

No. 1-11-1921

**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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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	No. 08 CR 16129
	)	
MAURICE EVANS,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PIERCE delivered the judgment of the court.

Presiding Justice Quinn and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in refusing defendant's proposed jury instructions on independent felonious purpose, self-defense and involuntary manslaughter. The trial court did not err in allowing the State to dismiss the intentional and strong probability first degree murder counts, leaving only one count of felony murder. The circuit court clerk is directed to correct the mittimus to reflect 1,040 days of presentence credit.

¶ 2 Following a simultaneous but severed jury trial with co-defendant Antwaun Thompson, defendant Maurice Evans was convicted of felony murder (720 ILCS 5/9-1(a)(3) (West 2008)) and was sentenced to 28 years' imprisonment. On appeal, defendant argues: (1) the trial court

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erred when it denied his request for jury instructions on independent felonious purpose; (2) the trial court erred in refusing his instruction on self-defense; (3) the trial court erred in denying his request for an instruction on involuntary manslaughter; (4) the trial court denied him his right to prepare a defense when it allowed the State to proceed to trial on only one count of felony murder; and (5) the mittimus should be corrected to reflect the correct amount of presentence credit. For the following reasons, we affirm the judgment of the trial court but direct the circuit court to modify the mittimus to reflect the correct number of days of presentence credit.

¶ 3

### BACKGROUND

¶ 4 Defendant and his co-defendants Antwaun Thompson, Clint Johnson and Martell Johnson<sup>1</sup> were charged by way of indictment with two counts of first degree murder and one count of felony murder for their role in the death of Daniel McKenzie. McKenzie was beaten as he lay on the edge of a subway platform and slipped over the edge onto an electrified train track and died. Two days prior to trial, the State dismissed the first two counts, leaving only the count of felony murder predicated on mob action.

¶ 5 Defendant and co-defendant Thompson were tried in severed but simultaneous jury trials. Michael McKenzie, Daniel's brother, testified that at about 2:00 a.m. on July 27, 2008, he and Daniel arrived at the 22nd Street CTA Red Line station, where they encountered his friend whose nickname was Rob Base. When the train arrived, Michael and the two other men boarded.

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<sup>1</sup>Antwaun Thompson, Clint Johnson and Martell Johnson are not parties to this appeal. We affirmed Antwan Thompson's conviction and sentence in *People v. Antwaun Thompson*, No. 1-11-2265 (October 29, 2013) (unpublished order pursuant to Supreme Court Rule 23).

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¶ 6 On the train, Michael saw defendant and described him as a shirtless man with braids, standing toward the front of the car. Michael, Daniel and Rob sat by the doors on one side of the aisle. There were three other men with defendant on the train. As the train began to move, defendant approached Michael and asked him “who he be.” Michael understood that to mean what gang was he affiliated with. Although he used to be affiliated with the Gangster Disciples, he no longer was, so he replied that they “wasn’t on that” and they were just trying to get somewhere. Defendant told Michael he was “cool” and could sit down. Michael remained standing.

¶ 7 Defendant then approached Daniel and asked him the same thing. Michael told defendant that Daniel was his brother and said “we ain’t on that.” Defendant persisted and “got in [Daniel’s] face.” He asked Daniel “who he be” and put his hands in Daniel’s face. Daniel said, “Man, get your hands out of my face.” Defendant continued to put his hands in Daniel’s face, so Daniel pushed his hands away. Defendant then “stole on him,” meaning he swung at him and hit Daniel in the jaw.

¶ 8 Daniel stood up but two men came and pushed him toward the rear door. Michael took off his belt. Another man held Michael back so that Michael could not help Daniel. Michael saw Daniel on a seat and the other men were hitting him in the face. Daniel’s attackers stopped. Defendant then swung and hit Rob in the face. Rob pulled out a box cutter and stabbed defendant in the chest. The two men who were with defendant took off their belts. Rob then took his off and so did Michael. "Everybody got to swinging belt buckles."

