2016 IL App (1st) 131423-U

FIFTH DIVISION
March 31, 2016

No. 1-13-1423

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. 06 CR 13932
	)	
JERRY HENDERSON,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes concurred in the judgment.
Justice Gordon specially concurred.

O R D E R

¶1 *HELD*: (1) Defendant was not denied effective assistance of counsel, who presented evidence and argument of self-defense even though self-defense is not a legal defense to a felony murder charge; (2) the trial court did not err in denying defendant's motion to suppress electronic surveillance evidence; (3) the prosecution proved defendant's guilt beyond a reasonable doubt;

and (4) defendant forfeited review of his claim that the trial court abused its discretion by imposing sentences totaling 80 years' imprisonment.

¶2 Following a jury trial, defendant Jerry Henderson was convicted of felony murder based on armed robbery and sentenced to 40 years' imprisonment for first degree murder plus an additional 40 years' imprisonment because the jury found he personally discharged a firearm that proximately caused death, for a total of 80 years' imprisonment.

¶3 On appeal, he first argues he was denied effective assistance of counsel because his attorney presented evidence and argued that defendant shot the victim in self-defense, but self-defense is not a legal defense to a felony murder charge. Second, defendant argues the trial court should have suppressed electronic surveillance evidence that was obtained by a procedure that did not comply with Illinois law. Third, defendant contends the evidence that the victim was found dead after a meeting with defendant and $13,050 was found in the apartment of defendant's girlfriend was not sufficient to prove his guilt beyond a reasonable doubt because the lack of forensic and testimonial evidence failed to establish defendant committed the underlying felony of armed robbery. Fourth, defendant contends the trial court abused its discretion in sentencing him to 80 years' imprisonment based on his limited criminal history and the lack of proof of his malicious intent.

¶4 Based on the following, we affirm the judgment of the trial court.

¶5 I. BACKGROUND

¶6 The State charged defendant with 12 counts of first degree murder and two counts of armed robbery in the May 17, 2006 shooting death of Timothy Forrest, who was a cooperating witness for the Federal Bureau of Investigation (FBI). Before he was shot, Forrest had consented

to the use of a transmitter and body recorder and agreed that the FBI could record his telephone conversations as part of the FBI's investigation.

¶7 Prior to trial, defendant moved the court to suppress, bar and prohibit the electronic evidence recorded by the FBI, contending the evidence was obtained in violation of Illinois and federal law and violated his rights to due process, equal protection and a fair trial.

¶8 At the hearing on the motion, FBI special agent David Bloniarz testified that in October 2005, Forrest had signed a consent allowing the FBI to install a recording device on his phone and a second consent to use a body recording device and transmitter for the purpose of conducting consensual recordings between Forrest, named target Winston Atwater, and others yet unknown. During the federal investigation, Forrest implicated defendant, so agent Bloniarz began investing him for a possible bank robbery and charges of selling grenades and guns. Forrest did not sign consents listing defendant as the named target because the consent forms were executed once for a cooperating witness, had no expiration date, and were specific to Forrest, not the named target. Furthermore, Illinois law enforcement officers were not involved in the FBI investigation and only became involved after Forrest's murder. Before Forrest's murder, there was never any intention for the State of Illinois to prosecute defendant.

¶9 The trial court denied defendant's motion to suppress, finding that federal law controlled because there was no evidence of collusion by the State, and, unlike the Illinois statute, the federal statute required consent from only one party involved in the communications. The court also found that the collection of electronic evidence in the instant case complied with federal law because the language of Forrest's consent included "others as yet unknown and continuing thereafter."

¶10 At trial, the State proceeded on one count of felony murder based on armed robbery. The State presented evidence showing that Forrest, a former Cook County jail guard, was facing federal charges involving "bootlegging" DVDs and other copyrighted material and was cooperating with an FBI investigation. In December 2005, Forrest told agent Bloniarz that Forrest could buy some stolen firearms from a person he knew as "Jerry," who was later identified as defendant. To verify this information, agent Bloniarz conducted several recorded telephone conversations between Forrest and defendant about the purchase of stolen guns. Agent Bloniarz learned defendant's identity after subpoenaing information concerning his telephone number and running his license plate number.

