SECOND DIVISION
April 28, 2015

No. 1-11-3460

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).

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	
	)	No. 09 CR 16847 01
	)	
	)	
SHAWN GASTON,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Jorge Alonso,
	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proven guilty of first degree murder and attempt murder beyond a reasonable doubt. Trial counsel was not ineffective for failing to request involuntary manslaughter instructions. The trial court did not abuse its discretion in failing to recuse itself. Defendant's sentence is not excessive.

¶ 2 Following a jury trial, defendant Shawn Gaston, was convicted of first degree murder (720 ILCS 5/9-1(A)(1) (West 2008)) in the shooting death of police officer, Alejandro Valadez

and attempted first degree murder (720 ILCS 5/9-1(A)(2) (West 2008)) of Kelvin Thomas. Defendant was sentenced to an aggregate of 125 years' imprisonment. On appeal, defendant argues: (1) the State failed to prove him guilty beyond a reasonable doubt of first degree murder and attempt murder; (2) trial counsel was ineffective for failing to request an involuntary manslaughter jury instruction; (3) "the trial court should have recused itself due to its attendance at [a] fundraiser for decedent with the State's attorney and trial counsel was ineffective for not moving for recusal"; and (4) his sentence was excessive. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 On October 16, 2009, the State charged defendant and co-defendants Kevin Walker and Christopher Harris[1] with the first degree murder of Chicago police officer Alejandro Valadez and the attempted murder of Kelvin Thomas.

¶ 5 At trial, it was established that on May 31, 2009, defendant borrowed his mother's gray four-door Pontiac G6. At 3:30 p.m., while driving the car, defendant was issued a citation by an Illinois State Police Trooper for a seat-belt violation near 7600 South State Street. Walker was in the car with defendant when the citation was issued. A video of the stop was played at trial.

¶ 6 Chicago police Officer Valadez and his partner, Officer Vargas, began their shift at 11 p.m. on May 31, 2009. Both officers were wearing their bullet-proof vests, their duty belts, and their badges over their vests. After leaving the station, they received radio reports about shots fired in the area west of Ashland at about 60th Street. When Officers Valadez and Vargas arrived at that location, they met up with Officer Pienta and his partner Officer Larson, who were

[1] Kevin Walker and Christopher Harris are not parties to this appeal

also on duty and received the same radio reports about shots fired. They received another report of shots being fired in the area of 60th to 61st and Hermitage and Paulina. The reports also included information about guns located in a red garage in the same area in an alley between Paulina and Hermitage. All four officers responded to the reports and drove to the alley on the east side of Hermitage to investigate. When the four officers arrived in the alley, Officers Lopez and Treacy were also there responding to the same reports. All of the officers exited their vehicles to investigate the guns in the red garage. They did not find anything in the garage. Additional officers arrived while the officers were looking in the garage.

¶ 7 Officers Larson and Pienta began searching the vacant lot. Officers Lopez, Valadez and Vargas were also standing in the vacant lot. Officers Valadez and Vargas were having a conversation when a man was seen walking southbound on the east sidewalk of Hermitage. The pedestrian, Kelvin Thomas, was carrying a Styrofoam container filled with nachos that he had just gotten from his sister's house at 60th and Hermitage. Officer Valadez did a protective pat-down of Thomas and asked him if he heard any gunshots. Thomas stated that he had heard shots fired 10 to 15 minutes earlier.

¶ 8 As they conversed, five or six shots were fired from the street and all the officers fell to the ground. The first set of shots was fired in slow succession, as if from a revolver. Officer Vargas saw Officer Valadez and Thomas fall to the ground and then observed a vehicle with the front passenger sticking out of the window firing shots towards their direction. Officer Vargas saw the shooter had a white t-shirt, a dark arm, and a black semi-automatic handgun. Thomas saw a white sleeve sticking out of the passenger side of the car as well. Officer Larson saw the same shooter, a black male wearing a white t-shirt with long hair in dreadlocks. Officer Pienta