¶ 9 When the train stopped at Roosevelt, Michael, Daniel and Rob got off the train. The train

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remained in the station for longer than normal. They did not immediately leave the platform because they were exchanging words with the four men still on the train car. When Michael, Daniel and Rob were about to leave the platform, the four young men got off of the train and chased Michael, Daniel and Rob. As they were running, Daniel stopped to pick up a garbage can top. When Michael got to street level, he did not see his brother. He left the scene. Michael testified that he never went to the police or talked to the State until the day before he testified in court. He explained that he was afraid because he "got a record."

¶ 10 At trial, Michael identified photos of each of the four young men who assaulted him, Daniel and Rob. On cross-examination, Michael testified that as he, Daniel and Rob got onto the train, Rob said, "Let's get on this car with these gangbangers."

¶ 11 A video taken by the CTA security cameras was played for the jury. The video showed Michael, Daniel and Rob exiting the train car. They are looking behind them as they back away from the train car. The second clip shows defendant and his companions run at the three men from behind. Michael and Rob run straight ahead but Daniel runs to one side and pauses to try to defend himself with part of a garbage can. The four men catch up with him and begin to swing at him. The next clip shows what occurred from a further distance. It shows Daniel being pursued by defendant and his companions. They run him down, beating him with belts and kick him until, according to defendant's brief, Daniel either jumped or fell over the edge of the platform onto the tracks.<sup>2</sup> A later clip shows the beating zoomed in for a much closer view.

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<sup>2</sup>The State, in it's brief, describes Daniel as "dropping off the platform, losing his balance, and falling onto the third rail."

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¶ 12 Alexander Hammond testified that he was employed as a laborer. He was convicted of aggravated unlawful use of a weapon in 2002. On July 27, 2008, at about 2:00 a.m., Hammond boarded the red line train at 79<sup>th</sup> Street. A group of four young men boarded the train at 47<sup>th</sup> Street and sat in the front of the car. Hammond later identified the four younger men as Clint Johnson, Martell Johnson, Antwaun Thompson and defendant. Hammond could hear the men having a conversation about a family dispute. The group told defendant that he needed to calm down. When the train stopped at 22<sup>nd</sup> Street, three older men, including Daniel McKenzie, boarded the train in the same car and sat down by the rear doors.

¶ 13 The four younger men said, "[y]ou know what? I'm tired of all this talk. Let's see." The four younger men approached the three older men and asked one of them, a man wearing a green suit, "Homie, what you be?" Hammond understood that to be a question about the man's gang affiliation. The man in the green suit answered, "Huh? Where that come from? What that got to do with anything? What I be?" When the man in the green suit did not answer the question, "they all just emerged on him." The younger men said, "Oh, okay. You GD, huh. Yeah, we at war with GD's. We New Breeds." They were "touching on the guy." One of the older men stood up and said, "hey, that's my brother." That is when Hammond got up and went to the next car.

¶ 14 Even though he was in the next car, Hammond could see the men shoving and punching each other. They were swinging their belts at each other. When the train stopped at Roosevelt, Hammond got off the train. The group of older men got off the train also, followed by the group of younger men. As the older men got off they were backing off of the train and were swinging their belts trying to keep the group of younger men on the train. The group of older men

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eventually walked away. The four younger men said, "man, fuck that. They think we some punks. Let's get their ass," and then rushed the older men.

¶ 15 As he was getting out of the train car, he saw the younger men run past. Hammond went back into the train car to look for his bag and when he came out, he saw one of the older men lying on the track. The young men were saying, "who else down here GD? You can get some, too. Who else wants some?" They eventually left and went up the escalator.

¶ 16 Hammond spoke with a CTA employee and then went up the escalator. There, he encountered police officers and went back down with them to the platform. Hammond went to the police station the next day where he viewed some photographs. He recognized one of the men in the photographs as one of the younger men who had been on the train. He later returned to the police station and viewed a line-up. He identified the same individual he earlier identified in the photographs.

