

FOURTH DIVISION
December 19, 2013

No. 1-11-2002

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 5705
)	
JEFFERY STARKS,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

- ¶ 1 **Held:** Evidence sufficient to sustain defendant's conviction for felony murder; same act not used to support conviction for murder and predicate felony of vehicular invasion; trial court did not give erroneous admonishment regarding reasonable doubt standard; and trial court did not improperly consider a factor inherent in felony murder in aggravation; judgment affirmed.
- ¶ 2 Following a jury trial, defendant Jeffery Starks was convicted of felony murder and sentenced to a term of 40 years' imprisonment. On appeal, he contends that the State failed to

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prove him guilty beyond a reasonable doubt of the predicate felony, vehicular invasion, and that the only evidence of force was impermissibly used to support both the charge of vehicular invasion and the felony murder. He further contends that the trial court erred in admonishing the jury regarding the reasonable doubt standard, and that the court erroneously considered a factor inherent in the murder offense as an aggravating factor in sentencing him.

¶ 3 At trial, Sonya Moore testified that about 2 a.m. on January 20, 2007, she was standing on the back porch of the domestic violence shelter at 3234 East 91st Street in Chicago, when she observed two men arguing inside a car that was parked in the alley below. She noticed that the driver's side of the vehicle was wedged against the wall in the alley so that the driver could not exit, and heard someone say, "[g]ive me your wallet. Give me your money." The driver, who was later identified as the victim Jesse Herrera, responded, "[n]o," and the other man, later identified as defendant, then started to strike and punch the victim, who responded, "[o]kay. Okay. I'll give you my money." Defendant then exited the vehicle on the passenger side, reached back into the vehicle, and grabbed the victim, dragging him through to the passenger side while continuing to punch him. The victim told defendant to "[s]top, you're hurting me," and at that point, Moore went inside and asked someone to call police.

¶ 4 Moore further testified that there were security cameras at the shelter which monitored the alley. While she waited for police to arrive, Moore watched through a security camera, and saw the victim partially out of the passenger side of the car while defendant kicked and stomped on him, before going through the victim's items in the car.

¶ 5 Chicago police officer Arroyo responded to the scene with his partner, and saw defendant standing over the victim with a pool of blood on the ground. Defendant looked in the direction of the officers, then fled, but was apprehended shortly thereafter, and found with blood on his hands. Defendant told police that he "ran because that Mexican dude tried to rob me."

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¶ 6 Detective Golab testified that he interviewed defendant, who told him that the victim approached him and "disrespected" him by asking him to buy some drugs. Defendant further indicated that he told the victim to "move along," and when he refused, he punched him in the face several times.

¶ 7 Dr. Ariel Goldschmidt testified that the victim died on February 6, 2007, and that he reviewed the report of Dr. Valerie Arangelovich, who performed the autopsy, as well as the victim's hospital records. These documents showed that the victim had several lacerations to his face as well as fractures to the bones around his eye, cheekbone, and the top of his jaw. The victim also suffered from two fractures to the back of his neck, and fractures to his shoulder blades and ribs, which resulted from a significant amount of force, such as being stomped on and kicked.

¶ 8 Dr. Goldschmidt further testified that the victim had a liver transplant in 1996, but when he was admitted into the hospital for this incident, he had alcohol in his system, and his liver had cirrhosis. The victim also had bleeding in the esophagus which was an indication of the final stages of liver disease. Dr. Goldschmidt testified that based on his review of Dr. Arangelovich's examination and the medical records, he agreed with her assessment that the victim "died of injuries sustained due to an assault in a homicide manner," and not from liver disease. The doctor explained that the broken bones caused the victim to lose a large amount of blood which contributed to the progress of his end stage liver disease. The doctor noted that "all of the injuries together are the cause of death," specifically stating that the victim's broken bones "started the domino effect leading to [his] death."

¶ 9 The defense called Dr. Daniel Spitz, who acknowledged that in a previous autopsy he missed a bullet wound in the back of a patient's head. Dr. Spitz then testified that he reviewed the victim's medical history, which showed that he underwent a liver transplant in 1996, but

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subsequently stopped taking his anti-rejection medication and continued to drink. As a consequence, he again developed cirrhosis of the liver, and in 2006, the victim's liver was found to be cirrhotic and he had bleeding of the esophagus. Dr. Spitz testified that the victim suffered numerous broken bones from the incident, but that the blood loss from these bone fractures did not play a role in the victim's death because it was not a large loss of blood, and the victim died from liver failure, and not as a result of the blunt trauma.

