

No. 1-11-1716

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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. 07CR24881 (02)
	)	
DEVOIS TURNER,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court  
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant's conviction upheld where the jury received proper jury instructions; defendant's mittimus corrected to include an additional day of presentence credit.

¶ 2 Following a jury trial, defendant Devois Turner was convicted of first degree murder and sentenced to 27 years' imprisonment. Defendant challenges his conviction and the sentence imposed thereon, arguing that the trial court erred in refusing to instruct the jury on the lesser offense of involuntary manslaughter and in refusing to provide the jury with an addicit

1-11-1716

instruction. Defendant also challenges the number of days of presentencing incarceration credit to which he is entitled. For the reasons explained herein, we affirm the judgment of the circuit court and correct the mittimus.

¶ 3

### I. BACKGROUND

¶ 4 On September 23, 2007, 87-year old Joe Miller was found dead in his apartment and money and a handgun were missing from his residence. Defendant and his former girlfriend, co-defendant Malia Nelson, were subsequently arrested and charged with various offenses in connection with Miller's death, including first-degree murder, armed robbery, home invasion, and felony murder.

¶ 5 Prior to defendant's trial, Nelson reached an agreement with the State to plead guilty to armed robbery in exchange for a 17-year prison sentence and her testimony against defendant. Defendant ultimately elected to proceed by way of a jury trial.

¶ 6 At trial, Malia Nelson acknowledged that her testimony against defendant was a component of her plea agreement that she reached with the State and that she was currently serving a 17-year prison sentence after pleading guilty to one count of armed robbery against Miller. Pursuant to Nelson's understanding, the agreement would be void if her testimony against defendant was not completely truthful.

¶ 7 Nelson testified that at the time of the offense, she had been dating defendant for approximately one year and had known Miller for about seven years. Nelson indicated that she considered Miller a good friend, but acknowledged that their relationship was "semi-sexual." In 2007, Miller was living in a fourth-floor apartment in a senior citizen building located near the

1-11-1716

intersection of 13th Street and Harding Avenue. Nelson had been to the building on 20 to 30 occasions and was familiar with the building's layout as well as the procedures for visiting residents who lived there. Nelson did not have a key to the building or to Miller's apartment and she explained that she would have to call Miller to buzz her into the building. Although there was a security guard in the lobby, Nelson indicated that she was not always required to show identification each time she came to the building. She would, however, have to sign a log at the security desk in the lobby.

¶ 8 Nelson further testified that during the course of their friendship, Miller provided her with money from time to time. She knew that Miller kept his money and a gun in a locked cabinet in his bedroom. Approximately one month prior to Miller's death, Nelson admitted that she had stolen \$3,500 from him. She had removed the keys from Miller's pants pocket while he was sleeping and used them to unlock the cabinet where he kept his money. Although Miller had given Nelson money on previous occasions, she acknowledged that he had never given her a sum as large as \$3,500.

¶ 9 On the evening of September 22, 2007, Nelson was with defendant in her apartment discussing how they could get money to purchase drugs. They talked about stealing money from Miller since Nelson had been able to take money from him before. Nelson agreed to try to get money from Miller again. This time, however, her plan was simply to ask Miller for money. Defendant told her that he wanted to accompany her in case they needed to scare Miller into giving them money, but Nelson told him, "no, I'm not going to let you hurt my friend." Defendant then promised her that he would not hurt Miller, but Nelson said she would go by

1-11-1716

herself and started to walk to Miller's apartment alone.

¶ 10 As she continued walking to Miller's apartment, defendant caught up with Nelson and insisted on coming with her. Nelson then told defendant that she changed her mind and did not want to go to Miller's house, but defendant accused her of trying to hide something from him. Defendant then dragged and pulled her in the direction of Miller's apartment building. When they reached the building, Nelson went into the lobby alone and Miller buzzed her in. She told defendant that she would "handle this by [her]self," but defendant grabbed her and pushed her into the building. Nelson and defendant then both signed into the building's log book. Nelson used the name L. Lewis, a name she had used in the past when visiting Miller. She did not know what name defendant used.

¶ 11 Nelson and defendant then took the elevator to Miller's apartment on the fourth floor. Miller answered the door in his pajamas and when he saw defendant, he told Nelson to come back the following day. Nelson then asked to use the bathroom and left both men standing in the kitchen. When she came back, Nelson observed Miller sitting in a chair. Defendant was standing behind Miller with one arm around Miller's neck and the other holding a gun to the right side of his neck. Nelson asked defendant what he was doing and he ordered her to "shut the fuck up, [and] let [him] handle it." Defendant then asked Miller where he kept his money and Miller indicated that he did not have any money in his apartment. In response, defendant put a hand over Miller's mouth and Miller started struggling against him, trying to pull defendant's hand down.

