2015 IL App (2d) 131048-U
No. 2-13-1048
Order filed October 15, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 02-CF-2072
RUBEN CONTRERAS,	)	Honorable Mark L. Levitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence was sufficient to sustain defendant's conviction for first-degree murder, where the circumstances of the crime reflected the requisite mental state for that crime, not for involuntary manslaughter; (2) trial counsel was not ineffective for failing to request that the jury be instructed on the definition of knowledge (the required mental state for first-degree murder); (3) the prosecutor's closing argument urging the jury that a guilty verdict on involuntary manslaughter would be an injustice was not improper; (4) the trial court did not abuse its discretion in imposing a 48-year sentence. Affirmed.

¶ 2 Following a jury trial, defendant, Ruben Contreras, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2014)) and was sentenced to 48 years' imprisonment. Defendant appeals, arguing that: (1) the evidence was insufficient to sustain his conviction and

that it should be reduced to involuntary manslaughter (720 ILCS 5/9-3 (West 2014)), where the evidence reflected that, when he covered his wife's mouth and nose for 12 to 15 minutes during an argument, he lacked the requisite intent for first-degree murder; (2) trial counsel was ineffective for failing to request that the jury be instructed on the definition of knowledge, which is the required mental state for first-degree murder; (3) the prosecutor's closing argument that an involuntary manslaughter conviction would be an "injustice" was improper; and (4) the trial court abused its discretion in sentencing defendant to 48 years' imprisonment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 2002, Graciela Guijarro's body was found by the river's edge in a forest preserve adjacent to Daybreak Farms in Libertyville, the horse ranch where defendant, her estranged husband, lived and worked. Around this time, defendant quit his job and went to Mexico, his native country.

¶ 5 In December 2008, defendant was extradited from Mexico to the United States and came into the custody of the Lake County Major Crimes Task Force. Defendant, age 51, confessed to police that, during an argument with Guijarro, age 34, he hugged her and covered her mouth and nose so that she would not yell, attract neighbors and police, or run away. He held her like that for 12 to 15 minutes. After he felt her body go limp, defendant got scared and carried Guijarro's body to an area near the river.

¶ 6 In January 2009, defendant was charged with two counts of first-degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2014)).

¶ 7 Trial commenced on April 9, 2013. Defendant did not testify, and the defense presented no evidence.

¶ 8 A. Sandra Guijarro

¶ 9 Sandra Guijarro, Graciela Guijarro's youngest sister, testified that she and her siblings grew up in Jalisco, Mexico. Graciela married defendant in Mexico, and, in 2001, she moved to the United States with their son, Amador, to reunite with defendant, who was already there. In early June 2002, defendant called Sandra and told her that Graciela had left him, slept with someone else, and left behind Amador. Subsequently, Rachel Castro, Graciela's friend, called Sandra and told her that Graciela was missing.

¶ 10 B. Rachel Castro

¶ 11 Rachel Castro testified that she met Guijarro in 2002, and they became fast friends. Guijarro was married, but lived in a small room of an apartment with only her two-year-old son, Amador. They had no bed and slept on the floor. Guijarro did not have a lot of money, and she worked in a country club restaurant.

¶ 12 The last time that Castro heard from Guijarro was the Friday before Memorial Day 2002. On Thursday, after not hearing from her for several days, Castro went to Daybreak Farms, where Guijarro used to live. She met defendant (whom she had never met before), who told her that he had not seen Guijarro. Castro had been to the ranch once before and knew that Guijarro had lived there at one point for several months. Defendant stated to Castro that Guijarro had probably left with some guy, that she was always between jobs, and that she did not keep her jobs. The next day, defendant called Castro, telling her not to worry. Again, he stated that Guijarro probably left with some guy and he called Guijarro a slut (in Spanish). According to Castro, Guijarro did not have a boyfriend at this time and had not packed her belongings to leave Waukegan.

¶ 13 On Tuesday, June 4, 2002, Castro returned to the ranch, but defendant was not there. She went to the police with Guijarro's brother to report her missing. Subsequently, Castro identified

for the police several items as belonging to Guijarro, including pieces of a shoe, hair clip, and an earring.[1]

¶ 14 C. Christina Gaspar

¶ 15 Christina Gaspar worked at the Jalisco Restaurant in 2001 and met Guijarro when Guijarro started working there. In December 2001, Guijarro and Amador moved in with Gaspar. Guijarro was separated from defendant, whom Gaspar had once met at the restaurant. Guijarro left the restaurant after two months. Defendant came to look for her and asked Gaspar about Guijarro, but he said that he already knew where she lived. The last time that Gaspar saw Guijarro was the Sunday before Memorial Day 2002.

