amount of force used were necessary, and (5) those beliefs were reasonable.

[People v. Morgan, 114 Ill.App.2d 421, 252 N.E.2d 730 \(1st Dist. 1969\)](#) Voluntary manslaughter conviction (after bench trial) was reversed. Defendant's belief that use of deadly force was necessary to protect himself was not unreasonable.

[People v. Rorer, 44 Ill.App.3d 553, 358 N.E.2d 681 \(5th Dist. 1976\)](#) Bench trial conviction for voluntary manslaughter reversed. The evidence, which showed the killing of an individual who brandished a knife and threatened to kill a baby, raised a serious doubt relating to self-defense or defense of another. In addition, other evidence raised grave doubt as to whether the gun discharged accidentally.

[People v. Dillard, 5 Ill.App.3d 896, 284 N.E.2d 490 \(5th Dist. 1972\)](#) Murder convictions (after bench trial) were reversed. A trespasser may defend himself against deadly force. While urinating behind a gas station, defendants were shot at by station attendant and fired back.

[People v. Taylor, 3 Ill.App.3d 734, 279 N.E.2d 143 \(5th Dist. 1972\)](#) Murder conviction was reversed because the evidence created a reasonable doubt of self-defense. The decedent, who was armed with a gun, came after defendant, who was sitting down and not saying anything. The decedent hit defendant, knocked him to the floor, jumped on him and threatened to kill him. Defendant then shot and killed the decedent.

[People v. Estes, 127 Ill.App.3d 642, 469 N.E.2d 275 \(3d Dist. 1984\)](#) Defendant was convicted of voluntary manslaughter arising out of the shooting of her husband. Defendant testified that she acted in self-defense.

The State argued that defendant's use of force was not justified because defendant knew that the deceased was unarmed. The law does not require the aggressor to be armed in order to justify the use of a deadly weapon in self-defense. In the instant case, the evidence showed that the deceased had previously inflicted serious bodily harm on defendant without the use of a weapon. Additionally, defendant's vision was extremely limited without her glasses, and a loaded weapon (the same weapon the decedent had previously used to threaten defendant) was found in the car which the deceased had exited. The State failed to prove that defendant did not act in self-defense.

[People v. Adams, 9 Ill.App.3d 61, 291 N.E.2d 54 \(5th Dist. 1972\)](#) Where defendant acted in self-defense by shooting at one person, but accidentally killed another (by a bullet passing through the body of the assailant), he was not guilty of a criminal offense.

[People v. Dennis, 373 Ill.App.3d 30, 866 N.E.2d 1264 \(2d Dist. 2007\)](#) The trial judge erred at a trial for attempt murder and aggravated battery with a firearm by denying a defense motion in limine to allow evidence of the victim's propensity and reputation for violence and aggressiveness.

Evidence of the victim's violent or aggressive character may support a theory of self-defense in two ways. First, defendant's knowledge of the victim's propensity for violence may affect the perception of and reaction to the victim's behavior, "so that a violent response may be reasonable due to the defendant's knowledge of the opponent's violent tendencies." Second, where there are conflicting accounts as to which of the actors was the initial aggressor, the victim's propensity for violence and aggressiveness may support defendant's version of events.

Here, the victim's violent nature would have been admissible in several respects: to show defendant's state of mind, to show that defendant responded to the victim's aggression with a reasonable amount of force, to assist the trier of fact in assessing the credibility of defendant's version of events, and to provide the trier of fact with "a more complete picture of what really occurred."

However, where no conviction resulted, evidence of a domestic battery complaint was not admissible to show the victim's propensity for violence. Evidence of an arrest without a conviction generally does not establish a reputation for violence and aggressiveness, "as an arrest alone does not establish that the person arrested actually performed the acts charged."

[People v. Brown, 78 Ill.App.2d 327, 223 N.E.2d 311 \(1st Dist. 1966\)](#) Voluntary manslaughter conviction reversed. There was sufficient evidence for defendant to reasonably believe that deadly force was necessary to protect himself from great bodily harm; deceased was intoxicated, had a bad reputation, and had previously struck defendant's mother, and defendant believed the deceased had a knife.

[People v. Reeves, 47 Ill.App.3d 406, 362 N.E.2d 9 \(5th Dist. 1977\)](#) Conviction for the murder of husband was reversed. Defendant and her husband argued in a bar. Defendant was hysterical and scared of the husband (since he had threatened her with guns on prior occasions), and she went to their residence and removed all the ammunition from the husband's guns. As defendant was leaving a café later that night, the husband grabbed her in a choke hold and, while hitting her on top of the head, dragged her toward a car. A shot was fired and the husband collapsed. Defendant was found in hysterics and with a gun in her hand.

