

NOTICE
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2011 IL App (4th) 100024-U

Filed 11/9/11

NO. 4-10-0024

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
BRANDON R. SHAW,)	No. 08CF883
Defendant-Appellant.)	
)	Honorable
)	Lisa Holder White,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Appleton and Pope concurred.

ORDER

¶ 1 *Held:* We affirm the trial court's judgment as modified as the court did not err by denying defendant's request to instruct the jury on self-defense and involuntary manslaughter; we remand for amendment of the sentencing judgment to ensure defendant receives credit due to him for time served prior to sentencing.

¶ 2 In July 2009, a jury found defendant, Brandon R. Shaw, guilty of first degree murder. In October 2009, the trial court sentenced defendant to 55 years in prison. Defendant appeals, arguing the court erred by (1) denying his request for instructions on self-defense and involuntary manslaughter and (2) mistakenly recording the dates of his presentence incarceration and as a result giving him insufficient credit toward his sentence. We affirm as modified and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On June 30, 2008, Marcelle Brown died in the south alley of the 1300 block of

East Prairie Street in Decatur, between Prairie and East Main Street. A blood trail ending at Brown's body was traced to a fence separating the alley from the densely vegetated backyard of the house at 1346 Main. It was later determined Brown was killed when a bullet passed through his thigh, severing his femoral artery and causing massive, immediate, fatal blood loss. The lethal bullet was not recovered. However, numerous shell casings and a live round were found strewn between the front yard of the residence at 1315 Main and the side yard at 1346 Main. Gunshots penetrated a vehicle parked in the driveway at 1346 Main and the residence there, such that a woman inside was struck in the chest by plaster dislodged from an interior wall by a bullet.

¶ 5 On July 7, 2008, defendant was arrested in Indianapolis, Indiana, and was returned to Macon County on an Illinois arrest warrant for Brown's murder. On July 10, 2008, the State charged defendant with five counts of first degree murder. 720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2008). The State sought a sentencing enhancement of an additional term of imprisonment of 25 years or up to a term of natural life, alleging defendant personally discharged a firearm that proximately caused Brown's death. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008).

¶ 6 Defendant was tried before a jury in June and July 2009. State witnesses testified to the manner of Brown's death and the location of various pieces of physical evidence—shell casings and bullet holes, for example. The State's occurrence witnesses observed defendant's actions on June 30, 2008. Sometime that afternoon, defendant began arguing with his then-ex-girlfriend, Jacquelyn "Nikki" Young, while riding in her car in the 1200 block of Main, where Brown lived with his girlfriend, Rose Walker. Young was, at the time, romantically involved with Brown, and she repeatedly refused defendant's pleas to take him back. Defendant got out of

Young's car while they were passing Walker's house. He told Walker about Brown's ongoing relationship with Young. Young drove off, and defendant walked away.

¶ 7 This spat between defendant and Young was not the first conflict regarding Young's relationships with defendant and Brown. Several days earlier, while defendant was at Young's residence, defendant and Brown had exchanged threats over the telephone. In addition, earlier on June 30, 2008, Brown had told Victoria Lawrence that, if defendant did not stop "messaging with him," he had a gun and was not afraid to use it. Lawrence, who was dating defendant's brother, Terrance, later conveyed this threat to defendant. Defendant told Lawrence he was not worried.

¶ 8 When Brown returned home on June 30, 2008, Walker confronted him about Young. Brown, who seemed angered, left in a car. He found defendant sitting on Terrance's porch at 1315 Main. When they saw Brown approaching, Terrance passed a handgun to defendant. Defendant gestured toward Brown as Brown drove up. Brown suddenly stopped the car and got out. Defendant and Brown began shouting at and walking toward each other. When Brown was approaching, defendant produced the gun from the waistband of his pants. He fired shots into the air and toward the ground.

¶ 9 Witnesses gave differing accounts of the events that followed. According to defendant's testimony and his statement to the police following his arrest, defendant shot into the air and at the ground to scare Brown away. Brown began retreating toward his car where defendant thought he had a gun. Defendant followed Brown, continuing to shoot into the air and toward the ground. Brown changed course and proceeded down the street toward 1346 Main. Defendant followed, up to the edge of the front yard but no farther than the sidewalk. He saw

Brown retreat around the corner of the house at 1346 Main, where he lost track of him due to the overgrowth in the backyard there. He thought he heard Brown hop a fence. He fired several shots, pointing the gun toward where Brown was when defendant had last seen him. In his statement to police following his arrest, defendant claimed Brown's being struck was an accident. Defendant did not see Brown when he was hit. By the time he was done shooting, defendant's weapon had no remaining ammunition.

