

No. 1-07-3170

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 16189
	)	
HANNANIAH DUKES,	)	The Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Howse concurred in the judgment.

**ORDER**

*HELD:* Upon vacation of original decision in this cause and reconsideration pursuant to Illinois Supreme Court supervisory order citing *People v. Mullins*, 242 Ill. 2d 1 (2011), trial court's delay in ruling on defendant's motion *in limine* to bar evidence of his prior convictions when it otherwise had sufficient information to make this ruling comprised only harmless error, thereby not warranting new outcome in this cause; in addition, defendant did not receive ineffective assistance where his counsel chose not to request separate verdict forms, but two of his convictions for home invasion must be vacated in light of the one-act, one-crime rule and, accordingly, his mittimus must be corrected as was originally ordered.

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¶ 1 Following a jury trial, defendant Hannaniah Dukes was convicted of first degree murder and three counts of home invasion in connection with the shooting death of Leon Brewer. He was sentenced to 40 years in prison on the first degree murder conviction, to run consecutively with three concurrent 30-year terms for each count of home invasion. Defendant now appeals arguing that (1) the trial court erred in refusing to rule on his motion *in limine* prior to trial, (2) defendant received ineffective assistance of counsel where defense counsel failed to request separate verdict forms, and (3) the trial court erred in convicting him of three counts of home invasion in violation of the one-act, one-crime rule.

¶ 2 For the record, we note that we filed our original decision in this matter affirming in part, vacating in part and correcting defendant's mittimus. However, pursuant to a recent supervisory order issued by our state supreme court, we have been asked to vacate that decision, which we have done, and to reconsider this cause in light of *People v. Mullins*, 242 Ill. 2d 1 (2011), to determine if a different result is warranted. Upon our reconsideration, and as we will discuss in further detail below, we conclude that a different result is not warranted, as our decision was directly in line with *Mullins*.

¶ 3 Accordingly, for the following reasons, we affirm in part, vacate in part, and correct the mittimus.

¶ 4 **BACKGROUND**

¶ 5 Defendant and two codefendants, Larry Williams and Damien Braboy, were charged by indictment with the first degree murder based upon three theories: intentional or knowing, strong probability, and felony murder. They were also charged with the armed robbery of Francisco

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Camacho, and multiple counts of home invasion pertaining to Camacho, Ulyses Brewer, and Robert Brewer. Williams' case was *nolle-prossed*. Defendant and Braboy were tried in a simultaneous but separate jury trial. Williams and Braboy are not parties to this appeal.

¶ 6 Prior to trial, defendant filed a motion to bar evidence of his prior convictions. The trial court averred that it would reserve its ruling until after defendant testified. The trial judge specifically stated:

“I don't know anything about the facts of the case right now, so I will wait and see how the case goes in. And if the defendant does testify, I'll make my ruling while he's testifying. If that becomes the case, just ask to approach before you end your direct examination, and I'll give you my ruling and hearing arguments at that time, so you will have the ability if you choose, if they do come in, to front that conviction if you like.”

¶ 7 At trial, the following facts were presented. In 2002, Camacho lived in a bungalow at 6125 South Artesian Avenue. He rented rooms in the house to the decedent, Leon Brewer, Brewer's wife Dorita, and their two sons Ulyses and Robert. Camacho sold marijuana from his residence, but never told the Brewer family.

¶ 8 At approximately 9 p.m. on May 12, 2002, 9-year-old Ulyses and 10-year-old Robert were home without their parents when a man appeared from the basement wearing all black and with a cloth covering his face. He instructed the boys to get on the floor, and the boys complied. They could hear screaming coming from Camacho's bedroom and voices demanding money.

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¶ 9 Camacho testified that he was watching television on the night in question when three masked men, all armed with guns, pushed him to the floor and he felt a gun barrel on the back of his neck. One of the men demanded \$10,000 and marijuana. Camacho recognized the voice as that of Braboy, who was his girlfriend Joi's brother, and with whom he had spoken earlier that day. On two occasions during the previous week, Camacho had sold Braboy marijuana at a discounted rate, but on the day in question, he explained to Braboy that he could no longer do so, and Braboy had left angry.

¶ 10 Camacho told the men that the drugs were in the attic. The men then led Camacho and the two young boys up to the attic. Ulyses saw the men hitting Camacho with their guns and hands. A voice Camacho did not recognize suggested that they hold Camacho until the following day so he could get money for them at the bank. Camacho heard Braboy say, "let's pop him right now."

¶ 11 Brewer and Dorita then entered the house, which had been ransacked. Brewer told Dorita to stay by the door, and he walked towards the boys' bedroom. Dorita heard people coming from the attic and then saw Brewer running toward her, with an armed, masked man behind him. Dorita saw the man shoot Brewer, who died later that night from the gunshot wound.

¶ 12 Camacho jumped from the attic window and ran into the alley. He then saw three men emerge from the back of his house carrying his black bag that contained marijuana. Camacho ran into a neighbor's house and called the police. When the police arrived, he told them that one of the men was Damien Braboy, but he did not know who the other men were.