The evidence was insufficient to prove that defendant's use of force was not justified.

[In re S.M., 93 Ill.App.3d 105, 416 N.E.2d 1212 \(1st Dist. 1981\)](#) Respondent was adjudged a delinquent based upon a petition charging him with two counts of murder and two counts of aggravated battery. The incident stemmed from an altercation in a school yard which resulted in respondent shooting four people.

Considering the evidence in the light most favorable to the State, the State failed to prove beyond a reasonable doubt that respondent did not act in self-defense. Respondent, who had a peaceful reputation, was on his way to hunt raccoons when he stopped by a high school with some friends. The four alleged victims, after some preliminary remarks, approached respondent. Respondent, who knew that one of the four was a wrestler, retreated. He backed across the school yard, pulled his gun and told the four to stay away. When they continued to pursue him, respondent ran. The group chased him. Finally, respondent fired at them.

Respondent's fears were well founded, he made repeated efforts to flee, and he at no time stood his ground or advanced toward the others. Even after he was temporarily cornered and had objects thrown at him, he again tried to run and called for help. When the others continued to pursue him, he fired a warning shot before firing at them. Under these circumstances, respondent's belief that he was in immediate danger of death or great bodily harm was not unreasonable. Adjudication reversed.

[People v. Evans, 259 Ill.App.3d 195, 631 N.E.2d 281 \(1st Dist. 1994\)](#) Defendant's first degree murder conviction was reversed because the evidence was insufficient to disprove defendant's claim that she had acted in self-defense.

The evidence showed that over eight years of marriage, the decedent repeatedly beat defendant and inflicted serious physical injuries. On the night of the offense, the decedent argued with defendant, swore at her, and threatened to hit her. Defendant claimed that she attempted to leave but was caught by the decedent and struck several times. Defendant said that during the beating she grabbed a paring knife from the floor and stabbed the decedent several times. She then hid.

A short time later, defendant left her hiding place and found the decedent lying on the ground. She called the police, but said that her husband had been robbed and stabbed by "some dudes." She explained that she thought the ambulance workers would respond more quickly than if they believed that only a domestic disturbance was involved.

When the paramedics and police officers arrived, defendant said that the decedent had been stabbed when he left to buy cigarettes. She testified that she made this claim because she "didn't think it was their business to know exactly what happened, at that time," and because she wanted to get the decedent to the hospital. Later, she revealed that the stabbing had occurred during a domestic dispute and that she stabbed the decedent after he struck her.

The police found blood in defendant's apartment, a bloody knife under clothing in a drawer, and a pair of bloodstained blue jeans in plain view. The autopsy showed that decedent had a blood alcohol level of .243.

The facts of the case "leave no room for doubt that [defendant] was a battered woman imbued with all of the psychological and emotional impairments of what we all know and commonly call 'battered woman's syndrome.'" The evidence failed to support the State's theory that defendant killed her husband out of jealousy; instead, the husband started the incident while he was drunk, was the aggressor, struck defendant, and was in the midst of "imposing a physical beating" when he was stabbed.

Defendant did not use an unreasonable and unnecessary amount of force in protecting herself:

"When a woman is threatened with violence by a physically larger man, she does not have time to muse about how much force is reasonable or necessary to quail the attack, subdue the attacker and provide for her escape. Moreover, the attack may escalate. We must also bear in mind that she is not involved in a sporting event where there are umpires or referees and a "time-out" may be called so that a reassessment of the threat may be made.

"[T]he law does not require that a woman exercise infallible judgment when she uses deadly force to repel her attacker if she has reasonable grounds to believe that she is in danger of suffering great bodily injury or losing her life. Rather, the law only requires that she use reasonable judgment."

There are several factors to be considered in determining whether the victim of a beating acted reasonably in using deadly force: the apparent mental states and sobriety of both parties, their differences in physical strength, any prior physical or verbal abuse or threats, the identity of the apparent aggressor, the availability of other options, the nature and extent of the attack, the type of weapon used to stop the attack, any escalation or diminishment of the attack by the time deadly force was used, and defendant's reasonable apprehensions at the time deadly force was used.

Defendant's claim of self-defense was not rebutted by the false explanations she gave over the phone and at the scene, or by the fact that the bloodstained knife was found in a drawer under clothing. Defendant's false explanations are insignificant when considered in context, and there was no reason to believe that she was attempting to conceal the knife where she did not clean it or wipe away her fingerprints. Finally, the fact that defendant changed out of her blood soaked clothing before the police arrived did not show an attempt to conceal her involvement in the crime, especially since the clothing was left in open view inside the apartment.