¶11 In May 2006, Forrest was finally in a position to buy stolen firearms from defendant, so agent Bloniarz obtained $15,000 in cash in small denominations from FBI funds. To make the cash look like "drug dealer" money, agent Bloniarz bundled the cash into stacks of thousands and rubber-banded each stack. After several recorded telephone conversations between Forrest and defendant on May 17, 2006, the gun sale was set to occur on that date at 8 p.m. in the parking lot of a home improvement store in Dolton, Illinois. Agent Bloniarz, other agents and Forrest met at an FBI office before the sale, and Bloniarz instructed Forrest about how the transaction should take place. Specifically, Bloniarz told Forrest that he could let defendant count the money, but Forrest was not to let defendant take the money from his person or out of his sight. Furthermore, Forrest was to remain in his vehicle and not get into defendant's car or leave the scene. Forrest was not supposed to agree to a change of location without contacting the agents for approval first. If Forrest was in danger, he should say, "I don't want any trouble," or "I need help." Furthermore, Forrest should try to describe the threat, such as by saying, "Hey put the gun down; I'm going to do what you want."

¶12 The agents and Forrest drove toward a staging area near the home improvement store to check their equipment, assign roles and conduct a briefing. En route to the staging area, Forrest telephoned Bloniarz and informed him that defendant had changed the location to a fast food restaurant about one mile away from the home improvement store. Bloniarz informed the other agents of the location change. At the staging area, Bloniarz tested the recording device, gave it to Forrest and instructed him to keep it on his person at all times. Bloniarz also gave Forrest a body transmitter, which did not record but transmitted sounds over a secured FBI radio frequency, similar to a walkie-talkie. Then Bloniarz searched Forrest and his vehicle for any weapons, contraband or drugs and did not recover anything. The trial testimony of agents Christopher Hendon and Frederick Osborne confirmed that Forrest and his vehicle were searched. When Bloniarz received information from other agents that they were in position at the restaurant, he gave Forrest a manila envelope containing the rubber-banded stacks of money. Bloniarz did not mark the money or record the serial numbers because he expected to receive the money back from Forrest later that night. Forrest drove to the restaurant, and agent Bloniarz and Osborne followed behind in a black truck. At the restaurant, Forrest parked his vehicle and waited. Eventually he received a telephone call, had a conversation, and then telephoned the agents to inform them defendant had changed the location to an animal hospital located at the same intersection as the home improvement store.

¶13 Forrest waited at the restaurant parking lot while agents drove to the animal hospital to ensure the location was suitable. At the new location, agents Hendon and Ron Reddy, who were in separate vehicles, observed defendant smoking a cigarette while standing next to a gray Camry that was parked outside a currency exchange. The currency exchange shared a parking lot with the animal hospital. Agent Hendon radioed this information to the other agents. Defendant

entered the Camry, drove alone through the parking lot to the animal hospital, and backed into a parking space so that the front of the Camry was facing out. Meanwhile, Forrest drove to the animal hospital while agents Bloniarz and Osborne followed behind.

¶14 Forrest parked his vehicle on the driver's side of defendant's Camry, with the front end facing the building. Agents Bloniarz and Osborne observed the encounter from a gas station across the street. Through military grade binoculars, Osborne observed defendant exit the Camry and enter Forrest's vehicle on the passenger side. The testimony of agents Bloniarz and Hendon confirmed this. Bloniarz monitored Forrest and defendant's conversation through the transmitter and learned that a white "beamer" or "Benz" was supposed to deliver the guns, but that vehicle never arrived. After about 20 minutes, defendant asked Forrest about a black truck, and Bloniarz thought defendant was pointing out Bloniarz's truck at the gas station. Osborne heard a car door, and he and Bloniarz observed defendant exit Forrest's vehicle, walk briskly to the Camry, and drive off at a high rate of speed. Bloniarz also observed defendant tuck something up under his shirt as he walked around the back of Forrest's vehicle to the Camry. Agent Hendon's testimony confirmed Osborne's and Bloniarz's observations.