¶ 13 The next day at the police station, Camacho listened to a voice recording of four men and

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picked out Braboy's voice as one of the intruders; he was also able to identify Braboy in a lineup.

¶ 14 On May 22, 2002, Officer Lawrence Odoms received information to look for two other men: defendant and Larry Williams. Defendant was supposed to be at 6130 South Artesion, so Officer Odoms and his team proceeded to that address. Officer Odoms was positioned in front of the house, and received a radio communication that defendant had exited the back of the house and then went back inside. Odoms heard the officer at the back of the house yell, "police." The officers then entered the house. Odoms saw several people in the house sitting in the dining room. He went into the attic with his partner and saw defendant hiding inside a four-foot crawl space. Odoms announced his office and asked defendant to come out. Defendant initially refused, but then complied and was arrested.

¶ 15 Subsequent to defendant's arrest, Camacho listened to another voice lineup in which he identified defendant's voice as one of the three men who came into his house on the night in question demanding money. He then viewed defendant in a physical lineup, but was unable to identify him.

¶ 16 Police conducted another voice lineup for Ulyses and Robert. Williams, defendant, and four others were in the lineup. Ulyses identified Williams' voice as one of the men in the house, and also picked Williams out of a physical lineup. Robert was unable make any voice or physical identifications.

¶ 17 Detective John Henry interviewed defendant on May 22, 2002. Defendant indicated that he understood his *Miranda* rights, and then told Detective Henry that he was with his girlfriend, Kimberly Vaca, on the day in question. Detective Henry interviewed Vaca, who denied being

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with defendant on the day in question. Confronted with this information, defendant admitted that he was involved in the robbery as a lookout. Defendant said that Braboy had set it up.

Defendant claimed that he was told to stay outside the house during the robbery to act as security, but that he had no part in the robbery or the shooting.

¶ 18 On May 24, 2002, Detective Henry had another conversation with defendant after advising him of his *Miranda* rights. Defendant then admitted that he, Braboy, and Williams entered the victim's home through the rear basement door and went upstairs to the first floor landing. There they saw two young boys, and Braboy told them to be quiet and lay down while defendant and Williams continued into the house. Williams then grabbed Camacho and screamed at him, "where's the money, where's the weed." Defendant averred that they walked to the front of the house and looked out the window. He heard Camacho tell Williams and Braboy that the money was upstairs, and they all took Camacho and the two boys up to the attic. According to defendant, they later heard a noise and Williams and Braboy ran downstairs. He heard yelling and screaming downstairs, so he followed them down, but then quickly returned to the attic in time to see Camacho jump out of the window. Defendant heard a shot fired and ran back downstairs where he and Braboy fled through the back door. Defendant claimed that he and Braboy jumped over the fence and saw Camacho yelling and screaming for the police. Defendant then handed his gun to Braboy who said that he "didn't meant to shoot him," and then they fled in opposite directions. According to defendant, he wanted to get his share of the proceeds but never did.

¶ 19 Assistant State's Attorney Michelle Wilson also spoke to defendant after advising him of

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his *Miranda* rights. Defendant indicated that the robbery was Braboy's idea, and that he first heard about the plan a few days prior. Defendant claimed that on the night in question, he, Williams, and Braboy armed themselves with weapons and entered Camacho's house through the basement. Defendant stated that they were all wearing rubber gloves, and that he had a .38 handgun, Braboy had a .380 handgun, and Williams had a "Tech." Defendant told ASA Wilson that he went to look out the front window while Braboy, Williams, and the two young boys went upstairs looking for Camacho's money and drugs. Defendant then followed them upstairs. When he heard a noise downstairs, Braboy and Williams ran downstairs. Then he heard a shot fired. He saw Camacho jump out of the attic window. Defendant then ran downstairs and through the basement and jumped the fence with Braboy. Back at Braboy's house, defendant gave his gun to Braboy who put it in a drawer and said, "I didn't want to shoot him."

¶ 20 ASA Wilson testified that defendant looked fine during her interview with him, that he did not ask for either an attorney or a phone call, that he was given food, and that he was allowed to use the bathroom.

¶ 21 After presenting autopsy evidence showing that Brewer had been shot in the left lower back, the State rested its case.

¶ 22 Jolee Colston, defendant's mother, testified that on May 22, 2002, she learned that her son had been arrested and went to various police stations with her two other children to locate him. They noticed him in the back of a squad car while driving in the vicinity of 63<sup>rd</sup> Street and Rockwell. Colston saw defendant in handcuffs and claimed that his shirt was dirty and it looked like there was a footprint on the back of his shirt. Colston asked defendant if he was okay and he

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responded “yeah,” but was shaking his head “no in a very small way.” Colston testified that the police told her defendant was there for questioning and that he would be released the following day. The police allowed them to get a jacket for defendant.