**[People v. Montes, 263 Ill.App.3d 680, 635 N.E.2d 910 \(1st Dist. 1994\)](#)** Where defendant raised a claim of self-defense, his proposed testimony (that he was carrying a knife because he had previously been attacked)

was relevant to his state of mind and should have been admitted.

[People v. Bedoya, 288 Ill.App.3d 226, 681 N.E.2d 19 \(1st Dist. 1997\)](#) A defendant is not barred from raising self-defense where he claims that a weapon fired accidentally during a struggle in which he was defending himself. Where a weapon is fired accidentally during the course of a "life and death struggle," defendant has the right to rely on an accident theory as to the ultimate injury and a self-defense theory as to his preceding acts.

[People v. Baker, 57 Ill.App.3d 401, 372 N.E.2d 438 \(4th Dist. 1978\)](#) Self-defense cannot be a defense to felony murder.

[People v. Francis, 307 Ill.App.3d 1013, 719 N.E.2d 335 \(4th Dist. 1999\)](#) The judge erred by concluding that self-defense is unavailable in an aggravated assault case in which defendant is not alleged to have injured the complainant, but merely to have "displayed" a weapon. Self-defense is available where a weapon was displayed with intent to cause the complainant to refrain from what defendant believed to be the imminent use of unlawful force or to prevent the commission of a forcible felony.

Where the accused "displays" but does not "use" a deadly weapon, the jury should not be instructed that the use of deadly force in self-defense is permitted only if defendant reasonably believed that such force was necessary to prevent imminent death or great bodily harm, or to prevent the commission of a forcible felony. Because the mere display of a deadly weapon does not constitute the "use" of deadly force, the special restrictions on the use of deadly force are inapplicable.

[In re T.W., 381 Ill.App.3d 603, 888 N.E.2d 148 \(4th Dist. 2008\)](#) Self-defense may be raised against a charge of disorderly conduct. Because the trial court did not believe that self-defense was available, and because the evidence clearly showed that the minor acted in self-defense, the delinquency and wardship adjudications for disorderly conduct were vacated.

[People v. Kauffman, 308 Ill.App.3d 1, 719 N.E.2d 275 \(1st Dist. 1999\)](#) Defendant was not entitled to a defense of dwelling instruction where she voluntarily permitted the complainant to enter her apartment, but thereafter unsuccessfully tried to get him to leave. The doctrine of defense of dwelling permits the use of force which an occupant reasonably believes is necessary to prevent or terminate an unlawful entry or attack upon a dwelling. Furthermore, force intended or likely to cause death or great bodily harm may be used only where two requirements are satisfied: (1) the entry is made or attempted in a "violent, riotous, or tumultuous manner," and (2) defendant reasonably believed that such force was necessary to prevent an assault upon or personal violence to herself or another in the dwelling, or to prevent commission of a felony in the dwelling.

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**Cumulative Digest Case Summaries §26-7(a)**

[People v. Brown, 406 Ill.App.3d 1068, 952 N.E.2d 32 \(4th Dist 2011\)](#)

1. A person is entitled to act in self-defense where: (1) he or she is threatened with unlawful force, (2) the danger of harm is imminent, (3) the use of force is necessary, and (4) the person threatened is not the aggressor. It is the State's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, the trier of fact is free to reject a self-defense claim due to the improbability of the defendant's account, the circumstances of the crime, the testimony of the witnesses, and witness credibility.

The court rejected defendant's argument that the evidence was insufficient to disprove self-defense. The State presented evidence that the two decedents fled defendant's apartment and returned only because defendant fired additional shots at the decedents' brother. In addition, defendant fired at least 14 times resulting in 11 gun shot wounds to four victims, four of the five wounds on the decedents were fired from

distances of greater than two feet, and the locations of the victim's wounds were inconsistent with defendant's testimony. Because conflicting evidence was presented concerning whether the defendant was the aggressor and there was a basis in the evidence for the jury to find that he was the aggressor and did not act in self-defense, the evidence supported the verdict.

2. Deadly force in defense of a dwelling is justified when: (1) the victim's entry to a dwelling is made in a "violent, riotous, or tumultuous manner," and (2) the defendant has an objective belief that deadly force is necessary to prevent an assault on himself or another in the dwelling. The evidence showed that defendant did not act in defense of dwelling where there was evidence on which the jury could have found that none of the three victims was armed, the victims were shot outside defendant's dwelling as they were fleeing, and defendant became the aggressor when he pursued the three persons when they left his apartment and shot them in the hallway.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

### [People v. Goods, 2016 IL App \(1st\) 140511 \(No. 1-14-0511, 9/12/16\)](#)

A defendant is entitled to an instruction of self-defense if there is some evidence on each of the following elements: (1) force was threatened against defendant; (2) defendant was not the aggressor; (3) danger of harm was imminent; (4) the threatened force was unlawful; (5) defendant actually and subjectively believed a danger existed which required the use of force; and (6) defendant's beliefs were objectively reasonable. When evidence supports a self-defense instruction, a second-degree murder instruction must be given as a mandatory counterpart.