¶ 17 Michelle Martinez, a paramedic with the Chicago fire department, testified that she and her partner were called to the red line station at Roosevelt and State on July 27, 2008, at approximately 2:17 a.m. There, she and her partner found Daniel McKenzie lying face down on the third rail of the tracks. His body was removed by a fireman and was brought to Martinez. At the time, McKenzie was unconscious and was gasping for air. He was taken to Northwestern hospital. A report generated by Martinez indicated that a crack pipe was found in McKenzie's pants pocket.

¶ 18 Officer Thomas Pierce, a forensic investigator for the Chicago police, found blood spatter evidence on the platform and bodily fluid along the southbound track. It was determined that the

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blood found on the platform was that of co-defendant Martell Johnson.

¶ 19 Doctor Mitra Kalelkar of the Cook County medical examiner's office, testified about an autopsy performed by another doctor in the Cook County medical examiner's office, Hisham Hashish. Doctor Hashish found a burn mark with singeing of the hair on the left temporal region of his head and another large burn mark on the back of his head. McKenzie also had electrical burns on his left shoulder and on his abdominal wall. The burn on his shoulder penetrated almost to the bone. McKenzie also had hemorrhages in the muscles of his neck and under his scalp on the right side, which were consistent with blunt trauma. Doctor Kalelkar opined, after reviewing Doctor Hashish's report, that the cause of death was electrocution and complications from burns caused by electrocution and that the manner of death was homicide.

¶ 20 The defense presented evidence by way of stipulation. The parties stipulated, among other things, that co-defendant Maurice Evans was taken by ambulance to Stroger Hospital about 2:15 a.m. on July 27, 2008. He was treated for two lacerations, one on his left clavicle and one on his back.

¶ 21 After hearing all of the evidence, the jury found defendant guilty of felony murder. Defendant was sentenced to 28 years' imprisonment. It is from this judgment that defendant now appeals.

¶ 22 ANALYSIS

¶ 23 Defendant raises several issues regarding the court's denial of his proposed jury instructions. Defendant claims that the trial court erred when it refused his instruction tasking the jury with the question of whether there was an independent felonious purpose for the

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predicate offense of mob action independent of the murder. He also argues that the court should have instructed the jury on his right to self-defense and that the evidence was sufficient to support an involuntary manslaughter instruction.

¶ 24 The purpose of jury instructions is to provide the jury with correct legal rules that can be applied to the evidence to guide the jury toward a proper verdict. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). The task of the reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. *People v. Mohr*, 228 Ill. 2d 53, 65 (2000). The decision to give a certain instruction rests with the trial court, and we will not reverse its judgment absent an abuse of discretion. *Id.* at 66. A trial court abuses its discretion if the jury instructions given are unclear, mislead the jury, or are not justified by the evidence and the law. *Id.* at 65-66.

¶ 25 In this case, defendant was charged with felony murder predicated on mob action. An individual commits felony murder if, while "attempting or committing a forcible felony other than second degree murder," a death occurs. 720 ILCS 5/9-1(a)(3) (West 2008). Mob action is considered a forcible felony and can serve as a predicate offense for felony murder. 720 ILCS 5/2-8 (2008). Mob action is defined as "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law." 720 ILCS 5/25-1(a)(1) (West 2008).

¶ 26 Prior to closing arguments, defense counsel proposed that the jury be instructed that it must find an independent felonious purpose and submitted the following instructions to the court:

"In order for you to find the defendant guilty, you must find, beyond a

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reasonable doubt, that the acts which constitute Mob Action do not arise from an act of murder, and that the acts constituting Mob Action are not inherent in an act of murder itself"; and

"In order for you to find the Defendant guilty, you must find, beyond a reasonable doubt, that the defendant acted with a felonious purpose for Mob Action that was independent of a felonious purpose for murder."

The trial court denied these instructions stating that it believed the jury had been adequately instructed on the law.