¶ 23 Colston further testified that on the night of the incident, she had plans to have dinner with her children because it was Mother’s Day. Defendant arrived between 2 p.m. and 2:30 p.m. Her other children arrived that afternoon and they ate dinner in the evening. They played cards until 10 p.m.

¶ 24 Defendant’s younger brother, Yohydaviyv Dukes, was living with his mother at the time of the incident. He testified that defendant came over to his mother’s house at around 2 p.m. and left around 10 p.m. Dukes had two prior felony convictions for possession of a controlled substance.

¶ 25 Naphthalie Dukes corroborated his brother’s and mother’s story, but had three prior convictions for armed robbery, possession of a cannabis, and retail theft.

¶ 26 Defendant’s sister, Tamar Maldonado, also corroborated the story.

¶ 27 Defendant testified that on the day of the incident, he arrived at his mother’s house and stayed after dinner to play cards and drank until 10:15 p.m. Ten days later, he was visiting friends at 6131 South Artesian when he heard his dog barking in the back yard. He went to the door and saw a gun barrel pointed downwards so he slammed the door and told his friends that someone with a gun was at the door. Defendant testified that they all ran towards the front of the house, and he ran upstairs to hide in a small crawl space. He then heard someone come upstairs and announce that it was the police and so he came out. Defendant claimed he was pushed to the

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floor and felt a knee on his head and a foot on his back as he was searched and handcuffed. He was then taken to the police station.

¶ 28 Defendant denied that he was ever advised of his *Miranda* rights by Detective Henry. He claimed that Detective Henry “got aggressive” and left the room, returning with a pair of handcuffs and cuffed defendant to the wall. Defendant averred that Detective Henry slapped him in the face three times and hit him twice in the chest. Defendant claims his repeated requests to make a phone call were denied.

¶ 29 Defendant further testified that he was taken to a different police station and on his way he saw his mother and brothers. When his mother asked how he was, defendant said he was okay, but shook his head to indicate that he was not. He told her the police were questioning him about something he did not know about. Defendant testified that he was then allowed to make a phone call, whereupon he placed a call to the house on Artesian where he had been arrested. Defendant was placed in a cell for the night. The following morning, defendant wanted to make another call but was prohibited.

¶ 30 Defendant testified that he was then taken to another police station, where Detective Henry asked if he had an alibi. Defendant refused to talk to him and was refused a phone call. Later, Detective Henry informed him that Vaca, his girlfriend, had told him that she was with defendant on the night of the murder. Defendant testified that Detective Henry told him to sign the paper saying he was with Vaca and that would help him. Defendant asked for another phone call but was refused.

¶ 31 Defendant testified that ASA Wilson then came to talk to him and asked him why he was

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not cooperating. Defendant told her that he did not know anything about the crime, and did not want to talk to her unless he could make a phone call. He claimed that Detective Henry and ASA Wilson were constantly entering and exiting the interview room. Detective Henry then told him they would get him a lawyer. A few hours later, Detective Henry returned with a tall, white male who brought food to defendant, said he was a lawyer, and tried to get defendant to talk about the murder. Defendant refused to talk and the man left after 15 minutes. Defendant claimed that he never made an admission to the crime, that he did not rob Camacho on the date in question, and was not present in Camacho's house when Brewer was shot and killed.

¶ 32 In rebuttal, Detective Henry testified that he never struck defendant, and that a photo taken of defendant after the lineup shows no marks on his face. Detective Henry stated that defendant never asked to make a phone call, and did not repeatedly request to make a phone call through the time he was in custody. Defendant did not ask to speak to an attorney, but had he done so, Detective Henry would have granted his request. Detective Henry further testified that defendant was not handcuffed while in the interview room and that he did not suggest to defendant that Vaca be offered as an alibi. Detective Henry did not tell defendant he would obtain a lawyer for him, nor did he send anyone pretending to be a lawyer to speak to defendant.

¶ 33 Following rebuttal testimony, the trial court ruled on defendant's previous motion *in limine* requesting his two prior convictions to be barred from introduction into evidence. The trial judge found that the two prior convictions for possession of a controlled substance with intent to deliver were probative of defendant's credibility and that the probative value of their admission into evidence outweighed any prejudicial effect.

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¶ 34 The jury then received instructions that it could find defendant guilty of murder under any of the three alternative theories: intentional, knowing, or felony murder. As to the murder charge, the jury received a pair of general verdict forms which read, “We, the jury, find the defendant, Hannaniah Dukes, guilty of first degree murder,” and “We, the jury, find the defendant, Hannaniah Dukes, not guilty of first degree murder.” Defense counsel did not object to the use of the general verdict forms for the first degree murder charge and three separate counts of home invasion as to Camacho. The jury found defendant guilty of these charges. The jury also determined that Ulyses and Robert were under the age of 12 at the time of the incident.