The court held that defense counsel was ineffective for not presenting a claim of self-defense. The evidence showed that prior to the night of the shooting, the victim had acted in a menacing fashion towards defendant and had displayed a gun. In response to this menacing behavior defendant armed himself with a gun. On the night of the shooting, the victim drove defendant to an apartment complex in order to rob two acquaintances of defendant's, including co-defendant. They both got out of the car and defendant saw the victim fumbling in his waist. Defendant feared that the victim might be getting ready to shoot him.

The two men walked through the parking lot when co-defendant, an acquaintance of defendant's who also knew about the victim's threatening behavior, came out of nowhere, knocked the victim to the ground and then shot him. The co-defendant's actions frightened defendant, who also fell to the ground. When defendant got up, he shot the victim several times as he lay on the ground. Co-defendant took the victim's gun and shot him again. Defendant was convicted of first-degree murder.

The court held that the evidence showed defendant believed he was in danger and that the victim threatened defendant with force when he showed defendant his gun and acted in a menacing manner. On the night of the shooting, defendant saw the victim fumbling in his waistband and knew that the victim intended to commit a robbery. The record thus provided slight evidence warranting a jury instruction on self-defense. And since this defense was consistent with the defense actually presented, counsel's failure to raise self-defense amounted to deficient representation.

The failure to raise this defense was also prejudicial. In making this finding, the court noted that co-defendant was convicted of second degree murder. Even if defendant's belief in self-defense had been unreasonable the jury could have found him guilty of second degree murder.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

### [People v. McLennon, 2011 IL App \(2d\) 091299 \(No. 2-09-1299, 9/22/11\)](#)

Defendant was convicted of criminal damage to property under \$300 and disorderly conduct for his actions in a hospital emergency room, where he was taken after police were called when defendant fell asleep at a restaurant. Defendant became agitated at the hospital and began screaming and "swinging" at hospital staff who said that they were going to treat him. Defendant also broke a lead wire to an EKG machine.

Defendant claimed he was acting in self-defense because he had not consented to medical treatment

and because the administration of unauthorized medical care is battery. [720 ILCS 5/7-1\(a\)](#) provides: “A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other’s imminent use of unlawful force.”

The Appellate Court held that even assuming that the administration of unauthorized medical treatment constitutes a battery, self-defense was not an authorized defense under these circumstances.

1. The plain language of §7-1 requires that the force used by the person claiming self-defense must be directed “against another.” Criminal damage to property requires only that the State prove that the defendant knowingly damaged property, not that the defendant directed force against another person. Because criminal damage to property could never have as its basis behavior involving the direction of force “against another,” self-defense is not available.

The court acknowledged that self-defense might be available where a criminal damage to property charge arises from damage which occurs incidentally from force which the defendant directs at another. Here, however, the force exercised by defendant was directed at the EKG wire, not other persons.

The court acknowledged defendant’s argument that its opinion would give the accused an incentive to act violently toward other persons so that self-defense would be available, but held that “such issues are best directed to the legislature.”

2. Similarly, self-defense could not be raised against the charge of disorderly conduct. Although defendant’s conduct (clenching his fist, verbally abusing and screaming at the hospital staff and “swinging” at staff members) was directed at other persons, §7-1 states that self-defense is authorized only to defend against the “imminent use of unlawful force.” Because the evidence showed that defendant engaged in the conduct which constituted disorderly conduct when emergency room personnel told him of their anticipated treatment, but before they took any action toward implementing the treatment, defendant had not been threatened with “imminent” force at the time of the offense. Thus, self-defense was unavailable.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

[Top](#)

## §26-7(b)

### Instructions

[People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 \(1972\)](#) At murder trial, defendant was entitled to an instruction on defense of dwelling. Defendant was a guest in an apartment, and the deceased forced entry and attacked him. Defense of dwelling does not cease once the intruder crossed the threshold into a dwelling.

[People v. Thurman, 104 Ill.2d 326, 472 N.E.2d 414 \(1984\)](#) Where there is evidence of both recklessness and self-defense in a case involving an involuntary manslaughter count, the issues instruction for involuntary manslaughter must include language informing the jury that the State must prove that defendant acted without lawful justification in order to sustain a guilty verdict.

[People v. Everette, 141 Ill.2d 147, 565 N.E.2d 1295 \(1990\)](#) The defenses of self-defense and accident are not inconsistent.