¶ 10 At the close of evidence, the jury found defendant guilty of felony murder, based on the predicate felony of vehicular invasion. At the sentencing hearing, the court stated that it extensively reviewed its notes from the trial, and considered all the statutory factors in mitigation along with the factors in aggravation. The court noted that defendant's conduct "caused the most serious harm possible. It caused the death of another individual." The court further noted that this was not a small incident, but, rather, involved the victim being ripped out of the car and severely beaten which left him with numerous broken bones. The court also observed that defendant had an extensive criminal history spanning a decade, and sentenced him to a term of 40 years' imprisonment.

¶ 11 On appeal, defendant first contends that the State failed to prove him guilty beyond a reasonable doubt of the predicate felony, *i.e.*, vehicular invasion. He specifically contends that the State failed to prove that he entered the car by force.

¶ 12 When defendant challenges the sufficiency of the evidence to sustain his conviction the proper standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375

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(1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *Campbell*, 146 Ill. 2d at 375. For the reasons that follow, we do not find this to be such a case.

¶ 13 To sustain defendant's conviction for felony murder predicated on vehicular invasion, the State was required to prove, in relevant part, that defendant knowingly, by force and without lawful justification, entered or reached into the interior of a motor vehicle while it is occupied by another person with the intent to commit therein a theft or felony. 720 ILCS 5/12-11.1(West 2010). Defendant maintains that the State failed to prove that he entered the car by force where he was seen in the car with the victim, and that any force that occurred while the parties were in the car cannot be properly classified as gaining entry by force.

¶ 14 The evidence presented at trial shows that Moore observed two people arguing inside a car that was parked in the alley, then saw defendant strike the victim and heard him demand money from him. Further evidence showed that defendant exited the car on the passenger side, then reached in and pulled the victim from the driver's side to the passenger side of the car while continuing to demand money and punching the victim, before going through the victim's items in the car. Based on this evidence, the jury could reasonably conclude that defendant forcefully reached into the interior of the car while it was occupied by the victim with the intent to commit a theft or a felony therein, thus proving the predicate felony of vehicular invasion.

¶ 15 In reaching this conclusion, we find *People v. Isunza*, 396 Ill. App. 3d 127 (2009), instructive. In that case, defendant insisted that he did not use any force to enter the victim's vehicle when he reached in through the open window and punched her. *Isunza*, 396 Ill. App. 3d at 131. The reviewing court found that the open window was not dispositive of whether defendant used force to reach into the vehicle, and that defendant's act of punching the victim while he stood outside her vehicle as she was sitting inside her car satisfied the element of using

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force to reach into the car. *Isunza*, 396 Ill. App. 3d at 131. We reach the same conclusion here where the evidence clearly showed that defendant reached into the vehicle, and forcefully pulled the victim to the passenger's side.

¶ 16 Defendant next contends that the only evidence of force presented by the State, namely Moore's testimony that after exiting the car, defendant punched and kicked the driver while attempting to drag him from the vehicle, was impermissibly used to support both the charge of vehicular invasion and felony murder. He maintains that these observations described a single course of conduct, and, as a result, the underlying felony of vehicular invasion was improperly based on the same act as the murder.

¶ 17 Where the acts constituting a forcible felony arise from, and are inherent in, the act of murder itself, those acts cannot also serve as the predicate felony for a charge of felony murder. *People v. English*, 2013 IL 112890, ¶29. Whether defendant's conduct constituting vehicular invasion arose from and was inherent in the act of murder is a question of law which we review *de novo*. *In re Dionte J.*, 2013 IL App (1st) 110700, ¶71.

¶ 18 In this case, Moore testified that she initially heard defendant demanding money and hitting the victim while inside the car. She then observed defendant outside the vehicle reaching in and pulling the victim across to the passenger side while continuing to demand money, which was the underlying force for the vehicular invasion. The evidence of the pummeling which followed and led to the victim's demise, however, were separate acts independent of the underlying felony, and support the separate convictions. *In re Dionte J.*, ¶79.

¶ 19 Dr. Goldschmidt specifically testified that the fractures the victim suffered to his neck and back required a significant amount of force, such as stomping and kicking, and that the broken bones caused the victim to lose a large amount of blood which impacted his end stage liver disease, resulting in his death. Defendant, however, contends that this is contradicted by

Dr. Goldschmidt's testimony that it was the cumulative effect of all his actions that resulted in the victim's death. Although Dr. Goldschmidt testified that "all of the injuries together are the cause of [the victim's] death," the acts of reaching in and pulling the victim to the passenger side to effect the robbery, did not cause the injuries leading to his death; rather, the further evidence that defendant punched, stomped, and kicked the victim causing injuries that ultimately led to his death, were separate acts supporting the separate offense.