¶ 12 While Miller continued struggling, defendant ordered Nelson to look for Miller's money.

1-11-1716

Nelson started looking around the apartment for Miller's keys because she knew he kept his money in a locked cabinet in his bedroom. She searched Miller's pants, his dresser drawers, his closet, and under his mattress but was unable to find the keys. Nelson then took a knife from the kitchen and used it to try to break into the locked cabinet. She cut her finger in the process and was ultimately unable to open the cabinet.

¶ 13 While she was in Miller's bedroom, Nelson was able to hear Miller calling her name. He sounded frightened. When Nelson returned to the kitchen, she saw defendant forcing Miller down to the floor. Miller continued to struggle against him. When defendant got Miller to the floor, Nelson noticed that his eyes were closed. She started shaking him, trying to get him to wake up. Miller was unresponsive and Nelson feared that he was dead. When Nelson told defendant, "he is dead, he is dead," defendant responded that Miller would be fine and ordered her to bind his hands. Defendant threatened to shoot her if she did not follow his instructions. While Nelson was preoccupied with Miller, defendant was able to get into Miller's locked cabinet. Nelson then grabbed a phone cord and used it to tie Miller's hands in front of him. After Miller was secured, Nelson and defendant left his apartment together.

¶ 14 Although she and defendant walked past the security desk in the lobby neither signed out. When Nelson and defendant returned to her house, she learned that defendant had taken money, a gun, and a Crown Royal bag filled with coins from Miller's cabinet. They used the money to buy drugs and discussed selling Miller's gun. Defendant sold the gun two weeks later for \$150. Nelson was subsequently arrested in connection with this case on November 13, 2007, and taken to the police station. She explained that she did not turn herself in prior to that date because she

1-11-1716

was scared. Nelson then identified multiple State exhibits including the sign-in log, surveillance video, still pictures of her and defendant entering Miller's apartment building, and photographs of the inside of Miller's apartment.

¶ 15 On cross-examination, Nelson recounted her history of substance abuse. On the date of Miller's death, she was spending \$50 to \$100 daily on cocaine and was ingesting heroin on occasion as well. She had been using cocaine for approximately 25 years and had used cocaine on the day of the offense. Nelson further acknowledged that she had been convicted of narcotics offenses seven times and had served prison time in connection with three of her prior offenses. In 2007, Nelson was not employed and explained that she would sometimes clean Miller's apartment in exchange for money. She would also have sex with Miller in exchange for money. Miller was aware of her drug use and wanted to help her stop using narcotics.

¶ 16 Nelson admitted that she expected the police to come arrest her for Miller's death because she left her eyeglasses at Miller's apartment, left her fingerprints on various surfaces in his apartment and cut her hand on a knife when she was trying to get into his locked cabinet. She indicated that she was not aware that Miller had died until September 23, 2007. When she was initially arrested, she admitted that she was not entirely truthful with the detectives who interviewed her. Specifically, Nelson told Detectives Swinkle and Garcia that she and defendant had gone to Miller's apartment to tell him that she and defendant were getting married and to ask Miller for money for the wedding. She did not recall telling the detectives that she had wanted to go into Miller's apartment alone and that defendant followed her and pushed her into the building.

1-11-1716

¶ 17 Leroy Miller, the victim's son, testified that on September 22, 2007, his father, a retired construction worker, was living in a fourth-floor apartment in a senior citizen housing building. At approximately 11 a.m. that day, Leroy arrived at his father's apartment to watch a baseball game on television. After leaving his father's apartment later that afternoon, Leroy called his father at approximately 7:30 p.m. to remind him to turn off his crock pot.

¶ 18 The following day, Leroy attempted to contact his father to ask him if he needed anything from the store. Leroy placed multiple calls to his father's cell phone and his landline but his father did not answer either phone. After not being able to get a response, Leroy went to his father's apartment building. He observed his father's 1998 Cadillac parked outside the building, but received no response when he attempted to use the buzzer in the lobby to contact him in his apartment. As a result, Leroy spoke to the security guard in the lobby and voiced his concerns. Leroy and the guard both went up to his father's apartment. The door was locked and the guard used a master key to open the door.