¶ 27 Before we reach the merits of defendant's argument, we find it necessary to point out that defendant is not challenging the sufficiency of the evidence against him, nor does he challenge that the underlying offense of mob action had an independent felonious purpose. His argument with respect to this issue is that under *People v. Morgan*, 197 Ill. 2d 404 (2001), *People v. Pelt*, 207 Ill. 2d 434 (2003), *People v. Davis*, 213 Ill. 2d 459 (2004) and *People v. Davison*, 236 Ill. 2d 232 (2010), the issue of whether an independent felonious purpose existed for the predicate forcible felony is a question of fact and therefore, he was entitled to a jury determination of that question. In addition, because the jury was not instructed that an independent felonious intent was an element of the offense of felony murder, the jury was unable to make a proper determination as to his guilt or innocence.

¶ 28 We agree with defendant's assessment of *Morgan*, *Pelt*, *Davison* and *Davis*. In these cases, the facts were closely scrutinized to determine whether the predicate offense had an independent felonious purpose. However, this line of cases does not stand for the proposition

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that a separate jury instruction on independent felonious purpose is necessary, nor do we find that it was necessary in this case. Although the court denied defendant's request for the proposed instruction, the jury was instructed that it was required to find an independent felonious purpose for the offense of mob action. The jury was instructed as follows:

"A person commits the offense of mob action when he, acting together with one or more persons and without authority of law, knowingly disturbs the public peace by use of force or violence." Illinois Pattern Jury Instruction, Criminal, No. 19.01.

In addition, the jury was instructed,

"A person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death, he was committing the offense of mob action." I.P.I. Criminal, No. 7.01

The jury was further instructed:

"To sustain the charge of first degree murder, it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased, Daniel McKenzie.

It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, such as to commit mob action, and that the deceased was killed by one of the parties committing that unlawful act." Illinois Pattern Jury Instruction, Criminal, No. 5.03A.

¶ 29 These instruction read together adequately apprised the jury that it must find that

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defendant acted with the felonious purpose of mob action that was independent of a felonious purpose for murder. Therefore, we cannot find that the trial court abused its discretion in denying defendant's jury instructions on independent felonious purpose. We also find no support for defendant's argument, nor has he provided any, that an independent felonious intent is an element of the offense of felony murder that must be pled and proven to the jury.

¶ 30 Defendant next argues that he was denied his due process right to present a complete defense where the trial court did not instruct the jury on his constitutionally protected right to self-defense despite the presence of supporting evidence. Defense counsel repeatedly requested a self-defense instruction in this case. The trial court deferred ruling on the issue until the instruction conference, when the court decided that it would not issue a self-defense instruction based on its "understanding of the felony murder statute and how it operates, especially with the underlying offense here today and the evidence that's before the jury."

¶ 31 Under ordinary circumstances, self-defense cannot be asserted as a defense to felony murder. *People v. Moore*, 95 Ill. 2d 404, 411 (1983). A defendant cannot raise a justification defense if he or she sets into motion a course of felonious conduct. *People v. Mills*, 252 Ill. App. 3d 792, 799 (1993). Provocation and belief in the need for self-defense can be partial defenses to felony murder, if the provocation or the belief in the need for self-defense occurred before defendant formed the intent to commit the underlying felony. *People v. Williams*, 315 Ill. App. 3d 22, 34 (2000).

¶ 32 A defendant is entitled to have the jury instructed as to any theory of the case that is supported by at least some evidence. *People v. Davis*, 213 Ill. 2d 459, 478 (2004). Although the

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amount of evidence needed to support the giving of an instruction is slight, the instruction must still be supported by some evidence. It is not error to decline to give a requested instruction that is not supported by the evidence. *People v. Wolf*, 185 Ill. App. 3d 552, 559 (1989). The question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review. *People v. Washington*, 2012 IL 110283 ¶19.