¶ 10 According to a witness for the State, in contrast, after firing several shots into the air and at the ground, defendant pointed the gun at Brown when Brown was within a few feet of defendant, when defendant and Brown were still near Terrance's front yard. This witness testified Brown started running away and defendant gave chase; defendant fired at Brown while chasing him around the side of the house at 1346 Main, where they passed out of the witness's sight. Lawrence, who testified for the State, stated she, too, saw defendant chase and shoot at Brown until they turned the corner of the house at 1346 Main. She continued hearing shots, although she could no longer see defendant or Brown.

¶ 11 After the shooting stopped, defendant returned the gun to Terrance (who later hid it in a friend's yard) and fled to Indianapolis.

¶ 12 Thomas Lilly, who lived in the 1300 block of Prairie, testified for defendant. According to Lilly, Brown jumped over the fence, emerging from the backyard at 1346 Main. He tossed a handgun into a hedge before crawling into the alley, where he collapsed and died moments later. Lilly testified he told police who arrived at the scene about the gun; according to him, an officer retrieved the gun and placed it in the trunk of his squad car. Lilly also testified he saw a red or burgundy car on a street at the end of the alley around the time Brown died.

¶ 13 Lilly's testimony was called into question by inconsistencies with two interviews regarding the incident. During the first, Lilly did not mention the gun he saw Brown discard, even when asked if he had any additional statements; during the second, Lilly mentioned the gun but later relented, claiming he must have been mistaken or confused about the presence of a gun. Further, no other witness present in the alley when Brown died saw him discard a weapon. Cynthia Hammell, who was dating Lilly at the time of Brown's death and who was present in the alley, testified in rebuttal that she had since broken up with Lilly because she "[c]ouldn't put up with his lies no more."

¶ 14 Quinton Carson, another resident of the 1300 block of Prairie, also testified for defendant. Carson heard three shots before going onto his porch. From his porch, he saw a burgundy car passing by the alley on the nearest perpendicular street. The driver of the car was holding a gun out the window. He also observed Brown on the ground in the alley. Carson went back inside. As he went inside, he saw the car speed off. Once inside, he heard four or five more shots. On cross-examination, the State impeached Carson with prior inconsistent statements. These statements were presented to the jury in rebuttal.

¶ 15 Following the evidence, the trial court held a jury-instruction conference. The parties agreed to have the jury instructed on second degree murder, on the theory that the jury could find defendant unreasonably, subjectively believed the use of deadly force was necessary to protect himself from imminent death or great bodily harm. See 720 ILCS 5/9-2(a)(2) (West 2008). The court denied defendant's requests to have the jury instructed on self-defense and involuntary manslaughter, finding these instructions were not warranted by the evidence. In connection with instructions on second degree murder, the court instructed the jury (1) that the

State was required to prove the absence of circumstances at the time of the killing that would justify the killing and (2) on the circumstances in which a person is justified in using deadly force in self-defense.

¶ 16 On July 8, 2009, the jury found defendant guilty of first degree murder. On October 29, 2009, the trial court denied defendant's motion for a new trial and sentenced defendant, pursuant to the enhancement, to 55 years' imprisonment. When pronouncing defendant's sentence, the court indicated defendant would receive credit for time served in presentence custody from July 8, 2008, through October 28, 2009. The written sentencing judgment indicated defendant was to receive credit for time served from July 8, 2009, through October 28, 2009. On January 6, 2010, the court denied defendant's amended motion to reduce sentence.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 A. Jury Instructions

¶ 20 Defendant first argues the trial court erred by refusing to instruct the jury on self-defense and involuntary manslaughter. In general, a party is entitled to a jury instruction on self-defense whenever such a theory is supported by some evidence, however slight. *People v. Everette*, 141 Ill. 2d 147, 157, 565 N.E.2d 1295, 1299 (1990). A defendant is entitled to a jury instruction on an uncharged, lesser offense if (1) the lesser offense is included in the offense charged and (2) some evidence was presented at trial that would allow the jury to find the defendant guilty of the lesser offense and not guilty of the greater offense. *People v. Hamilton*, 179 Ill. 2d 319, 323-24, 688 N.E.2d 1166, 1169 (1997); see also *People v. Jackson*, 372 Ill. App.