¶ 19 When Leroy entered the apartment, he noticed that the kitchen table had been moved and his father's bathroom was in disarray. His father was lying on the kitchen floor with his hands bound above his head. Leroy immediately ran to his father to check for signs of life but he did not find any and placed a call to 911. After paramedics and police officers arrived, Leroy was informed that his father was dead. Leroy talked to several police detectives later that day and was shown security footage taken from his father's building. The surveillance video showed a male and female exit the elevator, walk down the hall, and knock on the door to his father's apartment. Leroy told the detectives that he recognized the female in the surveillance video

1-11-1716

because she was a friend of his father. Although he could not remember the woman's name, Leroy indicated that he had seen her at his father's apartment on several occasions and had also seen her around the neighborhood. Leroy recalled that she had once asked him for a ride home and that he dropped her off at her residence located in the 1800 block, about two blocks west of Pulaski Avenue. Leroy did not recognize the male in the surveillance video.

¶ 20 The next day, Leroy accompanied police to his father's apartment. He noticed that a telephone that his father usually kept in his bedroom had been moved to his living room. Leroy also identified items that he believed to be missing from his father's filing cabinet including silver dollars, fifty cent pieces and a handgun. While he was in his father's bedroom, Leroy also observed a hammer and several knives laying around. Thereafter, on November 13, 2007, Leroy went to the police station to view a physical lineup. He identified Nelson from the lineup as the same woman he had seen in the surveillance footage.

¶ 21 On cross-examination, Leroy indicated that although his father appeared to be in good health, his father sometimes relied a cane to move around. Leroy also confirmed that he did not view the contents of his father's filing cabinet on September 22, 2007.

¶ 22 Detective Edward Carroll testified that in September 2007, he was a member of the Chicago police department's violent crimes unit. On September 23, 2007, he and his partner, Detective James Egan were assigned to investigate Miller's death. Detectives Carroll and Egan went inside of Miller's apartment and observed the victim and his apartment. Once forensic investigators from the department arrived, he relayed his observations and they agreed to videotape the scene and preserve as much evidence as possible in the event that Miller's death

1-11-1716

was found to be a homicide. Detective Carroll clarified that when he was initially assigned to look into Miller's death, it was initially a "death investigation" and that it was not until he began further investigations that the case turned into a homicide investigation.

¶ 23 During the course of his investigation, Detective Carroll spoke to Miller's son, Leroy, and pieced together a prospective timeline of Miller's actions on the day of his death. He also spoke to Naomi Thebo, a security guard who worked at Miller's building and recovered a surveillance video and log book from the building. Detective Carroll confirmed that the log book contained names from "L. Lewis" and "M. Partee" who signed in at 10:45 and 10:47 p.m., respectively, on September 22, 2007. Detective Carroll further confirmed that he showed surveillance footage to Miller's son, and Leroy indicated he knew the female shown in the video. Although Leroy did not know Nelson's name, he provided a location where he had dropped the woman off on occasion after she visited his father. After he discovered Nelson's name, Detective Carroll showed a picture of her to Leroy and he confirmed that she was the woman who he had previously seen at his father's apartment and who was depicted in the surveillance video. Following Leroy's positive identification, Detective Carroll received a notice from the Illinois State Police Crime Lab on October 30, 2007, that Nelson's DNA profile was found on the bloody knife recovered from Miller's apartment.

¶ 24 Retired Forensic Investigator William Sullivan testified that he and his partner, Thomas Mander, were assigned to process the scene at Miller's apartment at approximately 2:30 p.m. on September 23, 2007. By the time that he and his partner arrived, the apartment was being preserved as a crime scene. Investigator Sullivan observed the deceased victim laying prone on

1-11-1716

the floor with his hands bound. After speaking with the detectives already at Miller's apartment, Investigator Sullivan walked around the apartment to observe any evidence before videotape and photographs were taken of the scene. Investigators Sullivan and Mander then placed bags over Miller's hands in order to preserve any potential trace evidence that could potentially be recovered on Miller's hands and under his fingernails.

¶ 25 Investigator Sullivan's partner then processed the scene for fingerprints. Latent prints were recovered from a television, a mirror and a file cabinet in Miller's apartment. The latent print lifts were subsequently sent to the Illinois State Police Crime Lab (Crime Lab) for examination by a fingerprint analyst. Investigators Sullivan and Mander then recovered several items from the apartment, including four knives, a metal cylindrical-shaped item that appeared to be part of a firearm, a lighter shaped like a handgun, and a claw hammer. Each of the items were inventoried in accordance with department protocol and were also sent to the Crime Lab for testing. The final piece of evidence that Investigator Sullivan and his partner obtained from Miller's apartment was a DVD recording that they made of the crime scene. The DVD recording was published to the jury.

¶ 26 Chicago Police Detective Adrian Garcia testified that on September 23, 2007, he and his partner, Detective Swinkle, were assigned to assist Detectives Carroll and Egan in their investigation into the death of Joe Miller. As he familiarized himself with the case, he learned they were looking for two suspects, a male and a female. At that time, police did not have names for the suspects.