also saw the shooter was a black male in a white t-shirt who extended his right arm to fire the weapon. Officer Lopez saw muzzle flashes and that the shooter was wearing a white t-shirt. According to Officer Lopez, the second set of shots was longer and more rapid, as if the shots were being fired from a semi-automatic pistol. It did not sound as if the shots were fired from the same gun. Both Officer Vargas and Officer Pienta estimated that the second round of firing was between eight and ten shots, while Officer Larson recalled six to eight shots. Officer Vargas and Officer Larson were unable to draw their weapons. Officer Larson saw the shots being directed at Officer Valadez and Thomas. After the second round of shots, defendant's car sped away heading north-bound down Hermitage. It was described as a sporty four-door blue or gray vehicle with scratch marks along the back passenger side. Officer Vargas identified the vehicle as a Pontiac, either gray or blue. Officer Larson ran after defendant's car.

¶ 9 After the firing had ceased, Officers Vargas, Larson, and Pienta ran to check on Officer Valadez. They found him lying unresponsive on his back with his eyes open. Officer Valadez had been shot on the left side of his head and in his left thigh. Officer Vargas asked Officer Valadez if he was ok, but Officer Valadez did not respond. Officer Valadez was bleeding from the back of his head from the left side, behind his ear. Officer Vargas radioed for help, stating that an officer was down and that shots were fired at the police. When an ambulance arrived, Officer Valadez was transported to Stroger Hospital, where he was later pronounced dead. An assistant Cook County Medical Examiner testified that the cause of death was a gunshot wound to the head that entered from the left ear and lodged in the right side of the brain.

¶ 10 While the other officers were attending to Officer Valadez, Officers Lopez and Tracey ran back to their car in an attempt to follow the shooters. They traveled the same path that they

saw defendant take but returned to the scene when they could not find defendant's car.

¶ 11 The officers at the scene, as well as additional officers, began searching for defendant's car. At about 1:10 a.m., Officer Ruzak saw a vehicle that matched the description of the shooters' car, a gray Pontiac G6, at 6147 South Paulina. Officer Ruzak placed his hand on the hood of the car and felt that the engine was still warm. Officer Ruzak noticed a .40 caliber shell casing wedged between the rear window of the vehicle and the trunk. When Officers Larson, Pienta, and Lopez arrived at 6147 South Paulina they saw the same vehicle in which the shooters were driving. The vehicle was parked on the east side of the street, which ended in a cul-de-sac. Officer Larson recognized the distinguishing marks that were on the rear passenger side of the car and he also observed a spent cartridge lodged between the back window and the trunk. Thomas was also brought to the scene where the car was found, and stated that the car looked similar to the shooters' car. The officers also observed a traffic citation from the Illinois State Police on the center console. The car was impounded to a police facility. It was discovered that the vehicle was registered to Uvonne Gaston, defendant's mother.

¶ 12 The police went to defendant's mother's house, in the 6200 block of South Hermitage, where she told them that defendant had borrowed her car that day. She said that she had gone to bed at 9 p.m. and had not heard from defendant since he had taken her car. Defendant's mother consented to a search of defendant's room. In his room, the police recovered three loose .38 caliber rounds, one box of .357 caliber bullets, and a box of .44 caliber magnum bullets.

¶ 13 While the police talked to defendant's mother, he watched from across the street where he was hanging out with a group of friends. Dimarko Burns was present at the gathering across the street from defendant's house and established that while defendant watched, he said "[t]hat's

my house" and he also said "Niggers' snitching." Defendant was arrested across the street from his house after defendant identified himself to the police. He was brought into custody along with co-defendants Walker and Harris.

¶ 14 While at the police station, around 2:20 a.m. on June 1, 2009, an evidence technician performed a gun residue test on defendant and confiscated the white short-sleeve t-shirt that he was wearing. Detective Jacobsen read him his Miranda rights. He stated that he understood his Miranda rights and was willing to talk about what he had done in the early morning hours of June 1, 2009. During this interview, defendant stated that he walked to 62nd and Wolcott at approximately 9 p.m. to get a tattoo. He called his friend, Kevin Smith, to let him know that they were giving tattoos for $35. Smith met him there about 15 to 20 minutes later. They got matching tattoos, which took about an hour, and then they left in Kevin's Chevrolet Corsica. They then drove to the 6200 block of South Paulina, where Kevin dropped him off across the street from his house to hang out with some friends. He stated that he did not own a vehicle and claimed that he had not been in his mother's gray Pontiac for approximately one week.