[People v. Huckstead, 91 Ill.2d 536, 440 N.E.2d 1248 \(1982\)](#) Defendant was charged with murder, and claimed self-defense. The jury was instructed on the presumption of innocence ([IPI 2.03](#)), the elements of murder ([IPI 7.02](#)), and justified use of force (IPI 24.6). However, defendant did not tender, and the judge did not give sua sponte, [IPI 25.05](#), which includes justified use of force in the elements of the offense.

Defendant waived his claim that the judge erred in failing to give [IPI 25.05](#). The issue was not plain error — the evidence was not factually close, and the instructions that were given were not conflicting. In

addition, the instructions which were given, coupled with the closing arguments by both sides, apprised the jury that the State had the burden of proving that defendant was not justified in the force he used.

[People v. Berry, 99 Ill.2d 499, 460 N.E.2d 742 \(1984\)](#) At defendant's trial for murder, he raised the defense of self-defense. The jury was given appropriate definitional instructions, including [IPI 24.06](#) on justified use of force, but was not given IPI 25.05, which includes as an element the requirement that the State prove beyond a reasonable doubt that defendant was not justified in using the force he used.

The failure to instruct the jury with [IPI 25.05](#) was plain and reversible error. The jury was not apprised of the State's burden in regard to self-defense. Thus, "grave error resulted." In addition, the evidence was "factually close."

[People v. Jenkins, 69 Ill.2d 61, 370 N.E.2d 532 \(1977\)](#) At defendant's trial for attempt murder, where the central issue was whether his use of force was justified, two directly conflicting instructions were given to the jury. The defense instruction correctly stated that defendant could be convicted only if he was not justified in using the force in question, but the State's instruction omitted any reference to that essential element. Although there was no objection to the State's erroneous instruction, it was plain error.

[People v. Pinkney, 322 Ill.App.3d 707, 750 N.E.2d 673 \(1st Dist. 2000\)](#) A self-defense instruction is appropriate where: (1) defendant was not the aggressor; (2) there was a present danger of harm; (3) the force threatened was unlawful; (4) defendant actually believed there was a danger of harm, the use of force was necessary, and the type of force used was required to avert the danger; and (5) defendant's beliefs in each of these respects was reasonable even if mistaken.

Both defendant and a State's witness testified that the decedent made threatening remarks to defendant shortly before engaging him in a verbal argument, and that the decedent threw the first punch. In addition, defendant testified that the decedent put him in a headlock, causing both of the men to fall down the stairs. Although defendant admitted kicking the decedent six or seven times, he stated that his only intent was to defend himself and that he believed the decedent was capable of attacking him. Because such testimony clearly constituted "some" evidence of each of the elements of self-defense, the trial court erred by refusing to give a self-defense instruction.

[People v. Hughes, 109 Ill.App.3d 352, 440 N.E.2d 432 \(5th Dist. 1982\)](#) Defendant waived his contention that the trial judge erred by failing to instruct the jury on self-defense. Defendant did not present the issue to the trial court and failed to tender instructions thereon.

[People v. Francis, 307 Ill.App.3d 1013, 719 N.E.2d 335 \(4th Dist. 1999\)](#) Defendant is entitled to an instruction on his theory of the case if the instruction has some foundation in the evidence, even where the evidence is slight, inconsistent or of doubtful credibility. The evidence here was sufficient to require a self-defense instruction - defendant's testimony that he was confronted by two hostile men whom he believed were acting in concert to harm him, and that he attempted to prevent them from attacking by displaying and waving a knife, provided a basis on which the jury could have found that defendant acted in self-defense. The court rejected the State's argument that a self-defense instruction should be given only if defendant's testimony is corroborated, describing as "totally groundless" the assertion that self-defense cannot be based solely on a defendant's testimony.

[People v. Cook, 262 Ill.App.3d 1005, 640 N.E.2d 274 \(1st Dist. 1994\)](#) Defendant was convicted, in a jury trial, of the second degree murder of his girlfriend. Expert testimony presented by the State showed that the girlfriend suffered an extreme beating and was strangled. However, the defense presented expert evidence that death could have been caused by a blow to the neck instead of by strangulation. The deceased also had a history of becoming violent when she had been drinking, and her blood alcohol level at the time of her

death was 1½ times the legal limit for intoxication.

Defendant testified that he had seen the deceased become violent on prior occasions, that she had told him approximately a week earlier that she had stabbed her ex-husband when she learned that he had been seeing his ex-wife, and that on the day of the offense the deceased had seen him talking to another woman and had warned him not to "sleep too tight." Defendant testified that he struck the decedent in self-defense when she attempted to stab him with a boxcutter.