¶ 16 D. Juan Paniagua

¶ 17 Juan Paniagua, a maintenance manager at Daybreak Farms, testified that he also lived at the ranch in 2001. Three horse trainers and several other workers also lived at the ranch. Paniagua testified that, west of the ranch, there was a forest preserve and the Des Plaines River. At night, the ranch was very dark.

¶ 18 In the summer of 2001, Paniagua met defendant, who worked for one of the ranch's trainers. Defendant lived on the ranch in a room in the trainer's house. After defendant's arrival, Guijarro came to live on the ranch with Amador, but she and the child stayed for only a couple of months. Later, Guijarro returned, but left after a week or so.

¶ 19 About one week after Memorial Day 2002, defendant left the ranch. He had not mentioned anything about quitting or moving back to Mexico.

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[1] The first two items were recovered from the pasture at Daybreak Farms. The earring was recovered from Guijarro's body during the autopsy.

¶ 20 Paniagua had overheard disagreements between defendant and Guijarro. Guijarro had a loud voice. On one occasion, Guijarro came into the barn where defendant and Paniagua were working, grabbed a horse collar, and started hitting defendant with it. Defendant did not strike back. Paniagua never noticed bruises or scratches on Guijarro when she lived on the ranch. Paniagua did not call the police on defendant.

¶ 21 E. Lourdes "Lulu" Velazquez

¶ 22 Lourdes "Lulu" Velazquez testified that, in the spring of 2002, she started dating defendant. They dated for less than two months. On the Sunday before Memorial Day that year, at about 10 p.m., defendant called Velazquez and asked her to come to Daybreak Farms. He told her that a man had dropped off Amador, and his wife said that she would get in touch with him.

¶ 23 Velazquez got a ride to the ranch from Gambino and Lupe Bustos. Defendant asked the Bustos' to take his son, and they agreed and left with the child. He asked Velazquez to stay at the ranch with him, which she did. Later that night, defendant told her that he was going for a walk. Velazquez asked to join him, but defendant stated that he wanted to go alone. Velazquez fell asleep and awakened when defendant returned. Defendant stated that he was going to take a bath. During the middle of the night, Velazquez heard the washing machine running.

¶ 24 The following Sunday, defendant stated that he was going to leave for Mexico. He asked Velazquez and her friend, Ana Montelongo, for a ride to the bus company at the mall. He said that he would send for Amador in a few days. Velazquez and Montelongo dropped off defendant at the bus company, and she never saw him again.

¶ 25 F. Police Testimony and Defendant's Statement

¶ 26 Mark Stevenson, a sergeant in the criminal investigations division of the Waukegan police department in May and June of 2002, testified that, on June 6, 2002, at 8 a.m., he led a 40

or 50-person search party at the ranch to locate a missing person. Within one hour, police discovered a decaying human body along the river bank. Other testimony reflected that the body was later identified as Guijarro's.

¶ 27 Robert Kerkorian, a lieutenant with the Waukegan police department in June 2002, testified that he led a group during the search that discovered Guijarro's body in a densely wooded area of the forest preserve due west of the ranch. The body was heavily decomposed. Portions of the skull were visible, and there were maggots on the body. The arm bone had no skin on it.

¶ 28 Edgar Navarro, a detective with the Waukegan police department in June 2002, testified that he investigated the missing person report on Guijarro and worked on locating defendant in Mexico. In December 2008, the FBI, who had brought defendant back from Mexico, turned over defendant to the Lake County Major Crimes Task Force.

¶ 29 Navarro and Waukegan detective Andy Ulloa (both of whom are fluent in Spanish) interviewed defendant at the sheriff's department. Defendant was *Mirandized* and the interview, which was conducted in Spanish, was videotaped (and later translated and transcribed by Ulloa).[2] According to Navarro, defendant stated that, on a Sunday in May 2002, he picked up Guijarro and Amador from Lewis Produce and drove to Daybreak Farms. On their way, defendant and Guijarro argued. Before they reached his room there, defendant stopped the car and got out. Guijarro also got out, and they walked away from the vehicle. Guijarro started yelling at defendant. Defendant stated that he did not want people at the ranch to hear the argument, so he placed his hand over Guijarro's mouth and nose. He demonstrated this for

[2] At trial, the videotape was played for the jury while the jurors followed along with the English-translated transcript.

police and stated that he held it there for 12 to 15 minutes. Her body went limp, and she dropped her arms. Defendant further stated that he knew that Guijarro was dead and that he carried her through a wooded area toward the river and left her body there.

¶ 30 In the transcript, defendant states:

> "Graciela came to see me, at the entrance of the ranch, with my baby, she had my baby. And I ask her, Graciela, Why have you behaved so badly with me? She had a like a very bad problem and she began to shout loudly. She shouted very loud. I hugged her so that (Inaudible) because of fear, I did not want to go to jail for many years. I hugged her, and I covered her mouth until she wasn't breathing."