¶ 20 In reaching this conclusion, we find *People v. Payton*, 356 Ill. App. 3d 674 (2005), and the portion of *Isunza* cited by defendant factually inapposite. In *Payton*, 356 Ill. App. 3d at 683, this court found that the felony murder instruction had been given to the jury in error where the underlying felony, aggravated battery, arose out of and was inherent in the same act as the murder, namely, the fatal beating of the victim which involved defendant punching the victim in the face and kicking him in the head when he fell. *Payton*, 356 Ill. App. 3d at 676, 683. Here, unlike *Payton*, the fatal beating was separate from the vehicular invasion, and ultimately resulted in the victim's death. The evidence of these separate acts also distinguishes this case from *Isunza*, 396 Ill. App. 3d at 134, where this court found that defendant's act of reaching into the vehicle and striking the victim in the head was the same act as vehicular invasion, and accordingly, required that the lesser offense, aggravated battery, be vacated.

¶ 21 Defendant further contends that the State did not present any evidence from which the jury could conclude that some blows, but not others, resulted in the fatal injuries to the victim and cannot do so now. In support of that argument, he relies on *People v. Crespo*, 203 Ill. 2d 335, 342 (2001), however, we find that reliance misplaced. In *Crespo*, defendant was convicted of, *inter alia*, aggravated battery and armed violence, and argued on appeal that his conviction for aggravated battery could not stand because it was based on the same single act as the armed violence charge, namely, three stab wounds to the victim. *Crespo*, 203 Ill. 2d at 337. The

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supreme court in *Crespo* observed that the State did not delineate between the stab wounds for the charges, evincing the State's intent to charge the stab wounds as a single attack and not as multiple acts, and, accordingly, reversed the aggravated battery conviction. *Crespo* 203 Ill. 2d at 342-45. Here, by contrast, the State charged defendant with the felony murder based on his infliction of blunt force trauma, and with vehicular invasion based on his reaching into the interior of the victim's vehicle by force. Furthermore, the State established at trial that the victim's death was the result of the aggression of defendant stomping and kicking the victim, and was separate from the completed predicate felony of vehicular invasion. Accordingly, we find that the felony murder conviction was valid. *People v. Davison*, 236 Ill. 2d 232, 242 (2010).

¶ 22 Defendant next contends that the trial court erred in admonishing the jury regarding the reasonable doubt standard. He maintains that, by informing the jury that the definition of reasonable doubt was for them to decide, the court invited them to convict on a standard closer to the preponderance of the evidence.

¶ 23 Defendant acknowledges that he waived this issue for review where he did not raise it below, but he maintains that waiver should be less rigidly applied when it is the judge's conduct that is at issue. Although judicial misconduct can provide a basis for relaxing the forfeiture rule (*People v. Sprinkle*, 27 Ill. 2d 398 (1963)), the supreme court has clarified that this exception applies only in extraordinary situations such as when the trial judge makes inappropriate comments to the jury or relies on social commentary in sentencing defendant to death (*People v. McLaurin*, 235 Ill. 2d 478, 488 (2010)). The fact that forfeiture is rarely relaxed in noncapital cases underscores the importance of the uniform application of the rule except in the most compelling situations. *McLaurin*, 235 Ill. 2d at 488. Here, defendant has not presented any extraordinary or compelling reason to relax the rule under *McLaurin*.

¶ 24 Notwithstanding, defendant claims that the matter should be considered as plain error. The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). The burden of persuasion remains with defendant, and the first step is to determine whether an error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find none, and thus no plain error to preclude forfeiture of this issue.

¶ 25 The record shows that during *voir dire* the court advised the prospective jurors that it determines what reasonable doubt means. Then, during deliberations, the jury sent a note asking the trial court for a definition of reasonable doubt. The court refused to provide them with a definition, and with the concurrence of counsel merely told the jury, "[t]hat is for you as the jurors to determine."

¶ 26 Defendant, relying on *People v. Turman*, 2011 IL App (1st) 091019, and *People v. Franklin*, 2012 IL App (3d) 100618, maintains that the court's instruction erroneously invited the jurors to create their own definition and convict on something closer to the preponderance of the evidence standard. We observe that in *Turman*, the court advised the jurors that "reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is." *Turman*, ¶19. This court found that admonishment improper as it allowed the jury to come up with a standard that in all likelihood fell below the threshold of reasonable doubt. *Turman*, ¶25.