¶ 15 At around 7:15 a.m. that same day in a separate interview, Detective Foster confronted defendant about his previous story about not being in his mother's car for about a week. Detective Foster informed him that his mother had told the police that he borrowed her car on the night of May 31, 2009. Detective Foster also informed defendant that the Illinois State Police had issued him a traffic ticket that same night and therefore his story about not being in his mother's car could not be true. Defendant then admitted to using his mother's car to take his brother to his girlfriend's house and run some errands during the day. He then stated that he and Walker had actually driven his mother's car to get matching tattoos at 62nd and Winchester. He

stated that the tattoos took about 30 minutes and then drove back home in his mother's car. As they drove down the 6000 block of South Hermitage, Walker and defendant were shot at. He believed that the car was hit with gunfire. He and Walker returned to his house where defendant got a gun. Walker drove and defendant was a passenger in his mother's car. As they approached the 6000 block of South Hermitage, defendant saw people standing in a vacant lot. Walker slowed down and pulled the car closer to the curb. Defendant admitted that he fired his 9 millimeter semi-automatic four times at some people in a vacant lot in the 6000 block of South Hermitage. He stated that the shooting was in retaliation to being shot at earlier in the same block. After he shot at people he saw standing in the vacant lot, he and Walker proceeded back to his block where they parked the car and joined the party across the street from his mother's house.

¶ 16 Around 9 a.m. on June 1, 2009, defendant spoke with Assistant State's Attorney (ASA) Fabio Valentini for about 20 to 25 minutes. Defendant told ASA Valentini that he and Walker had driven in his mother's gray Pontiac G6 to get tattoos that night at a house on 62nd and Winchester. On their drive home, after the tattoos were finished, defendant and Walker were shot at about 10 times while driving north-bound on South Hermitage, although he did not see the shooters. Defendant then told ASA Valentini that he and Walker went to his block to get "a 9" from under a porch and told Walker that "we are fixin' to go back." Walker was driving and defendant was the passenger. They drove back to the block where they had been shot at. When they arrived at the 6000 block of South Hermitage, he saw some people standing by the vacant lot. He told Walker to slow down and he reached out with his right hand and shot four times at the people by the vacant lot. After the shooting, Walker and defendant drove back to the block of

61st and Paulina.

¶ 17 After the interview, ASA Valentini arranged to travel with defendant to the area of the shooting to retrace the route and ascertain addresses. Around 10 a.m., defendant, ASA Valentini, Detective Foster, and Sergeant Duffin traveled to the area of the shooting. As they drove to the area of the shooting, defendant pointed out the house where he got his tattoo as being 6240 South Winchester. Defendant showed ASA Valentini and the officers the route he drove after leaving the house on Winchester. When they arrived at the 6000 block of South Hermitage, defendant showed them the area where he and Walker had been shot at. There was a vacant lot on the east side of the street.

¶ 18 Defendant then showed them the route he drove after being shot at. The route led them to an alley and the back porch of 6235 South Paulina, where defendant stated he retrieved his 9mm semi-automatic from. This was also the same place where defendant had returned the gun to, after he fired it. The police officers spent about 10 to 15 minutes searching for the gun but could not find it. When defendant was informed that the gun was not found, he responded by remaining silent, putting his head down, and did not make eye contact.

¶ 19 Defendant then showed them the route he and Walker drove after he had retrieved his gun from the porch on Paulina. This route led them back to the 6000 block of South Hermitage, where defendant said he had been shot at. The defendant explained that while they were driving north-bound on Hermitage, he had Walker slow the car down, almost to a complete stop, at the curb on the right. The vacant lot was on the right side of the car. He said that they pulled up in front of a silver station wagon and he saw some people standing there so he decided to shoot at them. Defendant then demonstrated to ASA Valentini how he fired the gun with his right hand.