¶ 27 Sometime in late October, Detective Garcia received information from the Crime Lab,

1-11-1716

which led him to seek out a woman named Malia Nelson. Initial efforts to locate Nelson proved unsuccessful. However, on November 13, 2007, Detective Garcia and his partner were driving around the area of 19th Street and Pulaski Avenue when they observed Nelson standing outside of a Citgo gas station. After arresting Nelson, the officers transported her to the Area Four police station to interview her about her visit to Miller's apartment on September 22, 2007. During the videotaped interview, Nelson detailed her involvement in Miller's death.

¶ 28 At the conclusion of the interview, Detectives Garcia and Swinkle began looking for defendant. They located him the following day and placed him under arrest. After the detectives admonished defendant and obtained a waiver of his *Miranda* rights, defendant consented to take part in a videotaped interview to discuss the events that resulted in Miller's death. Defendant's videotaped statement was published to the jury.

¶ 29 In the video, defendant acknowledged he and Nelson went to Miller's apartment with the intention to rob him to get money for drugs. According to defendant, it was Nelson's idea to take money from Miller and he agreed to go along with her plan. When they got to Miller's apartment, Nelson introduced defendant to Miller and identified him as her brother. Initially, the three of them were sitting in the kitchen talking for a while and then Nelson rose from her seat and grabbed Miller. Miller started "tussling" with Nelson, so defendant told the detectives that he grabbed Miller by his shoulders to hold him down in his chair. Defendant used one of the detectives to demonstrate how he accomplished that. While defendant kept Miller seated, Nelson used a telephone cord to bind Miller's hands together. Defendant continued holding Miller in the chair while Nelson looked through his apartment to find keys that opened Miller's locked cabinet

1-11-1716

where he kept his money. When she was unable to find keys, defendant used a hammer to break into Miller's cabinet. According to defendant, he and Nelson only took money from Miller; he denied stealing a gun. Defendant indicated that Miller did not put up any struggle and remained calmly seated in the chair while he and Nelson took his money. Defendant said that the only physical contact that he had with Miller occurred when he put his hands on Miller's shoulders to keep him seated in the chair. Defendant denied ever engaging in a physical struggle with Miller or hurting Miller in any way. He also denied bringing any weapon to Miller's house or using any weapon against him. When defendant left Miller's apartment, the man was "wide-awake" and seated in the chair.

¶ 30 Doctor Valerie Arangelovich, a former medical examiner at the Cook County Medical Examiner's Office, confirmed that she performed an autopsy on Miller on September 24, 2007. When she received Miller's body, postmortem lividity was present on the left side of Miller's back and face. Doctor Arangelovich explained that this finding was indicative that Miller had been found on back, leaning toward his left side. In addition, Miller's body was not in a state of rigor mortis. She explained that the absence of rigor mortis was significant because "generally rigor mortis would stick around for at least 36 hours after death. Rigor mortis will come quickly and leave quickly in the body in cases where the individual before they died, either, experience, you know, heart exercise or increase in body temperature or a violent struggle."

¶ 31 Doctor Arangelovich examined Miller's body both externally and internally. She initially removed the phone cord that had been bound around Miller's hands. She explained that it was difficult to remove because it had been bound so tightly and left ligature impressions and signs of

1-11-1716

"blunt trauma" to Miller's skin. Doctor Arangelovich also observed additional signs of external physical injury, including hemorrhages or small areas of bleeding on the underside of Miller's upper lip. She explained that these hemorrhages indicated that the victim's body was experiencing a decreased oxygen supply, resulting in burst blood vessels at the time of his death. In addition, Doctor Arangelovich observed focal abrasions on the left and right sides of Miller's neck. She explained that these abrasions could have resulted if someone had grabbed Miller around his neck. Although it was clear that Miller experienced a lack of oxygen at the time of his death, Doctor Arangelovich was able to rule out manual strangulation as the cause for Miller's decreased oxygen supply.

¶ 32 During her internal examination of Miller's body, Doctor Arangelovich observed that evidence that he was suffering from heart disease at the time of his death. Two of his coronary arteries were 100% blocked while another was 75% blocked. The arteries were also firm and calcified, which would have prevented them from dilating in response to stress. During the autopsy, Doctor Arangelovich removed a pace maker from Miller's chest. The pacemaker appeared to be in proper working order and no recalls had been issued for that particular model. She noted that Miller's gall bladder had been previously removed and that there was evidence of scarring on his kidneys. His remaining internal organs were not remarkable. Miller's brain, however was slightly swollen, providing further evidence that he experienced a lack of oxygen prior to his death.