When Navarro asked defendant how long he covered her mouth, defendant replied: "It wasn't that much time, I don't know. I swear to God (Inaudible) I didn't realize when I covered her mouth, so that she wouldn't yell to and attract the neighbors and the police, and Ruben goes to jail." He also stated: "And so that she couldn't run away, she wanted to run away, so I embraced her, and I covered her mouth so that she wouldn't yell. (Inaudible). When I saw her hands, I got very scared." When asked how long he held her, defendant stated: "It is difficult to calculate the time. It was a moment so horrible, obscure. I would like to say maybe, fifteen minutes, twelve minutes. I didn't realize it. When asked if it was longer than one minute, defendant replied: "Yes, more than one minute. Yes." Navarro asked if defendant knew that Guijarro died, and he replied: "Yes." Navarro asked what happened when defendant removed his hand from Guijarro's mouth, and defendant replied: "The body went like this. I got very scared. Oh God. I took her body and walked…" When asked whether he covered Guijarro's mouth and nose, defendant replied: "Her nose, her mouth. Yes."

¶ 31 Later in the interview, Ulloa asks defendant again how he met Guijarro that day, and defendant replied: "She told me that she had an appointment. She was going to a dentist for her teeth. To work her teeth she was going to go to a place called Cicero. And that she wanted to go away, and leave me. I went to pick her up in a place called Lewis Produce [in Waukegan]." Guijarro was with Amador. Defendant stated that they stopped for lunch, and then they went to the ranch. When they arrived at the ranch, they started arguing. Guijarro started yelling because defendant had asked for an explanation as to why she had treated him so badly. "And she tells me, 'hey, are you going to start to bother me? You are crazy, nobody can talk with you.' And she would yell like that. I was afraid about the neighbors nearby. That was when, what I explained to you."

¶ 32 Defendant explained that he was very scared. He took Amador and called Velazquez to take his son. Defendant told Velazquez that he needed to take a walk. He walked to Guijarro's body and removed her clothes because he did not want to leave fingerprints.

¶ 33 Ulloa asked defendant if he ever considered calling the police. Defendant replied: "Yes, but I was afraid because she always would tell me that she had some papers, where she had prepared some papers, where she had said that I had kidnapped the baby. And that if she went to the police, they would believe her more than me because she had already accused me."

¶ 34 Navarro testified that defendant never stated that he wanted to kill Guijarro. He wanted to keep her quiet.

¶ 35 At trial, Ulloa testified that, during the interview with defendant, defendant related that, after Guijarro's body went limp and she died, he carried her body to an area near the river. Defendant then called Velazquez, telling her that he needed assistance in taking care of Amador. Velazquez arrived with the Bustos'. He asked Velazquez to stay with him and asked the Bustos'

to take his child, which they did. Defendant then told Velazquez that he wanted to take a walk. Defendant walked to Guijarro's body and removed her clothing; he feared that he had left fingerprints behind. Defendant disposed of the clothes in a sewer. Defendant told police that he continued working after this for several days.

¶ 36 G. Dr. Nancy Jones

¶ 37 Dr. Nancy Jones, an expert in forensic pathology, testified that she performed the autopsy on Guijarro's body. Dr. Jones stated that the first observation she made of the body was the degree of decomposition and skeletonization, which reflected that "the body had been exposed to insect and possibly animal predation for a period of time." Parts of the body "were down to only the bone," while others still had skin on them. There was no clothing on the body, and the head had become separated from the body.

¶ 38 There were no injuries to the skull and "no other injury or natural diseases on the outside of the body." The findings during the internal exam were normal. There was no evidence of natural disease or internal trauma. The only damage Dr. Jones observed was from decomposition and insect feeding. X rays showed no evidence of fractures, trauma, or foreign material in the body. Dr. Jones told police to return to the scene to look for more bones and cartilage from the neck region, which would help in determining if there was strangulation. The police found two additional fragments, which she examined.

¶ 39 Dr. Jones further testified that defendant's statement that he put his hand over Guijarro's mouth and nose until she stopped breathing was consistent with her findings. She explained that the easiest way to suffocate someone if you do not have a pillow or something similar at hand is to use your hands and place them over the victim's mouth and nose, creating an airtight seal. This method requires three to five minutes of pressure. Although the individual may become

unconscious in about 1 ½ to 2 minutes, irreversible brain damage and brain death occur in 3 to 5 minutes. Brain death is caused by lack of oxygen to the brain. "When the brain dies the rest of the body dies." Addressing lack of consciousness, which, again, occurs after 1 1/2 to 2 minutes, Dr. Jones explained that the body goes limp.