¶15 Bloniarz attempted to call Forrest while other agents followed defendant's Camry. Bloniarz and Osborne drove to Forrest's vehicle and found him slumped over in the driver's seat, covered in blood with gunshot wounds to his head. None of the agents observed the shooting or heard any gunshots over the transmission, but agent Hendon heard static. None of the agents observed or heard anything to indicate there was a struggle inside Forrest's vehicle. The agents following defendant, who was driving toward Indiana, were ordered to return to the scene for safety reasons. The police and an ambulance were called to the scene.

¶16 After laying a proper foundation, the audio from Forrest's body recorder was played for the jury, and the recording confirmed the testimony of the agents concerning the events and conversations on the evening in question. In addition, defendant can be heard on the recording asking Forrest if he knows who is in a black truck and if they are with him, but Forrest denies it. Defendant then tells Forrest he needs to count the money and can be heard counting on the audio. Defendant asks Forrest if he "shorted" him, takes a phone call, and asks Forrest if he brought people with him. When Forrest stated that the people he was involved with do not "play" with their money and would "take [someone] out" for $2,000, let alone $15,000, defendant agreed, stating, "You're right, cause I be ready to kill a [expletive] over 15 G's." Then, Forrest states, jokingly, "Knowing you, you ain't give him but $2500," which is immediately followed by a distorted noise on the audio, the car door opening and closing, and a sound like liquid being poured. A distant car door can be heard and then the squealing of tires. An unanswered phone rings before the audio ends.

¶17 An expert in the field of the forensic examination of audio recordings testified that the distortion part of the recording was two high level acoustical events that occurred a little over half a second apart and were highly consistent with the sounds of gunshots. Furthermore, agents of the FBI evidence response team processed the crime scene and recovered one cartridge case from the driver's side floor board of Forrest's vehicle and a second cartridge case outside on the ground near the rear passenger door of the vehicle. A cell phone and the recorder and transmitter were also recovered from Forrest's vehicle.

¶18 The opinion of the medical examiner regarding the autopsy performed on Forrest concluded that he suffered two close range gunshot wounds to the head: one to the right check fired from a distance between 4 and 12 inches, and a second to the right side of the head fired

from a distance between ½ an inch to 4 inches away. The fired evidence from Forrest's head was removed, in addition to old bullet fragments discovered in his chest and abdomen that had been in his body for many months or years and did not contribute to this death. An expert in the field of firearms and firearms identification compared the two fired shell casings recovered from the scene and fired evidence recovered from Forrest's body to a nine millimeter Ruger gun that was recovered at the apartment of defendant's girlfriend the day after the shooting. The firearms expert determined that one fired bullet, one fired bullet jacket, and jacket fragments were fired from the Ruger. She examined a third fired bullet jacket and determined that it was not fired from the Ruger.

¶19 Agents Reddy and Osborne learned that an apartment building in Alsip, Illinois was a possible address for defendant and went to that location. They observed the gray Camry in the parking lot. During the early morning hours, they observed defendant's girlfriend Merri Moore enter a car. At about 6:40 a.m., Osborne observed defendant leave the apartment building and walk toward the Camry with what seemed to be a key fob because the lights of the Camry "flashed." Osborne called out defendant's name; defendant turned and was placed under arrest.

¶20 Agent Bryan Vandeum and other members of the evidence response team searched Moore's apartment after a warrant was obtained. They recovered: a nine millimeter Ruger gun and a magazine with two live rounds inside a manila envelope on a shelf in the laundry area; a cell phone, charger, personal data assistant, and a white beanie hat in the laundry area; men's clothing—jeans, a sweater, underwear and socks—inside the dryer; a second cell phone on a master bedroom nightstand; $13,050 in rubber-banded bundles inside the nightstand drawer; and a pair of men's boots from the master bedroom. Agent Bloniarz testified that the recovered

manila envelope and money bundles were consistent with the envelope and rubber-banded money he had given Forrest before the meeting with defendant.