ASA Valentini and Detective Foster walked to the area where defendant indicated the people he shot at were standing. The location was about 10 to 15 feet from the car and there was a Styrofoam container with nachos on the ground.

¶ 20 Defendant also showed them the route they took after the shooting. This route took them to the 6100 block of South Paulina where there is a cul-de-sac at the end of the block. Defendant explained that Walker made a u-turn at the cul-de-sac and parked his mother's Pontiac on the east side of the street facing north. Defendant said that once the car was parked, he and Walker walked to the front porch of a house located on the east side of Paulina, south of 62nd street. They remained drinking on the porch for a short while and then he saw the police come to his house, which was across the street. The police then came to the porch where he was arrested.

¶ 21 When they arrived back at the station from the tour, defendant agreed to have his statement recorded on video. Defendant described the same events in the same way as he had done earlier in his interview with ASA Valentini and in the same way he had done during the driving tour. This videotaped statement was published to the jury.

¶ 22 The State also presented the following evidence at trial. Defendant's mother testified that Walker was defendant's best friend. She stated that both Walker and Harris lived at her house periodically.

¶ 23 The police recovered the following from the Pontiac G6: a .40 caliber semi-automatic pistol, a 9 millimeter semi-automatic rifle, and a Colt .357 revolver. The rifle was loaded with eight bullets in its magazine and had two jammed cartridges, the semi-automatic pistol had an empty clip, and the .357 pistol had one live cartridge with a live bullet and five fired cartridge cases inside it. A firearm analysis revealed that the two bullets recovered from Officer Valadez's

body were fired from this .357 pistol. The police also recovered two live .40 caliber rounds directly under the revolver and a large caliber fired bullet towards the passenger side front of the trunk. The forensics investigator determined that a large caliber bullet pierced the back of the car's right passenger rear bumper. The .40 caliber round lodged between the rear window and the trunk was also recovered along with an Illinois State Police traffic citation, near the shifter, that was issued to defendant.

¶ 24 Through fingerprint analysis, Walker's fingerprints were found under the trigger guard of the .40 caliber semi-automatic pistol recovered from the Pontiac G-6. DNA analysis also showed Walker's DNA on the .40 caliber pistol. Defendant's fingerprints were found on the 9 millimeter rifle. Defendant tested positive for gunshot residue on his right hand and codefendant Harris also tested positive for gunshot residue on his right hand. Walker did not test positive for gunshot residue.

¶ 25 Police recovered 38 separate pieces of firearms evidence at the scene of the crime. Seven cars on each side of the street, near 6025 South Hermitage, had bullet damage. On the side and the front of a gray Volvo, parked at 6025 South Hermitage, there were two .40 caliber casings. Further north from the Volvo, seven .40 caliber casings were recovered. One of the .40 caliber casings recovered was Winchester brand and was weathered. However, the remaining eight .40 caliber casings were from a CBC brand and were not weathered. The location of the eight CBC casings was consistent with shots fired from a moving car, driving past the Volvo. All eight CBC casings, along with the .40 caliber cartridge casings wedged in the trunk of the Pontiac, were fired from the .40 caliber pistol recovered from the Pontiac. A shotgun shell was also recovered at 6025 South Hermitage, which was on the east side of the street. The police also recovered six

.38 caliber special cartridge casings in the gang way of 6016 South Hermitage and fired bullets from a Dodge Durango, nearby porch and two other vehicles which were parked around 6020-24 South Hermitage.

¶ 26 Defendant's motion for a directed verdict was denied. Defendant did not testify. Defense counsel called a total of nineteen witnesses, thirteen related to the search and seizure of the vehicle. Of the remaining six witnesses, Paramedic Charles Butler testified about responding to Officer Valadez being shot. Lisa Reed, defendant's and his mother's upstairs neighbor, testified as to her consent to the search of her apartment. Detective Jean Romic testified that she examined the Pontiac and described the bullet holes as being consistent with "people shooting from both sides of the street as the car was going down it." Detective John Foster testified to an August 14, 2009, line up where witness Jolaine Thomas identified Chris Harris as the person she saw shooting the weapon from the vehicle on May 31, 2009. On cross-examination, Foster testified that Jolaine's niece was dating defendant at the time of the shooting.