¶ 33 Based on her examination, Doctor Arangelovich opined that Miller died as a result of stress due to restraint and robbery and identified coronary atherosclerosis as a contributing factor.

1-11-1716

She explained that Miller had been living with coronary atherosclerosis and that the emotional and physical stress that he suffered as a result of the restraint and robbery caused an increased blood flow that could not be accommodated by his diseased heart, and ultimately resulted in his death. She emphasized that the primary cause of death was stress due to restraint and robbery and ruled his death a homicide. Once Doctor Arangelovich completed her examination, she collected a blood sample, fingernail clippings, hair samples and orifice swabs from Miller's body and set them aside for further analysis. She also saved Miller's pajamas, the bags that had been placed on his hands, and the telephone cord for further analysis.

¶ 34 On cross-examination, Doctor Arangelovich acknowledged that she had no way of knowing how the abrasions came to appear on Miller's neck. She also confirmed that she found no blunt force trauma to Miller's head and that she was able to rule out manual strangulation as the cause of death. Although Miller's death was "cardiac in nature," Doctor Arangelovich denied that he died of natural causes associated with heart disease.

¶ 35 Christi Fisher, a former fingerprint analyst with the Illinois State Police, testified that she performed fingerprint testing and analysis on this case on December 6, 2008. She had received palm print cards taken from defendant and Nelson and compared them to five latent print lifts that had been collected by police investigators. Nelson's prints were matched to latent print lifts that had been found on a knife in Miller's apartment and on his TV.

¶ 36 Andrea Paulson Carson, a DNA analyst with the Illinois State Police, testified that she received evidence collected in connection with this case on September 28, 2007, including four knives and a beige-colored telephone cord. She conducted color tests on each of the four knives

1-11-1716

and found blood on three of the four knives sent to her for analysis. She collected swabs of each blood stain and placed them into sterile tubes for subsequent DNA analysis. Carson also swabbed the phone cord. Thereafter, Carson created DNA profiles for the DNA found on the knives and phone cord. After obtaining a blood standard from Miller and a buccal standard taken from Nelson, Carson compared the standards to the DNA profiles she obtained from the knives and the telephone cord. Carson concluded that the telephone cord contained a mixture of DNA profiles from Miller and Nelson. Carson also matched Nelson's DNA to the blood left on the three knives.

¶ 37 Lynette Wilson, another DNA analyst employed by the Illinois State Police, testified that she also conducted DNA analysis on evidence recovered in this case. She received swabs taken from Miller's fingernails and a buccal swab standard collected from defendant and a DNA profile of Nelson. She used defendant's buccal swab to develop his DNA profile for comparison purposes. Wilson concluded that DNA from three different contributors were on the swab taken from Miller's fingernails on his left hand, but one individual had contributed only a small amount. Wilson was able to positively identified Miller as a contributor. She was not able to positively identify nor exclude defendant as another contributor. Wilson further testified that Miller's DNA profile was the only profile found on the swabs taken from his right fingernails.

¶ 38 After presenting the aforementioned testimony, the State rested its case-in-chief. Defendant elected not to testify and the defense called no witnesses.

¶ 39 Prior to delivering closing arguments, counsel for both parties took part in a jury instruction conference. Defense counsel sought to have the court instruct the jury on the lesser

1-11-1716

offense of involuntary manslaughter. Counsel argued that an involuntary manslaughter instruction was appropriate given that defendant's statement demonstrated that his behavior was merely reckless. Specifically, counsel argued:

"The State has elected to choose to proceed against [defendant] using first-degree knowingly caused the death or his actions that he should have known could cause great bodily death or harm.

You have evidence that has been presented to the Court that this was an unintentional cause of death. [Defendant's] videotaped statement indicates that there—other than the tying of the hands of Mr. Miller, he was seated in the chair and was alive at the time.

We would say it goes more to a reckless rather than intentional action."

¶ 40 The court, however, denied counsel's request for an involuntary manslaughter instruction, reasoning: "There would have to be some evidence that the actions were reckless, and, in the testimony I've heard, either from the statements or from the other witnesses that testified, do not show a reckless act. They show an intentional act."

¶ 41 During the conference, defense counsel also requested that the court administer an addict instruction. Counsel argued that an addict instruction was appropriate given that Nelson, the State's key witness, admitted that she had a lengthy history of drug abuse. The court also denied this request, reasoning that evidence of Nelson's drug addiction was put before the jury and that an explicit addict instruction was unnecessary.