¶21 Merri Moore testified that in May 2006 defendant had been her exclusive boyfriend for over a year. During the late evening hours on May 17, 2006, defendant let himself into her Alsip apartment with his key. She met him at the door, and he did not have anything in his hands. He was not wearing the clothes the agents subsequently recovered from her dryer, and Moore did not know how those items got inside her apartment. She also never observed a gun, manila envelope, or rubber-banded bundles of money in her apartment and denied knowing how those items got there. The cell phone, charger, data assistant and white hat found in her laundry room were not hers, and she did not know who owned those items. On the evening in question, she and defendant went out for food, returned home and watched television. Moore fell asleep around midnight. When she woke up the next morning, she got ready for work, spoke with defendant, and left him alone in the apartment around 6:30 a.m. When she came home from work, the apartment door was kicked in and the place was "ransacked." Moore claimed that defendant previously told her that he used to gamble, and a couple of days before the police came to her apartment, she observed defendant with $4,000.

¶22 Members of the FBI evidence response team processed the Camry driven by defendant and recovered his wallet containing his driver's license, a credit card, a dry cleaning receipt, and a Michigan citation. To check for possible blood evidence, two pieces of carpet were cut out from the driver's side floor and a piece of cloth from the driver's seat. However, an expert in forensic biology examined the samples and opined that only one sample, a piece of carpet, had blood. He also opined that a stain on the trigger guard of the recovered Ruger was blood. The expert preserved those samples for further testing. Then, an expert in DNA analysis examined

the preserved samples, performed tests, and opined that DNA from the Camry's carpet was a mixture of three people, Forrest could not be excluded from having contributed to that mixture, and 1 in 140 African-Americans could not be excluded. The DNA expert also determined that the blood found on the Ruger matched Forrest's DNA profile and this profile would be expected to occur in 1 in 4.5 quintillion African-Americans.

¶23 The parties stipulated that Shirley McFarland, a.k.a. Shirley Johnson, had known defendant since at least April 2005 and had opened a cell phone account that had an authorized user by the name of "Jerry." This account was cancelled on May 18, 2006. Furthermore, McFarland went to a car rental company on May 15, 2006, and rented the Camry for a period from May 16 to May 22, 2006. On May 19, 2006, McFarland went to the police department because she was looking for the Camry and identified herself as defendant's wife. On May 19, 2006, she reported to the car rental company that the Camry had been towed by the city.

¶24 Defendant testified that he had gone to elementary school with Forrest and reconnected with him in 2006. They spoke numerous times about a gun transaction, and defendant agreed to sell Forrest guns and grenades. Defendant got the guns from his step-father and had sold guns once before to "some Asian guys." Defendant drove the Camry that McFarland had rented for him to the gun sale because his Corvette was being painted. Defendant was not nervous about the gun deal even though he acknowledged that people wanting to purchase numerous firearms were dangerous. Defendant was unarmed when he entered Forrest's vehicle and only counted $10,000 of the money, which was in a brown paper bag, because he trusted Forrest.

¶25 Defendant gave the bag of money back to Forrest and received a phone call from the man who was supposed to bring the weapons. Defendant heard something drop and observed Forrest pick up something defendant thought at the time was a cell phone and put it in his lap. Then

Forrest said something about defendant only giving him $2500, and defendant observed a gun in Forrest's lap. Forrest had told defendant that he had been robbed before. Forrest's hand was on the gun and defendant tried to grab it. Forrest snatched the gun away while the barrel was pointed at defendant, so defendant pushed the gun out of his face and the gun "went off." Defendant observed "blinding" smoke and Forrest's face coming right at him as if Forrest was going to "attack" him, so defendant, who somehow had the gun, "fired in self-defense." Defendant opened the car door, fell out and went to the Camry with the gun still in his hand. He dropped the gun on the floor of the Camry and drove to Gary, Indiana. After he talked to a friend for about 15 minutes, defendant drove to Moore's apartment. While Moore was sleeping, defendant brought the gun into her apartment and put it in a manila envelope he found in the laundry room. He also washed his clothes and put them in the dryer. The $13,050 recovered in the nightstand was his money that came from gambling and a few loans he had taken out on his car.