¶ 33 Defendant claims he was entitled to a self-defense instruction in this case when his belief in the need for self-defense occurred before he formed the intent to commit the underlying felony. Defendant urges that because the State limited the scope of mob action to the events on the platform, and all of the mutual combat between the two groups occurred before defendant could have possibly formed an intent to commit mob action on the platform, there was substantial evidence that defendant's belief in the need for self-defense occurred before he formed the intent to commit the offense of mob action on the platform. Defendant also argues that Rob's statement on the platform about getting on the car with "these gangbangers" constituted provocation that would establish a belief in the need for self-defense

¶ 34 Contrary to defendant's argument, there is no evidence whatsoever to support defendant's theory that his belief in the need for self-defense occurred before he formed the intent to commit mob action on the platform. There was no evidence whatsoever that Daniel, Michael or Rob threatened defendant in any way. Indeed, all of the evidence established that defendant and his companions were the aggressors. Michael testified that defendant approached him and demanded to know his gang affiliation. Defendant asked the same question of Daniel. Defendant put his hands in Daniels' face and Daniel swatted them away. Defendant hit Daniel in

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the jaw. Defendant and the other men pushed Daniel to the back of the car and beat him. Once Michael, Daniel and Rob exited the train, defendant and his companions pursued them, eventually catching up with Daniel and beating him causing him to go over the edge of the train platform and onto the third rail.

¶ 35 Defendant's argument that Daniel, Michael and Rob attempted to keep him and his friends from exiting the train by swinging their belts at the doorway is likewise unpersuasive. Hammond testified that the older men backed out of the car, swinging their belts, "trying to keep the younger guys in the car and off of them." As soon as Daniel, Michael and Rob turned their backs, defendant and his friends rushed the older men and pursued them on foot.

¶ 36 The video shows Daniel, Michael and Rob on the platform backing away from the train car. The next view shows defendant and his companions chasing them and catching up with Daniel who had tried to use part of a garbage can to defend himself. When they caught up with him, defendant and his companions began swinging at Daniel. The next view shows Daniel on the ground while defendant and his companions swing arms and belts at Daniel before he goes over the edge of the platform.

¶ 37 There is simply no evidentiary basis for a self-defense instruction in this case. All of the evidence shows that defendant and his companions were the aggressors. Furthermore, defendant could not have been provoked by Rob's statement to Michael and Daniel, outside of defendant's presence and before the three men even boarded the train car. We cannot say that the trial court abused its discretion in denying defendant's request for a self-defense instruction.

¶ 38 Next, defendant claims that the trial court erred in refusing to instruct the jury on

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involuntary manslaughter. Specifically, defendant argues that he was entitled to an involuntary manslaughter instruction because involuntary manslaughter is a lesser-included offense of felony murder under the charging instrument theory outlined in *People v. Davis*, 213 Ill. 2d 459 (2004). Furthermore, even if the instruction was not proper under *Davis*, he was entitled to the instruction under *People v. Golden*, 29 Ill. App. 3d 502 (1975).

¶ 39 A defendant is entitled to an involuntary manslaughter instruction if there is "slight" evidence upon which that theory could be based. *People v. Trotter*, 178 Ill. App. 3d 292, 298 (1988). However, such an instruction should not be given if there is no evidence that would reduce the murder charge to manslaughter. *Trotter*, 178 Ill. App. 3d at 298. The trial court's determination to give a specific jury instruction will not be reversed absent an abuse of discretion. *People v. Austin*, 133 Ill. 2d 118, 124 (1989).

¶ 40 In *Davis*, the defendant argued that the trial court erred when it refused to instruct the jury on involuntary manslaughter. In determining whether an involuntary manslaughter instruction should have been given, our supreme court noted that it had "adopted and applied the charging instrument approach to determine if one offense is a lesser-included offense of a charged offense so that jury instructions can be given for the lesser-included offense." *Davis*, 213 Ill. 2d at 476-77 (citing *People v. Novak*, 163 Ill. 2d 93, 106-14 (1994); *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997)). Under the charging instrument approach, the analysis is focused on whether: (1) the charging instrument includes a " 'broad foundation or main outline' " of the lesser-included offense so that it can be considered a lesser-included offense; and (2) the evidence at trial rationally could support a conviction for the lesser-included offense. *Id.* at 477. The first step in