¶ 40 Dr. Jones testified that it is possible to kill someone by cupping a hand over the mouth and nose, *without* applying any pressure to the face because it would cause carbon dioxide ingestion. The person would die from carbon dioxide intoxication and lack of oxygen. As examples, she listed that infants could be killed this way, or someone who was committing suicide (by placing a plastic bag over their head), or someone who was unconscious from alcohol or drugs and was incapable of fighting. However, "[i]n an alert, wide awake adult human being, no, you could not do that [*i.e.*, make an airtight seal and kill them]."

¶ 41 Dr. Jones opined to a reasonable degree of medical certainty that her findings were consistent with a suffocation death (*i.e.*, hand over mouth and nose *with* pressure to cut off oxygen for three to five minutes) or a strangulation death.

¶ 42 On cross-examination, Dr. Jones testified that she could not rule out asphyxiation like strangulation or suffocation as the cause of Guijarro's death because the soft tissues of the face or neck were absent. She reiterated that it was possible to cup a hand over someone's mouth and cause their death, though an adult would resist and remove the hand from their face. However, once the person has passed out, they can no longer resist.

¶ 43 H. Closing Arguments and Jury Instructions

¶ 44 During its closing argument, the State told the jury that:

> "you should not find the defendant guilty of involuntary manslaughter. Absolutely do not find him guilty of involuntary manslaughter. That's not the crime he committed. To return [a] verdict of guilty on this offense would be an injustice."

The trial court sustained defense counsel's objection, but did not instruct the jury to disregard the State's remark. (However, at the end of arguments, it reminded the jurors that they should disregard questions on which objections were sustained, that closing arguments are not evidence, and to disregard any statements that were not based on the evidence.) Later in the argument, the State told the jury:

> "This is an opportunity to provide justice for Graciela, for Sandra, and Rachel, and Amador, and the community as a whole. This is a chance for justice to that man, the defendant, who yards away from his son in a Waukegan horse pasture covers his wife's mouth and nose, held it there until she suffocated, until she was dead. Do justice. Follow your oath. Do your duty. There's one way to do that. Return a verdict of guilty on first degree murder. Thank you."

¶ 45 I. Verdict and Subsequent Proceedings

¶ 46 On April 11, 2013, the jury found defendant guilty of first-degree murder. The trial court denied defendant's motion for a new trial and sentenced him to 48 years' imprisonment. It subsequently denied his motion to reconsider sentence. Defendant appeals.

¶ 47 II. ANALYSIS

¶ 48 A. Sufficiency of the Evidence – First-Degree Murder

¶ 49 Defendant argues first that the evidence was insufficient to sustain his conviction for first-degree murder. He contends that he lacked the requisite intent for that crime and that, instead, he should have been convicted of involuntary manslaughter. He requests that we reduce

his conviction and remand for a new sentencing hearing. For the following reasons, we find defendant's argument unavailing.

¶ 50 When faced with a challenge to the sufficiency of the evidence, a reviewing court must view the evidence in the light most favorable to the prosecution and determine whether 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, 261 (1985). "Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Bush*, 214 Ill. 2d 318, 326 (2005). "[D]eterminations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact." *People v. Jimerson*, 127 Ill. 2d 12, 43 (1989). A reversal is warranted only if the evidence is so improbable or unsatisfactory that it leaves a reasonable doubt as to the defendant's guilt. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004). Similarly, although evidence of intent is generally a question to be resolved by the trier of fact, we will reverse a conviction where the evidence was insufficient to prove the defendant guilty beyond a reasonable doubt. *Jones*, 404 Ill. App. 3d at 744.

¶ 51 A person is guilty of first-degree murder when he or she kills an individual without lawful justification if, in performing the acts that cause the death, he or she intends to kill or do great bodily harm or knows that his or her acts created a strong probability of death or great bodily harm to that individual. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2014). However, a person commits involuntary manslaughter when he or she unintentionally kills another individual without lawful justification and his or her acts that cause the death are likely to cause death or great bodily harm and are performed recklessly. See 720 ILCS 5/9-3 (West 2014).

¶ 52 The primary difference between first-degree murder and involuntary manslaughter is the mental state that accompanies the conduct that results in the victim's death. *People v. Di Vincenzo*, 183 Ill. 2d 239, 249 (1998). First-degree murder requires knowledge, while involuntary manslaughter requires recklessness. *Id.* at 249-50. Thus, involuntary manslaughter requires a less culpable mental state. *Id.* at 249.

> "A person is said to have knowledge when he [or she] is consciously aware that his [or her] conduct is practically certain to cause a particular result. *People v. Leach*, 391 Ill. App. 3d 161, 175 (2009). A person acts recklessly when he [or she] 'consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow *** and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.' 720 ILCS 5/4-6 (West 2006). 'In general, a defendant acts recklessly when he [or she] is aware that his [or her] conduct might result in death or great bodily harm, although that result is not substantially certain to occur.' *Di Vincenzo*, 183 Ill. 2d at 250. Recklessness therefore typically involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *Di Vincenzo*, 183 Ill. 2d at 250." *People v. Jones*, 404 Ill. App. 3d 734, 742 (2010).