The jury was not instructed with [IPI Criminal 3d No. 24-25.06\(A\)](#), which states that the prosecution has the burden of proving beyond a reasonable doubt that defendant was not justified in using the force employed. Although defense counsel failed to tender the instruction, the failure to instruct on the State's burden of proof was plain error because the evidence was close and the outcome of the trial might have been different had the instruction been given.

[People v. Lahori, 13 Ill.App.3d 572, 300 N.E.2d 761 \(1st Dist. 1973\)](#) Before defendant may raise issue of self-defense, he must admit the killing. Thus, it is not error to refuse self-defense instruction where defendant does not remember what occurred at time of shooting.

[People v. Bailey, 15 Ill.App.3d 558, 304 N.E.2d 668 \(1st Dist. 1973\)](#) An instruction which stated that defendant had to exhaust all reasonable means of escape other than deadly force misstated Illinois law.

[People v. Harris, 39 Ill.App.3d 805, 350 N.E.2d 850 \(4th Dist. 1976\)](#) Trial court erred by failing to give the "justifiable use of force in self-defense" instruction tendered by the defense. Defendant testified that on earlier occasions, the deceased had acted as if he had a gun. In addition, a few minutes before the shooting defendant saw the deceased put a gun in his pocket. The deceased was reaching for his pocket when defendant fired.

This testimony, if believed, would support a finding of reasonable belief that the use of deadly force was justifiable despite the fact that no gun was found on the deceased. Although defendant's testimony was contradicted by other evidence, the conflict was a matter for the jury to resolve.

[People v. Scott, 97 Ill.App.3d 899, 424 N.E.2d 70 \(3d Dist. 1981\)](#) The trial judge erred in refusing defendant's tendered jury instructions on self-defense and voluntary manslaughter, because there was some evidence showing defendant's subjective belief that the use of force was necessary.

Defendant testified that she shot her husband after he struck her several times with his fist and with a gun. She stated that based upon the prior beatings she received from him, she was frightened of what he was going to do to her.

Since defendant's testimony was evidence of a subjective belief that deadly force was necessary to deter her husband from causing her great bodily harm or possibly death, it was for the jury to determine if that belief actually existed and, if so, whether it was reasonable.

[People v. Milton, 72 Ill.App.3d 1042, 390 N.E.2d 1306 \(1st Dist. 1979\)](#) The giving of [IPI 24.06](#) (use of force in defense of person) without the provision that deadly force may be used to prevent the commission of a forcible felony was reversible error; there was evidence from which the jury may have believed that defendant was resisting a robbery and used deadly force in doing so.

[People v. Woodward, 77 Ill.App.3d 352, 395 N.E.2d 1203 \(2d Dist. 1979\)](#) Defendant's conviction for voluntary manslaughter was reversed because the trial court refused to instruct the jury on self-defense. There was evidence that the victim had a reputation for violence, aggression and carrying a gun. The evidence also showed that defendant was aware of that reputation, and that a minute or two before the incident defendant heard the "victim" threaten defendant's father and say he was going home to get a gun to kill the father.

[People v. Dowdy, 21 Ill.App.3d 821, 316 N.E.2d 33 \(1st Dist. 1974\)](#) Reversible error for trial court to fail to submit tendered self-defense instruction. Defendant testified that the deceased hit her, and that she took a gun from her purse because she thought he was going to hit her again. The deceased was shot during a struggle for the gun. Defendant's testimony was rebutted by two disinterested witnesses; however, the credibility question was for the jury to resolve.

[People v. Brooks, 130 Ill.App.3d 747, 474 N.E.2d 1287 \(1st Dist. 1985\)](#) The trial judge erred by refusing to instruct the jury on justified use of force at defendant's trial for attempt murder and aggravated battery.

The offenses arose out of an incident in which defendant's estranged wife and defendant's stepson were shot. The wife and stepson testified that they were in the latter's truck during a traffic jam, and that defendant ran toward them with a gun and started shooting. Both the wife and the stepson were hit. A total of four shots were fired.

Defendant testified that as he was walking near the truck he heard a gunshot, turned, and saw the stepson holding a gun. The stepson pointed the gun at defendant, but it misfired. Defendant then reached into the truck and grabbed the stepson's hand that was holding the gun. They wrestled for the gun, and shots were fired while the stepson and defendant had their fingers on the trigger. Defendant ultimately took the gun and left. Defendant testified that he did not intend to shoot anybody.

The jury could infer that the stepson intended to kill defendant and that defendant was acting in self-defense when the gun was fired. A defendant is entitled to a self-defense instruction even where the shooting results accidentally from a struggle.