¶ 35 After trial, defendant filed a motion for a new trial claiming ineffective assistance of counsel. Trial counsel withdrew and new counsel was appointed. In his amended motion for a new trial, defendant challenged trial counsel’s competency and a hearing was held at which both defendant’s trial counsels testified. Following arguments, defendant’s motion for a new trial was denied.

¶ 36 After hearing impact statements from Brewer’s family, and an apology from defendant, defendant was sentenced to 40 years in prison on the murder charge, and two 30-year concurrent terms on each of the home invasion charges, to run consecutive to the sentence for murder, for a total of 70 years in prison. Defendant now appeals.

¶ 37 ANALYSIS

¶ 38 On appeal, defendant argues that (1) the trial court erred in refusing to rule on his motion *in limine* to bar evidence of his prior convictions before trial, (2) defendant received ineffective assistance of counsel where defense counsel failed to request separate verdict forms, and (3) the

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trial court erred in convicting him of three counts of home invasion in violation of the one-act, one-crime rule.

¶ 39 A. Motion *in Limine* to Bar Prior Convictions

¶ 40 Defendant's first argument on appeal is that the trial court erred in refusing to rule on his *Montgomery* motion *in limine* to bar his convictions prior to trial. Specifically, defendant claims that the trial court's refusal to rule on his motion deprived his trial counsel of critical information needed to make a decision regarding (1) whether defendant should testify, (2) whether to tell the jury that defendant would testify, and (3) how to disclose defendant's prior convictions in a way that would best reduce prejudicial effect if defendant decided to testify. The State responds that any error that may have resulted from the trial court's refusal to rule on defendant's motion was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt.

¶ 41 "Generally, evidentiary motions, such as motions *in limine*, are directed to the trial court's discretion, and reviewing courts will not disturb a trial court's evidentiary ruling absent an abuse of discretion." *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 42 In *People v. Montgomery*, 47 Ill. 2d 510, 517 (1971), our supreme court held that prior convictions must be excluded if the trial court determines that the probative value is outweighed by the danger of unfair prejudice. In *Montgomery*, the court adopted then-proposed Federal Rule of Evidence 609 as a guide for trial courts in deciding whether a defendant's prior convictions

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should be admitted to impeach credibility. *Montgomery*, 47 Ill. 2d at 519. Under *Montgomery*, evidence of a witness' prior conviction is admissible to attack the witness' credibility when: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statements, (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later, and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516-17.

¶ 43 The holding in *Montgomery*, however, does not suggest the proper time for ruling on the admissibility of a prior conviction. Noting such omission in *Montgomery*'s holding, our supreme court addressed this issue in *People v. Patrick*, 233 Ill. 2d 62 (2009). Specifically, the *Patrick* court addressed whether a trial court abuses its discretion by delaying its ruling on the admissibility of prior convictions until after defendant's testimony.

¶ 44 As the court in *Patrick* noted, "[a] criminal defendant's right to testify on his own behalf, or not to testify at all, is rooted in the fifth, sixth, and fourteenth amendments of the United States Constitution." *Patrick*, 233 Ill. 2d at 69. A defendant's decision to testify is an important tactical decision as such choice means the defendant faces serious risks of impeachment and may open the door to otherwise inadmissible evidence. *Patrick*, 233 Ill. 2d at 69. Although the decision to testify ultimately belongs to the defendant, it is generally made after consulting counsel. *People v. Medina*, 221 Ill. 2d 394, 403 (2006). "Making the important decision to testify without an opportunity to evaluate the actual strength of the State's evidence restricts the defense in planning its case." *Patrick*, 233 Ill. 2d at 69-70.

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¶ 45 In *Patrick*, our supreme court examined rulings of this court and of other state courts, and agreed in recognizing that a defendant needs an early ruling on *Montgomery* motions, and in acknowledging that in most cases the trial judge will possess the information necessary to conduct a *Montgomery* hearing before trial. *Patrick*, 233 Ill. 2d at 73; see also *People v. Averett*, 381 Ill. App. 3d 1001 (2008) (early rulings provide defendants with information necessary to make critical decisions regarding whether to testify and to gauge the strength of their testimony); *People v. Williams*, 161 Ill. 2d 1, 35 (1994) (early rulings permit defendants and counsel to make reasoned tactical decision in planning the defense by (1) informing the jury whether the defendant will testify, (2) portraying the defendant in a light consistent with prior convictions being admitted or not admitted, and (3) anticipatorily disclosing prior convictions during defendant direct examination to reduce prejudicial effect); *Settles v. State*, 584 So. 2d 1260 (Miss. 1991) (trial court abused its discretion in refusing to consider the admissibility of prior criminal conviction for impeachment purposes when the court had all information necessary to determine the issue before defendant testified); *State v. Ritchie*, 144 Vt. 121 (1984) (trial court committed error in failing to rule on defendant’s motion to exclude evidence of prior convictions because such deferral was prejudicial to defendant by leaving him without a basis on which to decide whether to bring the prior conviction to the attention of prospective jurors); *State v. McClure*, 298 Or. 336 (1984) (trial courts should rule on the admissibility of prior crimes as soon as possible after the issue is raised because it is only after a ruling on the admissibility that the prosecutor and defense counsel can make an informed decision how to effectively try the case).