¶ 53 The supreme court has stated that "a defendant may act recklessly where he [or she] commits deliberate acts but disregards the risks of his [or her] conduct." *Di Vincenzo*, 183 Ill. 3d at 252. Here, defendant concedes that he performed the acts that caused Guijarro's death. However, he disagrees with the jury's finding that he performed the acts with the requisite intent for first-degree murder. He argues that the evidence reflected that his acts were performed only recklessly. We disagree.

¶ 54 Defendant's assertion that the evidence showed only that he covered Guijarro's mouth and nose so that she would not yell and attract neighbors during the argument is unconvincing. The evidence reflected that he knew that his act of placing his hand over *both* Guijarro's mouth and nose for 12 to 15 minutes to prevent her from yelling or running away created a strong probability of death or great bodily harm. It was undisputed that defendant covered both of Guijarro's sources of air for a period, according to Dr. Jones, in excess of that necessary to cause death. Even if defendant's time estimate was not very precise, the evidence established that he continued to suffocate Guijarro for at least one minute after she lost consciousness. Dr. Jones testified that, although the individual may become unconscious in about 1 ½ to 2 minutes (after the nose and mouth are covered and pressure is applied), irreversible brain damage and brain death occur in 3 to 5 minutes. "When the brain dies the rest of the body dies."

¶ 55 We also find that defendant's reliance on *People v. Jones*, 404 Ill. App. 3d 734, 750 (2010), a case in which the reviewing court reduced the offense from first-degree murder to involuntary manslaughter, is misplaced. *Jones* involved a fistfight, and the victim died of asphyxia due to compression of the neck where the defendant asphyxiated the victim with his foot. The court held that the evidence was insufficient to establish that, at the time the defendant placed and held his foot on the victim's neck, he intended to kill the victim or that he was consciously aware that his conduct was "practically certain" to cause a particular result. *Id.* at 750. However, it concluded that the evidence *was* sufficient to show that the defendant acted recklessly when he placed his foot on the victim's neck and exerted sufficient pressure to cause the victim's death. *Id.* In that case, the medical examiner had testified that the pressure required to cause asphyxiation need not have been applied directly to the jugular vein. *Id.* at 747. The court held that the evidence was not sufficient to support an inference that the average person

knew or should have known that applying a certain amount of pressure for at least one minute was sufficient to cause the victim to asphyxiate or that this pressure need not have been applied directly to the jugular vein but instead to the soft tissue on the front or side of the neck. *Id.*

¶ 56 Defendant argues that *Jones* and the evidence presented here do not support an inference that a layperson such as defendant knew or should have known that hugging the victim and covering her mouth and nose to keep her from yelling was practically certain to cause her to asphyxiate. Defendant's argument is not well-taken, where he covered the only two avenues by which Guijarro could inhale oxygen, circumstances much unlike those present in *Jones*, where the average person, it was held, could not have known that applying pressure in the manner and for the time under which the defendant in that case did would cause the victim to asphyxiate. Further, as the State notes, if defendant here did not intend to cause Guijarro any harm, he would have released her after she initially lost consciousness, which Dr. Jones testified would have occurred after 1 ½ to 2 minutes, and stopped resisting. However, defendant continued covering Guijarro's mouth and nose for about 10 minutes longer (per his testimony), and certainly for at least one minute longer (per the expert testimony).

¶ 57 Defendant also points to Dr. Jones's testimony that there was no evidence of trauma (but she could not rule out death due to asphyxia) and to her testimony concerning carbon dioxide ingestion. As to the latter subject, defendant points to Dr. Jones's testimony that cupping one's hand over a person's mouth without pressure would cause carbon dioxide intoxication and result in the person's death, but that this is not something that the average person would be expected to know. However, Dr. Jones also testified that this would not occur with an alert human being (who would resist); rather, in her opinion, her findings were consistent with a suffocation death, where the killer's hand covered the victim's mouth and nose with pressure to cut off oxygen for

three to five minutes. Furthermore, defendant covered both Guijarro's mouth and nose to, according to him, prevent her from yelling and "so that she couldn't run away." He could not have done so without applying pressure.

¶ 58 The evidence further reflected that the couple had a tumultuous marriage, living together off and on and being observed arguing, although by the time of Guijarro's death, they had separated and defendant was dating Velazquez. Indeed, the event that led to their final disagreement was, according to defendant, Guijarro's announcement that she was leaving him (presumably with Amador). Further, Paniagua, the ranch maintenance manager, testified that he had overheard disagreements between defendant and Guijarro. Guijarro had a loud voice, and Paniagua observed her hitting defendant with a horse collar, although he did not observe defendant strike back or notice bruises on Guijarro.