¶ 27 After hearing all of the evidence, the jury found defendant guilty of four counts of first degree murder and three counts of attempt first degree murder. Defendant was sentenced to an aggregate of 125 years' imprisonment. Specifically, defendant was sentenced to a term of 80 years' imprisonment for first degree murder, which is 60 years for first degree murder plus a mandatory 20-year add on for personally discharging a firearm while committing the murder (730 ILCS 5/5-4.5-20(a)(1) (West 2008); 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2008)) and a consecutive sentence of 45 years' imprisonment for attempt first degree murder, 30 years for attempt murder plus a mandatory 15-year add on for being armed with a firearm while committing the offense (720 ILCS 5/8-4(c)(1)(B) (West 2008); 730 ILCS 5/5-4.5-25(a) (West

2008)). This appeal followed.

¶ 28 ANALYSIS

¶ 29 Defendant has admitted to shooting a 9 millimeter pistol at the group standing in the vacant lot on the 6000 block of South Hermitage on June 21, 2009. That fact is not contested. Defendant argues that the bullet fragments recovered from Officer Valadez were from a .357 and therefore the evidence was insufficient to establish that defendant fired the fatal bullet that killed Officer Valadez. As a result, the State failed to prove him guilty beyond a reasonable doubt of first degree murder. Defendant also argues that the State failed to prove him guilty beyond a reasonable doubt of attempt murder because the State failed to prove that he had the specific intent to kill Thomas.

¶ 30 When reviewing the sufficiency of evidence that supports a conviction, we must determine whether in a light most favorable to the State, any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985). Under a sufficiency of the evidence challenge, a court will not retry the defendant. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). Instead, the trier of fact's factual findings and credibility determinations are given great weight. *People v. Jimerson*, 127 Ill. 2d 12 (1989). The reviewing court may reverse the conviction when "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Wheeler*, 226 Ill. at 115.

¶ 31 Section 9-1(a) of the Criminal Code of 1961 sets forth the elements of first degree murder:

"A person who kills an individual without lawful justification commits first

degree murder if, in performing the acts that cause death

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

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

(3) he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a) (West 2008).

¶ 32 The State in this case proceeded on a theory of accountability. A person can be found to be legally accountable for the act of another if "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2008). It has been recognized that the purpose of the theory of accountability is to incorporate the common-design rule. *People v. Fernandez*, 2014 IL 115527, ¶ 13. To prove that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that (1) the defendant shared the criminal intent of the principal or (2) there was a common criminal design. *People v. Williams*, 193 Ill. 2d 306, 338. Under the common-design rule, when "two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts." *In re W.C.*, 167 Ill.2d 307, 337 (1995). Where there is "evidence that a defendant voluntarily attached himself to a group bent on illegal acts with

knowledge its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another. *Id* at 338.

¶ 33 In this case, defendant admitted that he went to his house to get his 9 millimeter to seek vengeance for the shots that were fired at him and Walker in the 6000 block of South Hermitage. He admitted that Walker drove the car while he sat in the passenger seat and they drove back to South Hermitage to retaliate. He also admitted to firing his 9 millimeter four times in the direction of Officer Valadez and Thomas who were standing in the vacant lot on June 1, 2009. Defendant's statement was corroborated by the testimony of several officers who saw that the second set of shots came from the person who was wearing a white t-shirt seated in the front passenger side of the vehicle. Furthermore, defendant tested positive for gunshot residue and his fingerprints were found on the 9 millimeter gun, which was found in the trunk of defendant's mother's car that was seen at the scene of the crime. In addition, the .357, from which the fatal shots were fired, was found in the trunk of defendant's mother's car.