¶ 42 After the court provided the jury with the instructions it deemed to be appropriate, the

1-11-1716

jury commenced deliberations and subsequently returned a general verdict finding defendant guilty of first-degree murder. At the sentencing hearing that followed, after hearing the arguments advanced by the parties in aggravation and mitigation, the court sentenced defendant to 27-years' imprisonment. Defendant's post-trial motions were denied and this appeal followed.

¶ 43

## II. ANALYSIS

¶ 44

### A. Involuntary Manslaughter Instruction

¶ 45 On appeal, defendant first contends that the trial court erred in declining to instruct the jury on the lesser offense of involuntary manslaughter. He maintains that there was some evidence that he and his co-defendant acted recklessly as opposed to intentionally or knowingly in causing Miller's death, and thus a involuntary manslaughter instruction was warranted. Given the court's failure to provide the jury with said instruction, defendant maintains that his conviction must be reversed and the cause remanded for a new trial.

¶ 46 The State responds that the trial court properly denied defendant's request to provide the jury with an involuntary manslaughter instruction because there was no evidence of reckless behavior presented at trial. The State further argues that even if the court did abuse its discretion in denying defendant's request for an involuntary manslaughter instruction, any error was necessarily harmless given that the evidence clearly demonstrated that defendant acted knowingly when he killed Miller during the course of a robbery and home invasion.

¶ 47 The purpose of jury instructions is to provide the jury with a complete and accurate set of legal principles applicable to the evidence so that the jury can reach the correct conclusion in accordance with both the law and the evidence. *People v. Bannister*, 232 Ill. 2d 52, 81 (2009). It

1-11-1716

is within the discretion of the trial court to determine the applicability of specific jury instructions. *People v. Castillo*, 188 Ill. 2d 536, 540 (1999). Whether an instruction on a lesser offense is warranted depends upon the unique facts and circumstances of each case. *People v. Perry*, 2011 IL App (1st) 081228, ¶ 28. As a general rule, however, an instruction on a lesser offense is justified as long as there is "some credible evidence" to support the instruction. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998); see also *People v. Ward*, 101 Ill. 2d 443, 451 (1984); *People v. Perry*, 2011 IL App (1st) 081228, ¶ 28. A court's failure to provide the jury with an instruction where there is some credible evidence to support the instruction constitutes an abuse of discretion. *Castillo*, 188 Ill. 2d at 540; *DiVincenzo*, 183 Ill. 2d at 249.

¶ 48 The fundamental difference between the offense of first degree murder and the offense of involuntary manslaughter is the mental state that accompanies the act that results in the victim's death, with involuntary manslaughter involving a less culpable mental state than first degree murder. *DiVincenzo*, 361 Ill. App. 3d at 249. Pursuant to statute, a person commits first degree murder when he intentionally kills another person without lawful justification, knows his acts will result in death to another, or knowingly acts in a manner that creates a strong probability of death or great bodily harm to another person. 720 ILCS 5/9-1 (a)(1), (a)(2) (West 2010). In contrast, a person is guilty of involuntary manslaughter where he recklessly performs an act that is likely to cause death or great bodily harm to another person. 720 ILCS 5/9-3(a) (West 2010); *DiVencenzo*, 183 Ill. 2d at 250; *People v. Hulitt*, 361 Ill. App. 3d 634, 639 (2005). A person is deemed to have acted recklessly when he consciously disregards a substantial and unjustifiable risk that his acts are likely to result in death or great bodily harm to another person. 720 ILCS

1-11-1716

5/4-6 (West 2010); *Castillo*, 188 Ill. 2d at 540-41; *Hulitt*, 361 Ill. App. 3d at 639. Generally, 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." *DiVencenzo*, 183 Ill. 2d at 250. Although a "defendant may act recklessly where he commits deliberate acts but disregards the risks" of those acts (*DiVencenzo*, 183 Ill. 2d at 252), "a voluntary and willful act having the natural tendency to cause death or great bodily harm is evidence of an intentional act rather than recklessness" (*People v. Ciavirelli*, 262 Ill. App. 3d 966, 973 (1994)).

¶ 49 Our supreme court has identified several factors to consider in determining whether a defendant acted recklessly such that an involuntary manslaughter instruction is warranted, including: (1) the disparity in the size and strength between the defendant and the victim; (2) the brutality and duration of the defendant's acts as well as the severity of the victim's injuries; and (3) whether the defendant used his bare fists or a weapon, such as a gun or knife. *DiVencenzo*, 183 Ill. 2d at 250-51; *Perry*, 2011 IL App (1st) 081228, ¶ 30. Generally, an involuntary manslaughter instruction is not appropriate where the existence of multiple wounds or the victim's defenselessness shows that the defendant did not act recklessly. *DiVencenzo*, 183 Ill. 2d at 251; *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 53.