¶ 59 In summary, the evidence was sufficient to sustain defendant's conviction for first-degree murder.

¶ 60 B. Ineffective Assistance of Counsel

¶ 61 Next, defendant argues that his trial counsel was ineffective for failing to request that the jury be instructed on the definition of knowledge (the required mental state for first-degree murder), where the only contested issue before it was the mental state with which defendant performed the acts that resulted in Guijarro's death. For the following reasons, we reject this argument.

¶ 62 The right to counsel guaranteed by both the United States and Illinois Constitutions includes the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668 (1984). In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set

forth in *Strickland* and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he or she was deprived of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish prejudice, the defendant must show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). "A reasonable probability of a different result is not merely a possibility of a different result." *Id.* If the defendant fails to establish either prong, his or her ineffective assistance claim must fail. *Albanese*, 104 Ill. 2d at 526-27. Where the facts relevant to an ineffective assistance of counsel claim are not disputed, our review is *de novo*. *People v. Bew*, 228 Ill. 2d 122, 127 (2008); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 63 Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). Illinois Supreme Court Rule 451(a) (eff. July 1, 2006) provides that whenever the Illinois Pattern Jury Instructions (IPI) contains an applicable jury instruction and the court determines that the jury should be instructed on the subject, "the [IPI instruction] shall be used, unless the court determines that it does not accurately state the law." Where no IPI instruction exists on a subject, the court has the discretion to give a nonpattern jury instruction. *People v. Ramey*, 151 Ill. 2d 498, 536 (1992).

¶ 64 It is well settled in Illinois that counsel's choice of jury instructions and the decision to rely on one theory of defense to the exclusion of others is a matter of trial strategy. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence," and therefore, are "generally immune

from claims of ineffective assistance of counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). However, the failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel if the instruction was so critical to the defense that its omission " 'den[ied] the right of the accused to a fair trial.' " *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008) (quoting *People v. Pegram*, 124 Ill. 2d 166, 174 (1988)).

¶ 65 IPI, Criminal, No. 5.01B contains the definitions of knowledge:

> "[1] A person [(knows) (act knowingly with regard to) (acts with knowledge of)] the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.
>
> [2] A person [(knows) (act knowingly with regard to) (acts with knowledge of)] the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct." IPI, Criminal, No. 5.01B (Supp. 2015).

¶ 66 The Committee Note states that "the Committee takes no position as to whether this definition should be routinely given in the absence of a specific *jury* request. See *People v. Powell*, 159 Ill. App. 3d 1005 (1987), for the general proposition that the words 'intentionally' and 'knowingly' have a plain meaning within the jury's common understanding." (Emphasis added.) *Id.*, Committee Note. See also *People v. Brouder*, 168 Ill. App. 3d 938, 948 (1988) (trial court committed reversible error in refusing to provide the jury with defense counsel's tendered instruction defining "knowingly," where the jury, on several occasions, specifically requested the court's assistance as to the meaning of the term).

¶ 67 Again, ordinarily, a jury need not be instructed on the term "knowingly" because it has a plain meaning within the jury's common knowledge. *Powell*, 159 Ill. App. 3d at 1013. Here, the

jury did not ask for a definition of the mental state for first-degree murder. Thus, pursuant to the pattern instruction directions, the instruction need not have been given. Defendant, however, notes that his mental state was the only contested issue at trial. The jury, he argues, would have been aided in their deliberations by having side-by-side definitions of the two mental states. However, due to trial counsel's deficient performance, they were deprived of this ability because they were instructed only on the definition of recklessness and not on knowledge.

¶ 68 We disagree that counsel's performance was deficient. The failure to offer the instruction could have been a tactical decision on defense counsel's part. *Cf. People v. Barnard*, 104 Ill. 2d 218, 236-37 (1984) (failure to tender self-defense instruction in murder prosecution, which would have required that a voluntary manslaughter instruction also be given, was not ineffective assistance where defense strategy was to present jurors with only the options of finding the defendant guilty or not guilty of murder). In giving only the definition of recklessness, counsel could have reasonably sought to focus the jury's attention on the lesser offense of involuntary manslaughter.