[People v. Garcia, 169 Ill.App.3d 618, 523 N.E.2d 992 \(1st Dist. 1988\)](#) The trial judge erred in refusing to give the jury [IPI 4.05](#) (Definition of Forcible Felony) upon the request of defense counsel. This instruction would have advised the jury that a person is entitled to use deadly force not only to prevent imminent death or great bodily harm, "but also if it is necessary to prevent the commission of a forcible felony."

In the instant case, there was evidence that defendant was on a "public way" when he was battered by the deceased. Since a battery on a public way is an aggravated battery and aggravated battery is a forcible felony, the failure to give [IPI 4.05](#) deprived defendant of a defense.

[People v. Carter, 193 Ill.App.3d 529, 550 N.E.2d 25 \(4th Dist. 1990\)](#) A defendant is entitled to a justified use of force instruction when there is some foundation in the evidence, even when the evidence supporting the theory is very slight, inconsistent or of doubtful credibility. A self-defense instruction should have been given here; though the evidence supporting self-defense was "slight and of questionable credibility," credibility questions are to be resolved by the jury and not by the judge.

[People v. Chatman, 381 Ill.App.3d 890, 886 N.E.2d 1265 \(2d Dist. 2008\)](#) As a matter of plain error, the trial judge erred at a trial for domestic battery and aggravated domestic battery where he: (1) instructed the jury concerning self-defense by an initial aggressor, (2) gave only a partial explanation of self-defense, and (3) failed to instruct on the State's burden of proof concerning self-defense.

It was error to instruct the jury with [IPI Crim. 24-25.09](#) (Initial Aggressor's Use of Force) where defendant did not concede that he committed the acts in question, did not claim self-defense, and objected to the self-defense instruction. "No instruction on self-defense, IPI Crim. 4th No. 24-25.09 or otherwise, is applicable to an act that a defendant denies committing."

Even had a self-defense instruction been proper, the court presented an "impossibly truncated understanding of self-defense" by giving only [IPI Crim. 24-25.09](#), without including IPI Crim. 4th No. 24-25.06 (the default or basic standard of self-defense). Because there was conflicting evidence concerning whether defendant was the initial aggressor, "the jury [was] compelled to assume that defendant was the initial aggressor and therefore had a diminished right of self-defense."

Finally, the self-defense instruction was incomplete because it did not mention the State's burden to

disprove self-defense beyond a reasonable doubt.

[People v. Timberson, 188 Ill.App.3d 172, 544 N.E.2d 64 \(5th Dist. 1989\)](#) Defendant and other defense witnesses testified that the deceased approached them in a threatening manner and reached for something in his waistband, and that they thought he was reaching for a weapon. The State contended that this testimony was insufficient to warrant a self-defense instruction in light of statements that the deceased turned his back on defendant before he was shot and the pathologist's testimony that the deceased's wound was in the back of his neck.

The defense evidence, if believed by the jury, was sufficient to support defendant's claim of self-defense. Although there was some evidence to contradict the defense evidence, the contradictions or inconsistencies were to be resolved by the jury. Thus, the instruction should have been given.

In addition, the jury was instructed on the belief of justification as a mitigating factor for second degree murder, and found defendant guilty of second degree murder. Thus, the jury concluded that defendant believed he was justified but that his belief was unreasonable. "Because the jury was not instructed that it could find that defendant's belief was reasonable, and that upon such a finding they could enter a verdict of not guilty, defendant is entitled to a new trial."

[People v. Rodriguez, 96 Ill.App.3d 431, 421 N.E.2d 323 \(1st Dist. 1981\)](#) At defendant's trial for attempt murder and aggravated battery, the trial judge erred by refusing to give defendant's tendered instruction on justifiable use of force. The complainant and a disinterested witness testified that the beating was inflicted without any provocation, but a defense witness testified that the complainant attacked defendant with a tire iron. Credibility of witnesses is to be resolved by the jury, not the trial court. Thus, defendant was entitled to an instruction on his theory of defense "even if the trial judge believed that the evidence offered in support of that defense was inconsistent or of doubtful credibility."

[People v. Tyler, 188 Ill.App.3d 547, 544 N.E.2d 1077 \(1st Dist. 1989\)](#) Defendant was convicted of attempt murder. It was reversible error to refuse a defense instruction on self-defense.

During an altercation between teenage girls, defendant stabbed the complainant (Tanya) with a pocket knife. According to the State witnesses (Tanya and her friends), defendant was the aggressor during the incident. Defense witnesses (defendant and her friends) testified that Tanya was the aggressor.

There was some evidence of self-defense; thus, the reasonableness of defendant's use of force was for the jury to decide.

[People v. Truss, 254 Ill.App.3d 767, 626 N.E.2d 1175 \(1st Dist. 1993\)](#) Defendant was convicted of first degree murder based on evidence he stabbed a man whom his girlfriend brought to their home. At trial, he claimed to have acted in self-defense.