¶26 The jury found defendant guilty of first degree murder and found that he had personally discharged a firearm that proximately caused death to another person. The trial court sentenced defendant to a 40-year prison term for first degree murder, to run consecutively to a 40-year prison term for discharging a firearm. Defendant timely appealed.

¶27 II. ANALYSIS

¶28 A. Ineffective Assistance of Counsel

¶29 Defendant argues he received ineffective assistance of counsel because trial counsel attempted to defend the charge of felony murder "solely" by using the theory of self-defense, which is not a legal defense to a felony murder charge. Defendant contends that when the trial court predictably ruled that jury instructions concerning self-defense and second degree murder

would not be given, defendant's "entire defense was erased." He claims "counsel did not demonstrate even a rudimentary understanding of the felony-murder doctrine" and counsel "failed to present any defense at all."

¶30 In determining whether a defendant was denied effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), 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 both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). To satisfy this first prong of the *Strickland test*, the defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). In evaluating the second prong of the *Strickland* test—sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If either prong of the *Strickland* test cannot be shown, then the defendant has not established ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶31 Because the right to effective assistance of counsel refers to competent, not perfect representation, mistakes in trial strategy, tactics or judgment do not, in themselves, equate to incompetent representation. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). Rather, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

¶32 We conclude that defendant's claim of ineffectiveness of counsel fails because the record does not support defendant's assertion that counsel's strategy was to *solely* present evidence and argue that defendant shot Forrest in self-defense. According to the record, counsel defended defendant by proceeding on multiple defenses in the hope of persuading the jury not to convict. In conformance with defendant's testimony that he did not commit an armed robbery, and in light of the trial court instructing the jury that it had to find defendant committed the underlying armed robbery in order to find him guilty, defense counsel vigorously argued that defendant was not guilty of armed robbery. During his opening statement, defense counsel told the jury that the evidence would show defendant did not have a weapon in his possession when he went to the animal hospital. Counsel also cross-examined the State's witnesses regarding their failure to mark the FBI money or record the serial numbers, to search Forrest's vehicle for any hidden compartments, or to observe defendant in possession of any money or weapon. During closing argument, counsel argued there was no direct evidence to support an armed robbery because none of the agents observed defendant exit Forrest's vehicle holding either money or an envelope.

¶33 Furthermore, counsel attacked the State's ability to prove its case beyond a reasonable doubt by challenging the credibility and believability of the State's witnesses and evidence during counsel's vigorous cross-examination of all the witnesses. During closing argument, counsel argued that defendant's testimony, including his statement that he did not bring the gun, was "unrefuted" and there was no fingerprint evidence on the recovered gun.

¶34 In addition to arguing the two sound legal defenses of failure to prove the underlying armed robbery felony and failure to prove its case beyond a reasonable doubt, counsel also argued, in accordance with defendant's trial testimony, that defendant was in fear for his life and safety, the first gunshot was fired because Forrest and defendant had a struggle for Forrest's gun, and the second gunshot was fired because defendant believed Forrest was moving toward defendant to attack him. Although a self-defense argument had no legal basis as a defense to the felony murder charge, the record indicates the argument was counsel's attempt to provide some justification or explanation for defendant's acts in light of the overwhelming evidence against him. See *People v. Ganus*, 148 Ill. 2d 466, 473-74 (1992) (in a situation where the defendant literally had no defense and the evidence of his guilt was overwhelming, counsel was not ineffective for conceiving a compulsion defense, which, although not a legal defense, could have persuaded a jury not to convict because jury nullification is always a possibility); *accord People v. Gilbert*, 2013 IL App (1st) 103055, ¶ 28.