¶ 46 The *Patrick* court concluded that “a trial court’s failure to rule on a motion *in limine* on

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the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion.” *Patrick*, 233 Ill. 2d at 73. The court reasoned:

“When applying the *Montgomery* rule before trial, a trial judge will certainly be able to determine whether the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statements. Likewise, a trial judge can readily ascertain whether less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement. Moreover, in all but the most complicated cases, a judge will have enough information before trial to weigh the probative value of admitting the prior conviction against the danger of unfair prejudice to the defendant. We acknowledge that there will be some rare cases when a trial court cannot effectively conduct a *Montgomery* balancing test without hearing the defendant’s testimony. But those rare cases should be the exception, and not the rule.” *Patrick*, 233 Ill. 2d at 73.

¶ 47 Finally, the *Patrick* court found that in those rare cases, trial judges must articulate a sufficient basis to support a delay in ruling on a motion *in limine* on the admissibility of prior convictions. *Patrick*, 233 Ill. 2d at 73.

¶ 48 In the case at bar, the trial judge stated:

“I don’t know anything about the facts of the case right now, so I

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will wait and see how the case goes in. And if the defendant does testify, I'll make my ruling while he's testifying. If that becomes the case, just ask to approach before you end your direct examination, and I'll give you my ruling and hear arguments at that time \*\*\*."

¶ 49 We find that, as in *Patrick*, defendant "was at least entitled to have the trial judge base [her] decision to defer a determination on the specific facts of his case, and to determine, before the defendant testified if possible, whether any of the convictions would be excluded as a matter of law." *Patrick*, 233 Ill. 2d at 74. Here, the trial judge was able to determine what the nature of the prior crimes were, and she had enough information before trial to weigh the probative value of admitting the prior convictions against the danger of unfair prejudice to the defendant. Moreover, there is nothing in the record to suggest that this is a rare case conforming to the exception to the rule. Because of the trial court's deferral here, defendant was deprived of the opportunity to make reasoned tactical decisions in planning his defense, and we conclude that it was an abuse of discretion for the trial court to defer ruling on defendant's *Montgomery* motion until after his testimony was heard.

¶ 50 The State argues, however, that even if the trial court abused its discretion in deferring its decision on the motion *in limine*, defendant was not prejudiced by the error. In *Chapman v. California*, 386 U.S. 18, 24 (1967), the Supreme Court determined that when the error is of a constitutional magnitude, a defendant is entitled to a new trial as long as the error was not harmless beyond a reasonable doubt. The *Patrick* court, relying on *Chapman*, "expressly held that the error can be found harmless beyond a reasonable doubt." *People v. Weatherspoon*, 394

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Ill. App. 3d 839, 857 (2009); *Patrick*, 233 Ill. 2d at 75; see also *People v. Holloway*, 393 Ill. App. 3d 317 (2009).

¶ 51 The *Patrick* court, applying the harmless-beyond-a-reasonable-doubt analysis, rejected the State's argument that Patrick was not prejudiced by the error. *Patrick*, 233 Ill. 2d at 75. The court found that Patrick was "substantially prejudiced" because his counsel was unable to properly plan trial strategy and possibly anticipatorily disclose his prior convictions to lessen the prejudicial effect the convictions would have on his credibility. *Patrick*, 233 Ill. 2d at 75. His decision to testify was "critical" because he relied on a theory of self-defense, and knowing whether his prior convictions were going to be used for impeachment was a vital factor that needed to be weighed. *Patrick*, 233 Ill. 2d at 75. The *Patrick* court did not discuss the strength of the evidence, except to note that the "jury's verdict of guilty of second degree murder indicates that, to some degree, the jury believed Patrick was justified in his use of force." *Patrick*, 233 Ill. 2d at 76.

¶ 52 The test to be applied in determining whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). There are three approaches for measuring error under this test: "(1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determining whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *Patterson*, 217 Ill. 2d at 428, citing *People v. Wilkerson*, 87 Ill. 2d 151, 157 (1981). As such, it is apparent

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that the Patrick court did not engage in a detailed discussion of the trial evidence; however, its holding allows us to do so here in applying the harmless-beyond-a-reasonable-doubt analysis. See *Weatherspoon*, 394 Ill. App. 3d at 857-58.

¶ 53 We agree with the State that the error in the instant cause was harmless beyond a reasonable doubt. First, unlike *Patrick* and *People v. Hogan*, 388 Ill. App. 3d 885 (2009), where the defendants relied on theories of self-defense and consent and, therefore, their decision to testify was critical, here, defendant did not rely on any such theory. In addition, unlike the prosecutor in *Patrick* who made a “focused and repeated argument urging the jury not to believe a three-time convicted felon” (*Patrick*, 233 Ill. 2d at 75-76), here, the State did not emphasize defendant’s prior convictions in closing argument. Therefore, we conclude that the error in this case was not as prejudicial as the error made in *Patrick*.