¶ 50 Here, defendant suggests that it was his videotaped statement to police that provided "some evidence" of recklessness, rendering an involuntary manslaughter instruction appropriate in this case. In that statement, defendant denied that he placed his hands over Miller's mouth or around his neck. Defendant acknowledged restraining Miller, but asserted that the only physical contact he had with Miller was holding his shoulders to keep him seated in his chair.

1-11-1716

¶ 51 Based on our review of the record, we are unable to conclude that the trial court erred in denying defendant's request to instruct the jury on the lesser offense of involuntary manslaughter. In certain circumstances a defendant's statement or testimony may provide some credible evidence of recklessness, warranting an involuntary manslaughter instruction; however, where a defendant's suggestion that his conduct was only reckless is wholly negated by physical evidence, there is no error in denying an involuntary manslaughter instruction. See, e.g., *People v. Ward*, 101 Ill. 2d 443 (1984) (concluding that the defendant's statement that he did not intend to cause the child victim's death was insufficient to warrant an involuntary manslaughter instruction because the severity of the child's beating negated any suggestion of the defendant that his conduct was merely reckless). Here, we find that the physical and testimonial evidence presented by the State refutes defendant's suggestion that his conduct was merely reckless.

¶ 52 Doctor Arangelovich provided detailed testimony about Miller's injuries and manner of death. Based on postmortem lividity, she was able to determine that Miller had been found laying on his back, leaning toward his left side. The lack of rigor mortis was an indicator that Miller experienced an increase in body temperature or a violent struggle at the time of his death. Among the external injuries found were blunt trauma to Miller's skin caused by the telephone cord, areas of hemorrhaging on the underside of Miller's upper lip, consistent with decreased oxygen supply at the time of death, and abrasions on the right and left side of Miller's neck, consistent with the application of manual pressure to that area of the body. Doctor Arangelovich further testified that the swelling of Miller's brain provided additional evidence that he experienced a lack of oxygen prior to death. Not only were Doctor Arangelovich's findings

1-11-1716

consistent with the account of the offense provided by co-defendant Nelson, but they negated any suggestion that defendant's conduct was merely reckless.

¶ 53 Moreover, although defendant does not provide any comprehensive analysis of the relevant factors set forth in *DiVencenzo* in his appellant brief, we find that these factors further support the trial court's decision to deny his request for an involuntary manslaughter instruction. See Ill. S. Ct. R. 341(h)(7) (eff. July 8, 2008) ("Points not argued are waived \*\*\*"). Although the record reflects that there was no great disparity in size between defendant and Miller, there was a great disparity in the strength between the two men. Miller was an 87-year-old man with heart problems who sometimes relied on a cane to walk around. Defendant, in turn, was 44 at the time of the offense with no apparent health problems. Although there was no evidence that Miller was harmed by a weapon, he was physically restrained and experienced a lack of oxygen during the course of the restraint and robbery. Finally, the nature of Miller's injuries that were detailed by Doctor Arangelovich and his defenselessness militate against a finding of reckless behavior. Not only was there was no evidence of defensive wounds indicating that Miller attempted to fight back, but he was found lying on the floor with his hands bound in a defenseless position. See, *e.g.*, *People v. Trotter*, 178 Ill. App. 3d 292, 298 (1988) (recognizing that an involuntary manslaughter instruction is not warranted where the nature of the killing, shown either by multiple wounds or the victim's defenselessness, makes the theory inapplicable); *see also* *Castillo*, 2012 IL App (1st) 110668, ¶ 60 (finding that the court did not abuse its discretion in denying the defendant's request to provide an involuntary manslaughter instruction where the victim was 29 years older than the defendant and did not fight back). Ultimately, we conclude

1-11-1716

that the court did not err in denying defendant's request for an involuntary manslaughter instruction.

¶ 54 B. Addict Instruction

¶ 55 Defendant next argues that the court erred in denying his request to provide the jury with his proposed addict instruction. He argues that his proposed instruction was both an accurate statement of the law and especially relevant given that the State's key witness, Malia Nelson, was an admitted long-time drug addict who was high at the time of the offense.

¶ 56 The State responds that the court properly denied defendant's request to instruct the jury that it could consider a witness' drug use and narcotics addiction in evaluating the witness' credibility. The State emphasizes that evidence of Nelson's narcotics addiction was presented to the jury by both parties and notes that Illinois law does not require jurors to be explicitly admonished about the relevance of a witness' narcotics use on the witness' credibility.