¶ 34 Defendant argues that *People v. Phillips*, 2010 IL App (1st) 101923, is dispositive of this issue because knowledge of the presence of weapons in the car is insufficient to establish that he knew that a crime may have been committed. In *Phillips*, there was a near collision between two cars, the passenger in the car driven by the defendant stepped out of the vehicle and began firing at the occupants of the other car. *Id.* ¶¶ 3-5. The shooter than returned to the car and the defendant drove away. *Id.* ¶ 6. The court in *Phillips* found that if the defendant did not know that his passenger had a gun then he could not have intended to help him commit a crime that requires a firearm regardless of his actions subsequent to the crime. *Id.* ¶22. The court rejected the State's accountability theory and found the defendant innocent. *Id.* ¶ 32.

¶ 35 *Phillips* was overturned in *Fernandez*, 2014 IL 115527. The court in *Fernandez* found that "there is no question that one can be held accountable for a crime other than the one that was planned or intended, provided it was committed in furtherance of the crime that was planned or intended. To the extent that *Phillips* holds or suggests otherwise, it is hereby overruled." *Id*. ¶ 19. Even if *Phillips* had not been overruled, in this case there is overwhelming evidence that defendant, after being shot at, returned to 6235 South Paulina to retrieve a weapon for the purpose of shooting people who shot at him and, after directing the driver of the car to the location of the gun and back to the scene of the earlier shooting, he readily admitted to firing multiple shots at people he saw standing in the area of the vacant lot.

¶ 36 "Proof of the common purpose or design need not be supported by words of agreement, but may be drawn from the circumstances surrounding the commission of the unlawful conduct." *People v. Jones*, 376 Ill. App. 3d 372, 383-84 (2007). Viewing the evidence in the light most favorable to the State, we find the evidence overwhelmingly supports defendant's conviction for first degree murder. See *People v. Flynn*, 2012 IL App (1st) 103687 (finding defendant liable for first degree murder and attempted first degree murder under accountability theory where defendant participated in the shooting, even though he did not fire the fatal shot that killed the victim).

¶ 37 We likewise reject defendant's argument that the State failed to prove that he had the intent to kill Thomas where the State only proved that he was present at the scene of the crime and he fired a weapon.

¶ 38 The State proves the offense of attempted murder when they show that the defendant "with specific intent to kill * * * does any act which constitutes a substantial step towards the

commission of murder." *People v. Hill*, 276 Ill. App. 3d 683, 687 (1995) (720 ILCS 5/8-4 (West 2008)). Intent, when not admitted, can be inferred from the surrounding circumstances, such as the character of the attack, use of a deadly weapon, and the level of injury. *People v. Williams*, 165 Ill. 2d 51, 64 (1995). Intent will be inferred when a "defendant voluntarily and willingly commits an act, the natural tendency of which is to destroy another's life." *People v. Green*, 339 Ill. App 443, 451 (2003). A defendant can be convicted under an attempted murder charge when he discharges "a weapon in the direction of another individual, either with malice or total disregard for human life." *People v. Bailey*, 265 Ill.App.3d 262, 273 (1994); see also *Green*, 339 Ill. App 443 (finding that the act of shooting at a group of police officers establishes the intent necessary to sustain a conviction of attempted murder).

¶ 39 As we have previously discussed, the evidence presented at trial established that defendant, who was a passenger in his mother's car, being driven by Walker, knowingly and intentionally fired his 9 millimeter pistol in the direction of Officer Valadez and Thomas. As such, we find that when viewing the evidence in the light most favorable to the State, a rational trier of fact could have found defendant guilty of attempt murder beyond a reasonable doubt.

¶ 40 Defendant next argues that trial counsel was ineffective when he failed to tender a jury instruction on the lesser offenses of murder and attempt murder where defendant lacked the knowledge and specific intent to commit the charged offenses.

¶ 41 To succeed in his claim of ineffective assistance of counsel, defendant must show (1) counsel's performance was deficient and (2) this deficient performance prejudiced the defense. *Strickland v. Washington*, 104 S. Ct. 2052 (1984). Prejudice is established when defendant demonstrates that there is a reasonable probability, but for counsel's unprofessional errors, that

the result of the proceeding would have been different. *Id*. If counsel's performance is not found to be prejudicial to the defense, then counsel's performance does not rise to the level of ineffective assistance of counsel. *Id*. In addition to the above two-pronged test, defendant must overcome the presumption that the challenged actions of trial counsel might be considered "sound trial strategy." *Id*.