¶ 69 In light of the fact that, pursuant to the pattern instructions, the definition instruction need not have been given and the fact that the decision could also have been based on sound trial strategy, we cannot conclude that trial counsel's performance was deficient. *Cf. People v. Perry*, 2011 IL App (1st) 081228, ¶ 60 (trial court did not abuse its discretion in failing to give knowledge instruction); *People v. Sanders*, 368 Ill. App. 3d 533, 536-38 (2006) (in first-degree murder case, trial court did not err in failing to define the term "knowingly" where the jury asked only whether intent was required; trial counsel was not ineffective for failing to offer the pattern instruction in response to jury's question and in acquiescing in trial court's response to question; performance was not deficient where the court was not required to provide the definition in

response to the jury's question); *People v. Sandy*, 188 Ill. App. 3d 833, 841-42 (1989) (trial court did not err in failing to give "knowingly" definition instruction, where the jury did not specifically request it); *People v. Masini*, 65 Ill. App. 3d 1011, 1015 (1978) (trial court did not err in failing to *sua sponte* give knowingly instruction), *aff'd* (1979), 78 Ill. 2d 17; *People v. Montgomery*, 18 Ill. App. 3d 828, 834 (1974) (trial court did not err in failing to give definitions of "knowingly" and "intentionally," where terms have plain meanings within the jury's common knowledge). Because we have determined that defendant has not established the deficient performance prong, we need not address the prejudice prong. His ineffective assistance argument fails.

¶ 70 C. Prosecutorial Misconduct - Closing Argument

¶ 71 Next, we address whether the prosecutor's closing argument comments denied defendant a fair trial. Defendant argues that the State engaged in prosecutorial misconduct during its closing argument when it told the jury that "to return a verdict of guilty on [involuntary manslaughter] would be an injustice." He asserts that the comment minimized the seriousness of a finding of involuntary manslaughter. Defendant requests that we reverse his conviction and remand for a new trial. For the following reasons, we find his argument unavailing.

¶ 72 Prosecutors are afforded wide latitude in closing argument. *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). Closing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context. *Id.* Closing argument must serve a purpose beyond inflaming the emotions of the jury. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). A prosecutor cannot use closing argument simply to "inflame the passions or develop the prejudices of the jury without throwing any light upon the issues." *People v. Halteman*, 10 Ill. 2d 74, 84 (1956). Moreover, it is improper for a prosecutor to utilize closing argument to forge an "us-versus-them" mentality

that is inconsistent with the criminal trial principle that a jury fulfills a nonpartisan role, under the presumption that a defendant is innocent until proven guilty. *Johnson*, 208 Ill. 2d at 80.

¶ 73 In reviewing comments made at closing arguments, we ask whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a guilty verdict resulted from them. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000). Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id.*

¶ 74 The standard of review for issues of prosecutorial misconduct is not clear. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (noting that *de novo* review applies); but see *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009) (noting that the supreme court in *Wheeler* may have intended that abuse-of-discretion standard applies concerning rulings on individual remarks, but that *de novo* review applies in assessing the cumulative effect of all of the improper remarks). However, without deciding which standard is appropriate, we conclude that, here, we would reach the same result under either the *de novo* or the abuse-of-discretion standard.

¶ 75 Here, again, the State told the jury during closing argument that:

> "you should not find the defendant guilty of involuntary manslaughter. Absolutely do not find him guilty of involuntary manslaughter. That's not the crime he committed. To return [a] verdict of guilty on this offense would be an injustice."

The trial court sustained defense counsel's objection, but did not instruct the jury to disregard the State's remark. (However, at the end of arguments, it reminded the jurors that they should

disregard questions on which objections were sustained, that closing arguments are not evidence, and to disregard any statement that was not based on the evidence.) Later in the argument, the State told the jury:

> "This is an opportunity to provide justice for Graciela, for Sandra, and Rachel, and Amador, and the community as a whole. This is a chance for justice to that man, the defendant, who yards away from his son in a Waukegan horse pasture covers his wife's mouth and nose, held it there until she suffocated, until she was dead. Do justice. Follow your oath. Do your duty. There's one way to do that. Return a verdict of guilty on first degree murder. Thank you."

¶ 76 Although this issue is close, we conclude that the comments were not improper. Compare *People v. Beler*, 327 Ill. App. 3d 829, 836 (2002) (no plain error in prosecutor's comments during opening statement and closing argument wherein he predicted that the jury would " 'do the right thing' " and find the defendant guilty; remarks did not cause "jury to abdicate its role as fact finder and convict [the] defendant out of a sense of duty"), and *People v. Lovelace*, 251 Ill. App. 3d 607, 623-24 (1993) (closing statement not improper, where the prosecutor stated, over the defense's objection, that " 'if you are not willing to give justice to those who administer justice to us [*i.e.*, the police] when they deserve it, then the next time that you hear someone talk about the society we live in, how terrible things have gotten, ask for not [*sic*] whom the bell tolls. It tolls for thee"; court held that "prosecutor made one comment which was in the nature of a call to duty," and it was "not improper *** to comment on the evil results of crime and to urge the jury to fearlessly follow the law"), with *People v. Nelson*, 193 Ill. 2d 216, 227-28 (2000) (remarks that a jury violates its oath by acquitting a defendant are inappropriate in light of fact that there was no objection and no curative instruction; prosecutor