¶ 57 Because a witness' habitual drug use is relevant to a witness' overall credibility, it is well-settled that parties must be allowed to cross-examine a witness about her narcotics use. *People v. Reed*, 405 Ill. App. 3d 279, 288 (2010); *People v. Iniguez*, 361 Ill. App. 3d 807, 815 (2005). However, courts are not required to provide the jury with specific instructions about how to evaluate an addict's credibility. *People v. Steidl*, 142 Ill. 2d 204, 238 (1991); *Foster*, 322 Ill. App. 3d 780, 789 (2001). Accordingly, courts have repeatedly held that it is not reversible error to deny a defendant's tendered addict instruction where evidence of the addiction has been already presented to the jury, affording members of the jury the opportunity to make their own determinations as to the believability of the witness. *People v. Steidl*, 142 Ill. 2d 204, 238

1-11-1716

(1991); *Reed*, 405 Ill. App. 3d at 288. In doing so, courts have expressed concern that a non-IPI addict instruction may place undue emphasis on the witness' narcotics use. *Reed*, 405 Ill. App. 3d at 288; *Iniguez*, 361 Ill. App. 3d at 815; *People v. Daniels*, 287 Ill. App. 3d 477, 486 (1997). Moreover, courts have rationalized that a specific addict instruction is unnecessary because "[j]urors do not leave their common sense behind when they enter court, and even in the absence of cautionary instructions they will ordinarily be aware of the factors which make some witnesses unreliable." *Steidl*, 142 Ill. 2d at 238, quoting *People v. Rollins*, 108 Ill. App. 3d 480, 488 (1982); see also *Daniels*, 287 Ill. App. 3d at 486 (recognizing that no specific addict instruction is needed "because the general instruction regarding jurors weighing witness credibility [i]s sufficient").

¶ 58 Here, defense counsel requested the court to either provide the jury with a non-Illinois Pattern Jury Instruction (IPI) or modify an existing IPI instruction to inform them of the unreliability of testimony provided by witnesses addicted to narcotics. Counsel argued that an addict instruction was appropriate because "[t]he primary witness here against [defendant] is Malia Nelson who admitted to being addicted to drugs and using drugs [at] the time of this offense." The court denied both requests, reasoning that Nelson was "cross-examined extensively about her drug abuse and drug addiction" and that it was the function of the jury, not the court, to determine the credibility of witnesses. The court, however, did provide the jury with IPI Criminal 4th No. 1.02, which informs the jury that it is the sole judge of the believability of the witnesses and of the weight to be given to their testimony.<sup>1</sup>

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<sup>1</sup> IPI Criminal 4th No. 1.02, in its entirety, provides as follows: "Only you are the judges

1-11-1716

¶ 59 Although defendant is correct that an addict instruction would not have been improper, we do not find any error with the court's choice of jury instructions. Because the jury was fully apprised of Nelson's lengthy history of drug addiction and her drug use on the day of the Miller's death and was admonished in accordance with IPI 1.02, the court did not abuse its discretion in denying defendant's request to provide an additional explicit addict instruction. See *Steidl*, 142 Ill. 2d at 238-39; *Reed*, 405 Ill. App. 3d 279; *Iniguez*, 361 Ill. App. 3d at 815; *Foster*, 322 Ill. App. 3d at 789-90.

¶ 60 C. PreSentence Credit

¶ 61 Finally, defendant argues, and the State agrees, that his mittimus should be corrected to reflect 1,189 days of presentencing custodial credit rather than the 1,188 days currently delineated on his mittimus.

¶ 62 Pursuant to statute, a criminal defendant is entitled to credit against his sentence for time spent in custody prior to sentencing. 730 ILCS 5/5-4.5-100 (b) (West 2010) ("[T]he offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for the number of days spent in custody as a result of the offense for which the sentence was imposed"). Here, defendant was granted 1,188 days of presentence credit;

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of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, [his age], his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000)

1-11-1716

however, the record reflects that he is entitled to one additional day of credit. Defendant was arrested on November 14, 2007, and remained in custody until he was sentenced on February 15, 2011. As defendant notes, 2008 was a leap year which included an additional day. Pursuant to Supreme Court Rule 615(b), a reviewing court has the authority to correct an offender's mittimus without remanding the cause to the circuit court. Ill. S. Ct. R. 615(b) (eff. Aug 27, 1999); *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). Accordingly, we order that the mittimus be corrected to accurately reflect 1,189 days of pre-sentencing custody credit. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008).

¶ 63

### III. CONCLUSION

¶ 64 For the aforementioned reasons, we affirm defendant's conviction and 27-year prison sentence. We correct the mittimus to reflect 1,189 days of pre-sentencing custody credit.

¶ 65 Judgment affirmed; mittimus corrected.