The trial judge erred by giving the following non-IPI instruction:

"The law does not permit one who instigates an assault on another to then rely on the victim's response to that assault as evidence of mutual combat sufficient to mitigate a subsequent killing from murder to manslaughter."

The instruction was erroneously given because there was no evidence of "mutual combat," which involves a struggle into which two people willingly enter or where death results from a fight "upon equal terms. . . ." Here, the evidence established that defendant stabbed the deceased either as the latter sat passively in a chair or because he anticipated that the deceased was about to attack.

[People v. Gracey, 104 Ill.App.3d 133, 432 N.E.2d 1159 \(5th Dist. 1982\)](#) The trial court erred where, as a sanction for defendant's failure to comply with discovery, it refused to instruct the jury on defenses of intoxication and self-defense.

**People v. Cacini**, 2015 IL App (1st) 130135 (No. 1-13-0135 & 1-13-3166, 12/11/15)

Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave IPI Criminal 4th No. 24-25.06, which provides the general definition of self-defense. However, the trial judge failed to also give IPI Criminal 4th No. 24-25.06A, which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to IPI Criminal 4th No. 24-25.06 instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

1. Once the defense properly raises the affirmative defense of self-defense, the State bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. The jury must be instructed as to the affirmative defense and the State's corresponding burden of proof. IPI Criminal 4th Nos. 24-25.06 and 24-25.06A fulfill this requirement. Supreme Court Rule 451(a) requires the trial court to use the Illinois Pattern Jury Instructions, Criminal, related to a subject when the court determines that the jury should be instructed on the subject.

2. Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of Illinois Supreme Court Rule 651(a).

Under the plain-error doctrine, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

3. Although defense counsel failed to tender IPI Criminal 4th No. 24-25.06A, failed to timely object to the absence of the instruction, and failed to include the issue in his posttrial motion, the Appellate Court concluded that the trial judge's failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party's closing argument clarified the burden of proof and the State's closing argument could easily have been misinterpreted.

Defendant's convictions for attempt first degree murder and aggravated battery were reversed and the cause remanded for a new trial.

**People v. Lewis**, 2015 IL App (1st) 122411 (No. 1-12-2411, 2/27/15)

Self-defense is an affirmative defense. Unless the State's evidence raises an issue about self-defense, the defendant bears the burden of presenting sufficient evidence to raise the issue. A defendant is entitled to a jury instruction on self-defense if "very slight" or "some" evidence supports his theory. To raise self-defense in a first-degree murder case, the defendant must admit that he killed the decedent.

The Appellate Court held that defendant was not entitled to a jury instruction on self-defense because neither the State nor the defense presented any evidence that he acted in self-defense. The State's evidence showed that defendant shot the decedent after they argued about who should be allowed to sell shoes in the parking lot of a strip mall. Nothing about the argument, however, would have justified the shooting.

The defense witnesses testified that the decedent was armed and reached for his gun, but they also testified that another person, not defendant, shot and killed the decedent. Accordingly, neither the State nor the defense presented any evidence that defendant acted in self-defense. Instead, defendant improperly attempted to combine the State's evidence that he shot the decedent with his own evidence that he feared for his safety. But since there was no direct evidence from either side that defendant acted out of a reasonable belief in self-defense, he was not entitled to a self-defense instruction.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

**[People v. Washington, 399 Ill.App.3d 664, 926 N.E.2d 899 \(1st Dist. 2010\)](#)**

1. First degree murder occurs where the defendant kills an individual without lawful justification and with intent to kill or inflict bodily harm, knowledge that his acts will cause death, or knowledge that his acts create a strong probability of death or bodily harm. Second degree murder occurs when first degree murder was committed and the offender unreasonably believed that the circumstances justified the use of deadly force or acted under serious provocation.

2. Under **[People v. Lockett, 82 Ill.2d 546, 413 N.E.2d 378 \(1980\)](#)**, a second degree murder instruction is required whenever there is sufficient evidence to give a self-defense instruction on a first degree murder charge. The trial court may not weigh the evidence and deny a second degree instruction based on its determination that defendant's subjective belief in the need for self-defense was reasonable or unreasonable.

The court also rejected the argument that a second degree murder instruction is required in a first degree murder case only if there is independent evidence that defendant's belief concerning the use of deadly force was unreasonable. (Rejecting **[People v. Anderson, 266 Ill.App.3d 947, 641 N.E.2d 591 \(1st Dist. 1994\)](#)**).

3. Because the trial court properly found that there was sufficient evidence to justify a self-defense instruction, it erred by refusing to also give defendant's tendered second degree murder instruction.

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