¶ 54 Moreover, the evidence establishing defendant’s guilt was overwhelming in the case at bar. Defendant admitted to talking to Braboy and Williams about robbing Camacho. According to his initial statement, defendant was going to stay outside of Camacho’s house as security. However, defendant admitted all three of them armed themselves with weapons and entered Camacho’s house through the basement on the night in question. They brought the two young boys and Camacho into the attic, whereupon the boys’ parents came home. Defendant admitted that he heard a gunshot downstairs, and then fled the residence. Subsequent to defendant’s arrest, Camacho identified defendant’s voice as one of the voices of the men who invaded his house on the night in question.

¶ 55 Accordingly, as in *Holloway* and *Weatherspoon*, we find that the admission of

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defendant's prior conviction would not have been so crucial a factor in the jury's determination of defendant's guilt that the verdict would have been different had the evidence not been admitted.

¶ 56 Our discussion and determination herein are directly in line with the Illinois Supreme Court's holding in *Mullins*, which reaffirmed the law as established in *Patrick* and *Averett*.<sup>1</sup> See *Mullins*, 242 Ill. 2d at 19-21. Similar to the instant cause, *Mullins* examined whether a trial court's erroneous delay in failing to rule on a motion *in limine* to bar evidence of a defendant's prior convictions when it has sufficient information to otherwise make this ruling could be considered harmless error. Again, citing *Patrick* and *Averett*, the *Mullins* court declared that such an error is not structural and does not require automatic reversal—it is, without question, a matter for harmless error analysis. See *Mullins*, 242 Ill. 2d at 23. Applying this analysis, which we, too, have used herein, to the facts of the case before it, the *Mullins* court found that its cause was distinguishable from *Patrick* since, unlike *Patrick*, there was no emphasis by the State on the defendant's prior convictions and the strength of the evidence against the defendant was strong, especially when viewed in light of the defendant's inconsistent theory on the case. See *Mullins*, 242 Ill. 2d at 25. Accordingly, the *Mullins* court held that any error committed by the trial court in delaying the ruling was harmless beyond a reasonable doubt. See *Mullins*, 242 Ill. 2d at 27.

¶ 57 Just as the *Mullins* court, we also have employed the proper harmless error analysis to the

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<sup>1</sup>Again, for the record, we note that, pursuant to the Illinois Supreme Court's supervisory order issued on September 28, 2011, we were asked to vacate our original decision of January 22, 2010, and to reconsider this cause in light of *People v. Mullins*, 242 Ill. 2d 1 (2011), to determine if a different result is warranted. As we explain herein, we find that it does not.

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circumstances presented before us, pursuant to *Patrick* and *Averett*. We have examined at length defendant's need to testify in his cause, the parties' mention of defendant's prior convictions during argument, and the strength of the evidence against defendant, as well as his theory on the case. See *e.g.*, *Mullins*, 242 Ill. 2d at 23-26. From all this, we hold that any error in the trial court's delay of its ruling on defendant's motion *in limine* here was harmless beyond a reasonable doubt. See *e.g.*, *Mullins*, 242 Ill. 2d at 27 (finding harmless error in same situation).

Accordingly, we conclude that the instant cause merits the same outcome as *Mullins*, and we will not reverse defendant's conviction on this ground.

¶ 58 B. Verdict Forms

¶ 59 Defendant's second argument on appeal is that he was denied effective assistance of counsel where trial counsel did not request separate verdict forms for the various theories of first degree murder under which defendant was charged. Specifically, defendant argues that he was prejudiced because it was reasonably probable that the jury would have convicted him of felony murder had separate verdict forms been given, which would have precluded the trial court from sentencing him to consecutive terms for the underlying felony.

¶ 60 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness, and (2) that he was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *Palmer*, 162 Ill. 2d at 475-76. To satisfy the first prong, a defendant must overcome the presumption that contested conduct

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which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d 849, 859 (2003). The reviewing court must remember to give great deference to the performance of counsel. *Strickland*, 466 U.S. at 691. Such deference to counsel's conduct should be given within the context of trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). To establish the second prong of prejudice, a defendant must show that there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different. *People v. Easley*, 192 Ill. 2d 307, 317 (2000).

¶ 61 In Illinois, the offense of first degree murder is statutorily defined as:

“(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

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

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

(3) he is attempting or committing a forcible felony other than second degree murder.” 720 ILCS 5/9-1(a) (West 2006).

¶ 62 A defendant cannot be found guilty of both felony murder and the predicate felony.

*People v. Morgan*, 197 Ill. 2d 404, 447 (2001). The purpose of jury instructions is to convey to

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the jury the correct principles of law applicable to the evidence submitted so that the jury may reach a correct conclusion according to the law and the evidence. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004).