3d 605, 613, 874 N.E.2d 123, 130 (2007) ("An instruction on a lesser offense is justified when there is some *credible* evidence to support the giving of the instruction." (Emphasis added.)).

We review the trial court's giving or refusal of a jury instruction for an abuse of discretion.

People v. Jones, 219 Ill. 2d 1, 31, 845 N.E.2d 598, 614 (2006). A trial court's failure or refusal to give a tendered instruction warranted by the evidence constitutes an abuse of discretion. *Id.*

¶ 21

1. *Self-Defense*

¶ 22 Defendant argues the trial court erred by refusing to instruct the jury on self-defense. However, the record shows the court, after initially rejecting defendant's request for such an instruction during the jury-instruction conference, actually instructed the jury on self-defense. As the requested instruction was ultimately given, the error defendant alleges either did not occur or was corrected by the court before it could result in prejudice to defendant.

¶ 23

The trial court instructed the jury on the offense of second degree murder based on a defendant's unreasonable, subjective belief that his use of deadly force was justified. In addition, the court instructed the jury on the circumstances that legally justify a person's use of deadly force in self-defense. See Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th 2000) (hereinafter IPI Criminal 4th). This instruction stated, in relevant part, "[A] person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." These instructions were properly accompanied by IPI Criminal 4th No. 7.06B, which added the following proposition to the elements of murder that the State was required to prove beyond a reasonable doubt: "That the defendant was not justified in using the force which he used." See IPI Criminal 4th No. 24-25.06A (Committee Note) (requiring such an instruction

whenever IPI Criminal 4th No. 24-25.06 is given); *Jackson*, 372 Ill. App. 3d at 615, 874 N.E.2d at 131 (requiring such an instruction whenever the jury is instructed on second degree murder). The record refutes the premise of defendant's argument on appeal—that the jury was not instructed on self-defense. Any further instruction on justification would have been cumulative and, thus, was not required.

¶ 24 Nevertheless, defendant maintains the trial court's ruling that a self-defense instruction was not warranted deprived him of the opportunity to present a justification defense in closing argument. To the contrary, the jury was instructed that the burden of proving defendant's actions were not justified fell on the State. See IPI Criminal 4th No. 7.06B. As this court stated in *Jackson*, 372 Ill. App. 3d at 615, 874 N.E.2d at 131, a jury instructed pursuant to IPI Criminal 4th No. 7.06B "could conceivably find the defendant's actions were justified and that he was accordingly not guilty, even [where] the only argument was that his belief that his conduct was justified was unreasonable and he was guilty of second degree murder." Nothing prevented defendant from arguing—or the jury from finding—under these instructions, that the State failed to carry its burden in light of defendant's supposed use of force in self-defense.

¶ 25 Indeed, both parties referred to justification in their closing arguments. The State, going through the propositions it had to prove to sustain a conviction of first degree murder, read the jury the definition of justification provided in IPI Criminal 4th No. 24-25.06. It argued that the circumstances of the shooting "would [not] support a belief on the defendant's part that he was imminently at that second in danger of receiving death or great bodily harm." In his closing argument, defendant responded:

"If you believe that [defendant] thought he was in danger

but you believe that that thought was unreasonable, that would be Second Degree Murder, not First Degree. If you thought that that thought was reasonable, you have other options in the verdict as to what to do."

The jury instructions cannot be blamed for defendant's failure to argue wholeheartedly that he was not guilty because Brown's killing was justified by defendant's need to defend himself.

¶ 26 Defendant points to no specific instruction he requested, regarding self-defense, that the trial court denied or failed to relate to the jury. Instead, he argues generically about the applicability of a self-defense theory to his case. However, regardless of the merits of his argument, the court simply did not err in the manner defendant alleges. Accordingly, the relief defendant requests with respect to this alleged error is inappropriate.

¶ 27 *2. Involuntary Manslaughter*

¶ 28 Next, defendant argues the trial court erred by refusing his tendered jury instruction on the lesser offense of involuntary manslaughter. Because no evidence would have allowed the jury to convict defendant of involuntary manslaughter rather than first degree murder, we disagree. As we find no evidence warranting the requested instruction, we need not consider whether involuntary manslaughter was included in the offense of first degree murder as charged in this case.