¶ 42 The offenses of involuntary manslaughter and first degree murder require different mental states, such that involuntary manslaughter requires a less culpable mental state than first-degree murder. *People v. Jones*, 219 Ill. 2d 1, 30 (2006). A defendant commits first degree murder when he kills an individual without lawful justification and he knows that his acts create a strong probability of death or great bodily harm. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). A defendant commits involuntary manslaughter when he performs acts that are likely to cause death or great bodily harm to another and he performs those acts recklessly. *People v. Sipp*, 378 Ill. App. 3d 157, 163 (2007). A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. *Id*. Clearly, reckless conduct involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. See *People v. Davis*, 35 Ill. 2d 55, 60 (1966).

¶ 43 There are certain factors that may suggest recklessness including disparity in size and strength between the defendant and the victim, the severity of the victim's injuries, whether the defendant used his bare fists or a weapon, whether there were multiple wounds, or whether the victim was defenseless. *Sipp*, 378 Ill. App. 3d at 164. A defendant's testimony that he did not

intend to kill anyone does not provide a sufficient basis for instructing on involuntary manslaughter. *Id*. A defendant is not entitled to reduce first-degree murder to involuntary manslaughter by a hidden mental state known only to him and unsupported by the facts. *Id*. Reckless conduct generally involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *DiVincenzo*, 183 Ill. 2d at 250.

¶ 44 In *DiVincenzo*, 183 Ill. 2d 250, our supreme court found that an involuntary manslaughter instruction was appropriate since there were no weapons involved in the fight, the defendant and victim were fighting one on one, and they were evenly sized. In this case, unlike *DiVincenzo*, defendant knowingly and intentionally fired his 9 millimeter gun at Officer Valadez and Thomas who were standing in the vacant lot. There is not a scintilla of evidence in this case to support a finding that defendant acted recklessly. Therefore, we cannot find that defendant was prejudiced as a result of counsel's failure to request an involuntary manslaughter instruction.

¶ 45 Defendant also faults trial counsel for failing to request that the trial court recuse itself from this case after the judge spread of record that he attended a fundraiser for the fallen officer with the State's Attorney.

¶ 46 The Code of Judicial Conduct provides that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities (Ill. S. Ct. R. 62 (eff.Oct.15, 1993)) and therefore recuse if his impartiality may reasonably be questioned (Ill. S. Ct. R. 63 (eff. April 16, 2007)). However, the decision by the trial judge to recuse himself is a decision that rests exclusively within the determination of the individual judge. *Id*. at ¶ 45. The Code of Judicial Conduct cannot be used by a party or his lawyer as a means to force a judge to recuse himself once the judge does not do so on his own. *Id*.

¶ 47 We note defendant has *grossly* mischaracterized the record and the trial judge's involvement with the victim and the State's Attorney. The following is what actually transpired at a pretrial hearing:

"THE COURT: Mr. Marek, one second. Let me put something on the record that I recall from once in awhile, but I don't usually recall it at a time where I can do anything about it.

Just to spread something of record, I don't believe there's a duty to do this, but I'm going to err on the side of caution. About two years ago I was at a function, a Latino police officers function – I forgot exactly the name of the organization – it was shortly after this shooting, and Ms. Alvarez was there and Ms. Alvarez said a few words. I don't recall what she said. I'm sure she was appropriate. But nothing about the facts of the case or at least nothing that I remember. But the issue came up and I was there. So I wanted to spread that of record and I wanted to hear from the parties, starting with Mr. Carroll [defense counsel].

MR. CARROLL: Your Honor, I have no question of your integrity or Ms. Alvarez's integrity. I have no problem

THE COURT: An obviously this case was nowhere being in my courtroom at the time.

MR. CARROLL: And even if it was, Judge, it is what it is. I have no problem with your integrity or hers.

THE COURT: Then I should state what I'm saying that I haven't said yet, which is, it is not going to have an affect [sic] on me whatsoever. Mr. Allen, Ms. Alvarez, Mr.