¶ 63 Our supreme court recently resolved an issue similar to the one at bar in *People v. Smith*, 233 Ill. 2d 1 (2009), in which the court considered the consolidated appeals of defendants Leratio Smith and Adam Titus. Smith was charged with first degree murder (intentional murder, knowing murder, and felony murder predicated on armed robbery and attempted armed robbery), armed robbery, and attempted armed robbery. See *Smith*, 233 Ill. 2d at 5. Defense counsel requested the court provide the jury with separate verdict forms, noting that a conviction for first degree murder based on the commission of a felony would have specific sentencing implications. See *Smith*, 233 Ill. 2d at 8-9. The court denied the request, and the jury returned a general verdict of guilty of first degree murder. See *Smith*, 233 Ill. 2d at 9. It also found the defendant guilty of armed robbery and attempted armed robbery. See *Smith*, 233 Ill. 2d at 9.

¶ 64 At Smith's sentencing, the court noted there was no doubt that the defendant intentionally killed the victim, and it imposed a sentence of 60 years' imprisonment for first degree murder, a concurrent term of 20 years' imprisonment for armed robbery, and a consecutive term of 8 years' imprisonment for attempted armed robbery. See *Smith*, 233 Ill. 2d at 9-10.

¶ 65 On appeal, this court noted that the defendant would not have been eligible for a consecutive sentence on the attempted armed robbery conviction if the jury had found him guilty of felony murder premised on attempted armed robbery, and not guilty of both intentional and knowing murder. See *Smith*, 233 Ill. 2d at 10. We held:

“ ‘[W]hen a defendant who is charged with intentional or knowing murder and felony murder requests a separate verdict form for felony murder and such a request has a basis in the evidence presented at trial, the separate verdict form must be given or consecutive sentences cannot be imposed based on the offense underlying the felony murder, pursuant to section 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-8/4(a) (West 2004)).’ ” *Smith*, 233 Ill. 2d at 10 (quoting *People v. Smith*, 372 Ill. App. 3d 762, 771-72 (2007)).

¶ 66 The other defendant, Titus, was charged with intentional murder, knowing murder, and felony murder, and one count of armed robbery for the robbery and shooting death of a pizza delivery man. See *Smith*, 233 Ill. 2d at 10. Like *Smith*, Titus requested separate verdict forms for each of the counts of murder charged. See *Smith*, 233 Ill. 2d at 13. The trial court denied the request, and the jury returned general verdicts of guilty of first degree murder and armed robbery. See *Smith*, 233 Ill. 2d at 13. The trial court sentenced Titus to 38 years’ imprisonment for first degree murder and a consecutive 18-year sentence for armed robbery. See *Smith*, 233 Ill. 2d at 13. On appeal, a different division of this court, following our decision in *Smith*, held that the trial court erred when it refused the defendant’s request for separate verdict forms. See *Smith*, 233 Ill. 2d at 13. The court affirmed Titus’ convictions but modified his consecutive sentence for armed robbery to run concurrently with his sentence for murder. See *Smith*, 233 Ill. 2d at 13.

¶ 67 Our supreme court, hearing these consolidated appeals, noted that “first degree murder is a single offense and, for that reason, it is constitutionally permissible to use a general verdict

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form, even when murder is charged in a multicount indictment based on different theories.”

*Smith*, 233 Ill. 2d at 14 (citing *Schad v. Arizona*, 501 U.S. 624 (1991)). The different theories embodied in the first degree murder statute are simply differing ways to commit the same crime of first degree murder. *Smith*, 233 Ill. 2d at 16 (citing *People v. Cooper*, 194 Ill. 2d 419, 429 (2000)). Accordingly, “because first degree murder is a single offense, it is constitutionally permissible for jurors to return a general verdict of guilty even if there is no juror unanimity with regard to *the means* by which the murder was committed.” (Emphasis in original.) *Smith*, 233 Ill. 2d at 16 (citing *Schad*, 501 U.S. at 631-32).

¶ 68 Nonetheless, there may be different sentencing consequences based on the specific type of murder proven. *Smith*, 233 Ill. 2d at 16-17. For example, a defendant cannot be convicted of both felony murder and the predicate felony, but there is no such limitation where the defendant is convicted of intentional or knowing murder. *Smith*, 233 Ill. 2d at 17 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)).

¶ 69 The State in the case at bar urges us to find that, although defendant’s sentence would have been different had defendant been found guilty only of felony murder and not of knowing or intentional murder, we should nonetheless apply the “one good count rule” to uphold the trial court’s determination that defendant was convicted of intentional murder. The “one good count rule” is a legal construct “ [w]here an indictment contains several counts arising out of a single transaction, and a general verdict is returned[,] the effect is that the defendant is guilty as charged in each count[.]’ ” *People v. Thompkins*, 121 Ill. 2d 401, 455 (1988) (quoting *People v. Lymore*, 25 Ill. 2d 305, 308 (1962)). However, a “general verdict would not be sufficient if the defendant

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was charged with an offense and the ‘degree of the offense’ was dependent on some factor not specifically found by the jury.” *Smith*, 233 Ill. 2d at 20; *Armstrong v. People*, 37 Ill. 459, 464 (1865). Courts have held that, where a general murder verdict is delivered for a defendant who is charged with murder in multiple counts alleging intentional, knowing, and felony murder, the defendant is presumed to be convicted of the most serious offense of intentional murder, and judgment and sentence should be entered on that count. *Smith*, 233 Ill. 2d at 20-21 (citing *People v. Davis*, 231 Ill. 2d 349, 358 (2008)).