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this analysis is to look at the indictment or information. *Id.*

¶ 41 The *Davis* court noted that neither the indictment nor the statutory definition of felony murder indicates a mental state for the killing. The court further noted that it had previously confirmed that the offense of felony murder does not include an intent to kill, while the offense of involuntary manslaughter requires the perpetrator have a reckless mental state. *Id.* Because a lesser-included offense is proved by lesser facts and/or a lesser mental state, for involuntary manslaughter to be a lesser offense of felony murder, the charge of felony murder must contain a culpable mental state, equal to or greater than involuntary manslaughter. In looking at the defendant's indictment, the court found that the felony murder described therein did not contain a culpable mental state as to the killing, while the offense of involuntary manslaughter requires a reckless mental state. Consequently, the court held that the charging instrument did not contain a broad outline of involuntary manslaughter and as such, involuntary manslaughter was not a lesser-included offense of felony murder. *Id.*

¶ 42 Following the charging instrument approach, we look to the indictment in this case. The felony murder count alleged that defendants committed the offense of first degree murder, "in that they without legal justification, chased, struck and killed Daniel McKenzie during the commission of a forcible felony, to wit: mob action, in violation of chapter 720 act 5 section 9-1(A)(3) \* \* \*." The felony murder outlined in this indictment does not include a culpable mental state and therefore does not include a broad outline of involuntary manslaughter. Therefore, similar to *Davis*, involuntary manslaughter is not a lesser-included offense of felony murder in this case. Given our conclusion, we need not reach the second step of the charging

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instrument approach.

¶ 43 Defendant argues that even if involuntary manslaughter is not considered a lesser-included offense of felony murder under *Davis*, he was still entitled to an involuntary manslaughter instruction under *Golden*, 29 Ill. App. 3d 502. Defendant argues that the *Davis* court declined to overrule the holding in *Golden* finding involuntary manslaughter to be a lesser-included offense of felony murder. *Davis*, 213 Ill. 2d at 477 (stating "involuntary manslaughter is not a lesser-included offense of felony murder in this case [citations omitted]; but see [*Golden*], 29 Ill. App. 3d at 507.")

¶ 44 In *Golden*, the defendant was charged with felony murder predicated on armed robbery where during the robbery of a cab driver, he shot and killed another individual. There was conflicting testimony presented regarding whether the shooting was deliberate or accidental. Over the defendant's objection, the jury was instructed that involuntary murder was a lesser included offense of murder. The jury convicted the defendant of involuntary manslaughter and armed robbery. The defendant appealed. *Golden*, 29 Ill. App. 3d at 502-3.

¶ 45 On appeal, the court upheld the defendant's conviction for involuntary manslaughter. The court stated,

"A review of the record in the case at bar indicates the jury could reasonably have determined the defendant acted recklessly when he brandished the gun to scare the cab driver. \* \* \*We hold that involuntary manslaughter is a lesser-included offense of felony murder. Involuntary manslaughter was therefore an issue in the present case, and the court properly instructed the jury as to that offense." *Id.* at 505-507.

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¶ 46 We disagree with defendant's assertion that *Golden* is controlling here. Although the *Davis* court did not expressly overrule *Golden*, our supreme court has issued several decisions since *Golden* that led to the adoption and implementation of the charging instrument approach that became *the* test utilized in determining whether a jury could be instructed on a lesser-included offense. See *Novak*, 163 Ill. 2d 106-14; *Hamilton*, 179 Ill. 2d 324; *People v. Kolton*, 219 Ill. 2d 353, 367 (2006); *Davis*, 213 Ill. 2d at 476. *Golden* was decided before this line of cases so this court did not did not have the benefit of the charging instrument approach in determining that involuntary manslaughter was a lesser-included offense of felony murder. Even if the *Golden* court considered an approach similar to that of the charging instrument approach, the *Golden* court clearly limited its findings to the facts of that case. Accordingly, the trial court did not abuse its discretion in denying defendant's request for a jury instruction on involuntary manslaughter.