Marek, anything?

MR. ALLEN: Judge, this was a speech that the state's attorney was giving that you happened to be present for?

THE COURT: I don't believe it was announced as a speech, if I recall correctly. She was kind of put on the spot there.

MS. ALVAREZ: To say a few opening remarks.

THE COURT: Yes. Just a few days after this, and obviously everyone in the room was thinking about it and she said a few words."

¶ 48 As the above colloquy shows, the function was not a fundraiser for Officer Valadez; it was a Latino police organization function that occured a few days after Officer Valadez was killed. It did not occur after the case had been assigned to the trial judge's courtroom, as defendant alleges. This case was not assigned to the trial judge until more than two years after the incident. The court did not attend the event with the State's Attorney. Rather, the State's Attorney apparently was present at the function and made some unplanned remarks after being requested to do so. In addition, the trial court did not recall any specifics or whether the State's Attorney even commented on the facts of the case.

¶ 49 Based on the record before us, we cannot find that the trial judge abused its discretion in not recusing himself from this case. The trial judge brought the subject matter to light *sua sponte* and asked for the parties' comments on the issue. Neither the State nor defense counsel had any issue or stated any concern with the trial judge remaining as the trial judge and nothing in the record indicates the judge failed to remain impartial throughout the proceedings.

¶ 50 Defendant also alleges, without citation or authority, that trial counsel was ineffective for

failing to move for the recusal of the trial judge once the matter was spread of record. We decline to address this argument where defendant has cited no authority in support of the assertion. Bare assertions that are unsupported by any citation of authority do not merit consideration on appeal. Ill. S. Ct. R 341(h)(7) (eff. Feb. 6, 2013) (argument in appellate brief must be supported by citation to legal authority and factual record); *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 64.

¶ 51 Defendant next argues that his 125-year sentence is excessive. Defendant was sentenced to a term of 80 years' imprisonment for first degree murder, which is 60 years for first degree murder plus the mandatory 20-year add on for personally discharging a firearm while committing the murder (730 ILCS 5/5-4.5-20(a)(1) (West 2008); 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2008)) and a consecutive sentence of 45 years' imprisonment for attempt first degree murder, 30 years for attempt murder plus the mandatory 15-year add on for being armed with a firearm while committing the offense (720 ILCS 5/8-4(c)(1)(B) (West 2008); 730 ILCS 5/5-4.5-25(a) (West 2008)), for aggregate of 125 years' imprisonment.

¶ 52 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *People v. Jones*, 295 Ill.

App. 3d 444, 455 (1998). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation that is before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶ 53 We find no abuse of discretion in this case. In imposing sentence, the court indicated that it had considered the evidence at trial, the presentence investigation, and the evidence offered in aggravation and mitigation including defendant's age, his character, his history and the costs of incarceration. See 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2010). The court noted that defendant was on probation at the time of the offense. That probation case was also in front of the same trial judge. The court observed that rather than returning to court on the probation case to prove he was enrolled in G.E.D. classes, defendant committed this murder.

¶ 54 Furthermore, defendant's 125-year sentence fell within the statutory range of imprisonment and is therefore presumptively proper. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007); 720 ILCS 5/5-5-3(c) (West 2010). The sentencing range for first degree murder while personally discharging a firearm is from 40 to 80 years in prison, 20 to 60 for murder, plus 20 years for personally discharging a firearm. 730 ILCS 5/5-4.5-20(a)(1) (West 2008); 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2008). The sentencing range for attempt first degree murder while armed with a firearm is 21 to 45 years in prison, 6 to 30 for the attempt murder plus 15 years for being armed with a firearm. 720 ILCS 5/8-4(c)(1)(B) (West 2008); 730 ILCS 5/5-4.5-25(a) (West 2008). In light of the facts of this case and in light of the mitigating and aggravating

circumstances, we find that the trial court properly exercised its discretion in sentencing defendant to the maximum terms of imprisonment.

¶ 55 CONCLUSION

¶ 56 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 57 Affirmed.