¶ 27 In *Franklin*, the trial court admonished the jury that reasonable doubt is "what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt." *Franklin*, ¶27. The Third District found, in light of *Turman*, that this instruction erroneously provided the jury with a definition of reasonable doubt, and allowed them to convict on a standard less than reasonable doubt. *Franklin*, ¶¶27-28.

¶ 28 Here, unlike *Turman*, and *Franklin*, the court did not indicate that the jurors were to collectively come up with a definition. Instead, the court simply responded to the jury's question that reasonable doubt was for it to determine, a response that was found proper in *People v. Failor*, 271 Ill. App. 3d 968, 970-71 (1995).

¶ 29 In *Failor*, 271 Ill. App. 3d at 969, as here, the jury asked for a definition on reasonable doubt. The parties agreed that the court should advise the jurors that they decide what reasonable doubt is, and, accordingly, the trial court responded that the matter is for the jury to determine. The court also told them to review all their instructions as previously given and to continue their deliberations. *Failor*, 271 Ill. App. 3d at 970. On appeal, defendant argued that the trial court erred in refusing to define reasonable doubt after a request from the jury to do so. *Failor*, 271 Ill. App. 3d at 970. This court observed that no instruction was given on reasonable doubt, and that the trial court did not err in refusing to give an instruction where the supreme court has determined that neither the trial court nor counsel should define reasonable doubt for the jury. *Failor*, 271 Ill. App. 3d at 970-71. We find no appreciable difference in this case, and likewise conclude that no error occurred in the court's response. Therefore, there can be no plain error. *People v. Willis*, 2013 IL App (1st) 110233, ¶117.

¶ 30 Finally, defendant contends that the trial court improperly considered a factor inherent in the murder, namely, serious harm and death, as an aggravating factor in sentencing. He thus requests that we vacate his sentence and remand for a new sentencing hearing.

¶ 31 We initially observe that defendant maintains that the standard of review is *de novo*, citing *People v. Caballes*, 221 Ill. 2d 282, 289 (2006), and *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008). We disagree. Neither of these cases dealt with the issue before this court, *i.e.*, whether the sentence imposed was based on an improper aggravating factor. The standard of

review for such an issue is whether the trial court abused its discretion in imposing sentence.

Brewer, ¶55. For the reasons that follow, we find none here.

¶ 32 Defendant takes issue with the court's comment that defendant's conduct caused the most serious harm possible, the death of another individual. It is well settled that in imposing a sentence, the trial court may not consider facts implicit in the underlying offense for which defendant was convicted. *People v. Brewer*, 2013 IL App (1st) 072821, ¶55. However, we bear in mind that the requirement that the court specify on the record the factors that led to his sentencing determination was not intended to be a trap for a sentencing judge (*Barney*, 111 Ill. App. 3d at 679), and that it is unrealistic to suggest that the trial court in sentencing a convicted murderer must avoid mentioning the fact that someone has died or risk committing reversible error (*People v. Martin*, 112 Ill. App. 3d 486, 503 (1983)).

¶ 33 It is well settled that the sentencing court may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense committed by defendant. *Brewer*, ¶55. Here, considering the court's comments as a whole (*People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009)) it is evident that the court focused on the manner and circumstances of the victim's death, rather than the death itself where it noted that this was no small incident, but, rather, a severe beating where defendant ripped the victim from the car, beat and kicked him, breaking numerous bones. We thus find no error by the court in this regard, nor an abuse of discretion in sentencing defendant to a term of 40 years' imprisonment, which was well within the statutory range for murder. *Brewer*, ¶57.

¶ 34 In reaching this conclusion, we find defendant's reliance on the Fifth District case, *People v. Joe*, 207 Ill. App. 3d 1079, 1086 (1991), misplaced. In *Joe*, the trial court explicitly stated that a factor in aggravation was that defendant engaged in a course of conduct which threatened serious harm, and indeed caused serious harm to the victim, but did not consider the particular

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circumstances of the offense such as the manner in which the harm was inflicted. *Joe*, 207 Ill. App. 3d at 1085-86.

¶ 35 For the reasons stated, we conclude that the State proved defendant guilty beyond a reasonable doubt of the predicate felony for felony murder, vehicular invasion; the same act was not used to support defendant's conviction for murder and the predicate felony; the trial court did not erroneously admonish the jury concerning the reasonable doubt standard; and the trial court did not abuse its sentencing discretion in imposing a 40-year term of imprisonment on his conviction of felony murder.

¶ 36 We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.