¶ 47 Defendant next contends that the trial court abused its discretion in allowing the State to *nolle prosequi* the intentional and strong probability murder charges two days before trial, leaving only the felony murder predicated on mob action charge. Defendant claims that at that point the trial court had a "vested" duty to determine whether the dismissal would cause substantial prejudice to the defendant.

¶ 48 The State has discretion in deciding whether to nol-pros a charge. *People v. Olson*, 128 Ill. App. 3d 560, 562 (1984). While the court must consent and approve of the State's request to nol-pros a charge, the court must not preclude the State from nol-prosing a charge unless the State's action is "capriciously or vexatiously repetitious" or will cause substantial prejudice to

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the defendant. *Id.* at 562. The State may nol-pros a charge up until the time that sentence is imposed. *Id.*

¶ 49 In *People v. Rixie*, 190 Ill. App. 3d 818 (1989), the defendant was charged with one count of intentional murder and one count of felony murder. After the jury instruction conference, the State dismissed the intentional murder, leaving only the felony murder count. Defendant requested jury instructions on the lesser included offenses. Those instructions were refused and defendant was convicted of felony murder. On appeal, the *Rixie* court found that the defendant was not substantially prejudiced by the State's determination to nol-pros the intentional murder count. The court stated:

“Defendant knew of the felony murder charge since the inception of the proceedings. He was given a full opportunity to prepare and present a defense to felony murder. The jury was presented with all the evidence in this matter along with counsel's argument that *Rixie* was not involved in any plan or attempt to rob [the victim]. The jury could have concluded that *Rixie* may have been guilty of something, but not felony murder. This determination would have required the jury to find *Rixie* not guilty. \* \* \* The court did not err in allowing the State to nol-pros the murder charge and to proceed on only the felony murder charge.” *Rixie*, 190 Ill. App. 3d at 831.

¶ 50 Similarly, in *People v. Williams*, 315 Ill. App. 3d 22 (2000), the defendant was charged with intentional and knowing murder, and felony murder. After jury selection, the State nol-pros the first count of murder. During the jury instruction conference, the State nol-pros the second murder count leaving only felony murder. The defendant was convicted of felony

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murder and appealed. On appeal, the defendant argued that he was substantially prejudiced when the State was allowed to nol-pros two counts of murder leaving only the felony murder.

Relying on *Rixie*, the *Williams* court found that defendant suffered no prejudice. The court found that the defendant was charged with felony murder from the inception and was able to defend against that charge. Furthermore, the jury was properly instructed on the offense of felony-murder. Consequently, as in *Rixie*, the defendant was not prejudiced and the trial court properly granted the State's request to nol-pros the intentional murder counts. *Williams*, 315 Ill. App. 3d at 31.

¶ 51 Like the defendants in *Rixie* and *Williams*, defendant knew of the felony murder charge since the beginning of the proceedings and should have been prepared to defend against it. Given that defendant had notice of the charges against him and was able to prepare a defense to the charge of felony murder predicated on mob action, we cannot see how defendant suffered any prejudice as a result of the trial court granting the State's motion to nol-pros the intentional and strong probability murder counts, especially where the jury was properly instructed on felony murder.

¶ 52 Finally, defendant argues and the State agrees that defendant's mittimus should reflect a credit of 1,040 days of presentence credit. Accordingly, we exercise our authority under Illinois Supreme Court Rule 615(b) (eff. Jan 1, 1967), and direct the circuit court clerk to correct the mittimus to reflect credit for 1,040 days. See *People v. Magee*, 374 Ill. App. 3d 1024, 1035-36 (2007).

¶ 53

CONCLUSION

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¶ 54 For the foregoing reasons, the judgment of the trial court is affirmed. The mittimus is modified to reflect 1,040 days of presentence credit.

¶ 55 Affirmed as modified.