¶ 29 "The basic difference between involuntary manslaughter and first degree murder is the mental state that accompanies the conduct resulting in the victim's death." (Internal quotation marks omitted.) *Jackson*, 372 Ill. App. 3d at 613, 874 N.E.2d at 130. A person who commits first degree murder "knows his acts 'create a strong probability of death or great bodily

harm.' 720 ILCS 5/9-1(a)(2) (West 2000)." *Id.* A person who commits involuntary manslaughter, as opposed to murder, causes the death of another while "recklessly" performing acts that are "likely to cause death or great bodily harm." 720 ILCS 5/9-3(a) (West 2008).

¶ 30 "Reckless conduct generally involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm." (Internal quotation marks omitted.) *Jackson*, 372 Ill. App. 3d at 613, 874 N.E.2d at 130. "[A] defendant may act recklessly where he commits deliberate acts but disregards the risks of his conduct." *People v. DiVincenzo*, 183 Ill. 2d 239, 252, 700 N.E.2d 981, 988 (1998). "However, 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." *Jackson*, 372 Ill. App. 3d at 613-14, 874 N.E.2d at 130.

¶ 31 In this case, no evidence suggests defendant recklessly caused Brown's death. The only evidence regarding the trajectory of the fatal bullet suggested the bullet struck Brown directly while it traveled roughly parallel to the ground. Eyewitnesses and defendant himself testified defendant initially shot into the air and at the ground; none of these shots caused Brown's death. Several witnesses testified defendant fired at Brown while chasing him. Defendant testified that, after Brown had passed from his sight, defendant shot in the direction of where Brown had been. Nothing suggested any of these shots was accidental or inadvertent. The only coherent version of these facts is that Brown was killed by a deliberate shot from defendant's weapon pointed in Brown's direction. Even accepting defendant's contention that he did not intend to kill Brown but merely to scare him away, defendant's acts do not constitute

involuntary manslaughter. As no credible evidence would have supported a verdict convicting defendant of involuntary manslaughter rather than first degree murder, the trial court did not err in refusing to instruct the jury on this lesser offense.

¶ 32 B. Sentencing Credit

¶ 33 Defendant also argues the trial court erroneously granted him insufficient credit toward his sentence for time spent in presentence custody. The State concedes this issue.

¶ 34 We review questions of credit for time spent in presentence custody *de novo*. *People v. Evans*, 391 Ill. App. 3d 470, 472, 907 N.E.2d 935, 937 (2009). Normal rules of forfeiture do not apply to claims that insufficient credit was given, and such arguments may be raised for the first time on appeal. *People v. Roberson*, 212 Ill. 2d 430, 440, 819 N.E.2d 761, 767 (2004).

¶ 35 A defendant "shall be given credit on the determinate sentence *** for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2010). A defendant is given one day of credit for each day or part of a day spent in custody before the date of sentencing. *People v. Morrison*, 298 Ill. App. 3d 241, 243, 698 N.E.2d 671, 673 (1998). Custody is said to begin when a defendant is arrested for an offense, regardless of whether he has been formally charged with that offense. *Roberson*, 212 Ill. 2d at 439, 819 N.E.2d at 766.

¶ 36 In this case, defendant was taken into custody on July 7, 2008, and was sentenced on October 29, 2009. Accordingly, he is entitled to credit toward his sentence for time served from July 7, 2008, through October 28, 2009, inclusive. However, when it pronounced defendant's sentence, the trial court stated the initial date of custody was July 8 (not July 7),

2008. Further, the written sentencing judgment indicates defendant is to receive credit toward his sentence for time spent in custody from July 8, 2009 (not 2008), through October 28, 2009. The written sentencing judgment should thus be amended to reflect credit for time served from July 7, 2008, through October 28, 2009—a total of 479 days' credit.

¶ 37

III. CONCLUSION

¶ 38 For the foregoing reasons, we affirm the trial court's judgment as modified with respect to sentencing credit. We remand and direct the court to issue an amended written sentencing judgment to grant defendant credit for time served in presentence custody from July 7, 2008, through October 28, 2009. As part of our judgment, we award the State its \$50 assessment against defendant as costs of this appeal.

¶ 39

Affirmed as modified; cause remanded with directions.