¶ 70 However, the *Smith* court affirmed the appellate court’s finding that the trial courts had erred in refusing defendants’ requests for separate verdict forms, and held that where “specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, favorable to the defendant, specific verdict forms must be provided upon request and the failure to provide them is an abuse of discretion.” *Smith*, 233 Ill. 2d at 23.

¶ 71 As we held in *People v. Braboy*, 393 Ill. App. 3d 100 (2009), we find *Smith* inapposite to the case at bar, where, because counsel did not request separate verdict forms, the trial court was not asked to rule on whether separate verdict forms should be provided to the jury. The *Smith* case as it stands today is limited to situations in which the trial court actually denied a request for separate verdict forms. See *Smith*, 233 Ill. 2d at 23 (where “specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, favorable to the defendant, specific verdict forms must be provided *upon request* and the failure to provide them is an abuse of discretion” (emphasis added)). If our supreme court wishes to expand this to a mandatory requirement that knowing, intentional, and felony murder always have separate

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verdict forms due to the different sentencing consequences, then it can do so. It is not our place to expand the holding of *Smith*, as defendant urges us to do.

¶ 72 Here, defendant’s claim fails because he is unable to show the requisite deficient performance of counsel. Specifically, defendant has failed to overcome the presumption that counsel’s decision not to request specific verdict forms was trial strategy. See *Martinez*, 342 Ill. App. 3d at 859. Defendant merely states in his brief that “[t]rial counsel had no strategic reason not to request a separate verdict form for felony murder.” He fails to point us to any case law or offer persuasive argument to the end that defense counsel would not choose—as a part of trial strategy—to submit a general verdict form to the jury. Moreover, we find counsel’s decision to proceed with a general verdict form reasonable where the law did not and does not place a mandatory burden on counsel to request separate verdict forms. See *Braboy*, 393 Ill. App. 3d at 108.

¶ 73 C. One-Act, One-Crime

¶ 74 Defendant next contends that two of his three convictions and sentences for home invasion must be vacated because they arose out of the same act in violation of the one-act, one-crime rule. We agree.

¶ 75 In deciding whether two of defendant’s convictions must be vacated, we first determine whether defendant’s conduct constituted a single act or separate acts. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). If the conduct in question constituted a single act, the conviction in question must be vacated. *Rodriguez*, 169 Ill. 2d at 186. Under the one-act, one-crime rule, an “act” is defined as “any overt or outward manifestation which will support a different offense.”

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*King*, 66 Ill. 2d at 566. A person commits home invasion where, in relevant part, he enters a dwelling place without authority when he knows or has reason to know that one or more persons are present, and uses force or threatens the imminent use of force upon a person within. 720 ILCS 5/12-11 (West 2006). The gravamen of a home invasion offense is unauthorized entry. *People v. Taylor*, 318 Ill. App. 3d 464, 472 (2000). A defendant may be convicted of only one count of home invasion where the defendant made but one entry into one dwelling, regardless of the number of occupants inside the dwelling. *People v. Cole*, 172 Ill. 2d 85, 102 (1996).

¶ 76 Here, defendant engaged in two crimes, *i.e.*, murder and home invasion. Regarding the home invasion, defendant entered the house at 6125 South Artesian Avenue, where Camacho, Ulyses Brewer, and Robert Brewer all lived, only one time. Accordingly, two of the convictions must be vacated.

¶ 77 When a defendant is convicted of multiple crimes for the same act, the lesser offense is merged into the greater offense. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). The legislature determines the relative gravity of all offenses. *Lee*, 213 Ill. 2d at 229. Here, defendant has three convictions for home invasion, all under Section 12-11(a)(3) of the Illinois Criminal Code of 1961 (720 ILCS 5/12-11(a)(3) (West 2006)). Accordingly, we vacate defendant's convictions and sentences for two of the home invasion counts. We affirm defendant's conviction and sentence for the remaining home invasion count.

¶ 78 **CONCLUSION**

¶ 79 For the aforementioned reasons, we affirm the judgment of the circuit court of Cook County, vacate two of defendant's convictions for home invasion, and, pursuant to our authority

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under Supreme Court Rule 615(b)(1), correct the mittimus. 134 Ill. 2d R. 615(b)(1); *People v.*

*McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 80 Affirmed in part and vacated in part; mittimus corrected.