stated in rebuttal that "[w]henever a jury acquits a person who has been proven guilty they don't follow their oaths" and "your oaths require you to find [the defendant] guilty on this evidence"), *People v. Howard*, 232 Ill. App. 3d 386, 389-90 (1992) (prosecutor stated that involuntary manslaughter "does not apply; it is a cop-out and I don't want to insult anyone but it is a cop-out in this case. The evidence is clear and we ask you to find [the defendant] guilty of murder"; reviewing for plain error, held that, although the comments on their own, which were not supported by any evidence, may not have constituted reversible error, when considered along with defense counsel's failure to tender an involuntary manslaughter instruction, they cumulatively may have influenced the outcome), and *People v. Crossno*, 93 Ill. App. 3d 808, 823-24 (1981) (prosecutor's comment that "[i]f you want to slap [the defendant] on the wrist find him guilty of involuntary manslaughter" held to be improper and inaccurate reference to the severity of the sentence).

¶ 77 We believe that, here, the prosecutor's comment that the jury would be committing an injustice by convicting defendant of involuntary manslaughter was, taken in context, not improper. The comment emphasized to the jury to perform its duty and do justice (see, *e.g.*, *Beler*, 327 Ill. App. 3d at 836 (" 'do the right thing' " held not improper); *Lovelace*, 251 Ill. App. 3d at 623-24 ("give justice to those who administer justice" held not improper)), although, clearly, the State's definition of justice was different from defendant's definition. Further, the statement was not an improper comment, for example, on the severity of the sentence. *Cf. Howard*, 232 Ill. App. 3d at 389-90 (involuntary manslaughter "is a cop-out" held improper); *Crossno*, 93 Ill. App. 3d at 823-24 (involuntary manslaughter is a "slap *** on the wrist" held improper). Nor did it rise to the level of "inflam[ing] the passions or develop[ing] the prejudices

of the jury without throwing any light upon the issues." *Halteman*, 10 Ill. 2d at 84. Accordingly, defendant was not denied a fair trial.

¶ 78 D. Sentence

¶ 79 Defendant's final argument is that his 48-year sentence is excessive. He contends that the trial court failed to give adequate weight to his background and rehabilitative potential. We disagree.

¶ 80 A trial court's sentence will not be reversed absent an abuse of discretion. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Our supreme court has opined that "a sentence within statutory limits will be deemed excessive and the result of an abuse of discretion *** where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). The Illinois Constitution requires the trial court to balance the seriousness of the offense against the likelihood of restoring the offender to useful citizenship. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002); Ill. Const. 1970, art. I, § 11. In determining an appropriate sentence, a trial court must consider all factors in aggravation and mitigation, including the defendant's age, mental ability, credibility, demeanor, moral character, social environment, and habits. *People v. Thomas*, 171 Ill. 2d 207, 227 (1996). Where mitigating evidence is before the trial court, as it was here, it must be presumed that the trial court considered the evidence absent some indication otherwise. *People v. Willis*, 210 Ill. App. 3d 379, 389 (1991). A court, further, is not required to give greater weight to the possibility of rehabilitation than to the seriousness of the offense. *People v. Novak*, 94 Ill. App. 3d 1024, 1031 (1981).

¶ 81 The sentencing range for first-degree murder is 20 to 60 years. 730 ILCS 5/5-4.5-20(a) (West 2014). Defendant, age 52, will have to serve 100% of his term. 730 ILCS 5/3-6-3(a)(2)(i) (West 2014).

¶ 82 We conclude that the trial court did not abuse its discretion in sentencing defendant to 48 years' imprisonment. In announcing the sentence, the court stated that it found it "very mitigating" the fact that defendant did not have any significant prior criminal history while in the United States. However, it also noted that defendant's act was "horrendous and selfish" and deprived "a family of a loving sister, daughter, depriving children [*sic*] of a loving mother, and for all intents and purposes for [*sic*] any parent whatsoever." The court further characterized defendant's actions as "incredibly shocking." We cannot conclude that these findings were unreasonable. During his police interview, defendant stated that, prior to Guijarro's death, the couple had argued and Guijarro told defendant that she wanted to leave him. Before her body went limp, defendant struggled with Guijarro for 12 to 15 minutes to muffle her yelling and so that "she couldn't run away." Further, this struggle occurred while Amador, who was a toddler, was in the nearby vehicle. The court's sentence did not constitute an abuse of discretion.

¶ 83 III. CONCLUSION

¶ 84 For the reasons stated, the judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 85 Affirmed.