¶35 Specifically, the overwhelming evidence against defendant showed that he agreed to sell grenades and guns to Forrest and intended to, and actually did, rob him on May 17, 2006, and shot him twice in the head. In preparation for the robbery, defendant's girlfriend McFarland, the day before the gun sale meeting, used a false name and rented the Camry for defendant. The day of the meeting, defendant changed the location twice in an effort to counter-surveil Forrest. Furthermore, at the animal hospital, defendant parked the Camry with the front end facing out to facilitate a quick escape. The forensic evidence, FBI recording, and eyewitness and expert testimony established that defendant entered Forrest's vehicle, engaged in conversation, counted the money, and after static was heard on the recording, quickly exited Forrest's vehicle, tucked something under his shirt, and sped away in the Camry.

¶36 The FBI agents who were observing the meeting found Forrest slumped over in the driver's seat with gunshot wounds to his head, and no one except defendant had entered Forrest's vehicle. In addition, agent Bloniarz searched Forrest and his vehicle before the meeting and did not find any weapon. Outside the apartment building of defendant's girlfriend Moore, the agents found the Camry, which contained defendant's wallet and other documents. Inside Moore's apartment, the agents recovered the Ruger, which had Forrest's blood on it; the clothes defendant had worn at the scene; defendant's cell phones; a manila envelope that was consistent with the envelope the FBI had given Forrest containing the $15,000, which was in small denominations and rubber-banded to look like "drug dealer money"; and $13,050 in cash that was rubber-banded and in small denominations. Moreover, the ballistic evidence showed a match between defendant's gun, the fired bullets that killed Forrest, and the fired shell casings at the scene.

¶37 The fact that in retrospect one of counsel's tactics—attempting to justify or explain defendant's behavior, which was admitted into evidence by defendant's own testimony—was unsuccessful in light of the overwhelming evidence against defendant does not demonstrate incompetence by counsel. See *People v. Gonzalez*, 238 Ill. Ap. 3d 303, 331-32 (1992). Accordingly, defendant does not meet his burden to demonstrate deficient performance by counsel under the first prong of the *Strickland* test, and, thus, his ineffective assistance of counsel claim fails.

¶38 B. Electronic Surveillance Evidence

¶39 Defendant contends the trial court erred in denying his motion to suppress the electronic surveillance evidence because (1) the procedure used by the FBI did not comply with Illinois law; and (2) the FBI never obtained or requested that Forrest sign a consent form that specifically named defendant as someone whose conversations with Forrest the FBI could overhear. The

federal cases defendant cited to support his second argument are not relevant in the instant case because the cited cases did not involve communications gathered pursuant to the specific provision of the federal statute that allows for a one-party consensual overhear. See, *e.g.*, *United States v. Kahn*, 415 U.S. 143 (2000) (involving an application to a federal judge for an order authorizing a wiretap interception without the knowledge or consent of any of the parties to the communication); *accord U.S. v. Bin Laden*, 126 F.2d 264 (S.D.N.Y 2000).

¶40 When, as here, the trial court's findings of fact are not disputed, the court's legal ruling on whether to suppress evidence is subject to *de novo* review. *People v. Bridgewater*, 235 Ill. 2d 85, 92-93 (2009). The defendant bears the burden of proof on a motion to suppress evidence. 725 ILCS 5/114-12(b) (West 2016); *People v. Lampitok*, 207 Ill. 2d 231, 239 (2003); *People v. Gipson*, 203 Ill. 2d 298, 306 (2003). The electronic surveillance evidence against defendant was gathered by the FBI pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter "the Crime Control Act"). 18 U.S.C. §2510 *et seq.* (West 2015). Although the Crime Control Act prohibits the nonconsensual recording of conversations, it does allow "for a person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. §2511(2)(c) (West 2015). In contrast, the Illinois law authorizing eavesdropping by law enforcement requires either that both parties consent to such a recording or that one party consent with prior judicial approval. 720 ILCS 5/14-2 (West 2016). Here, Forrest consented without prior judicial approval.

¶41 States may adopt eavesdropping standards that are more stringent than those in the Crime Control Act; however, with respect to this federal-state law conflict, our supreme court has held that "electronic surveillance gathered pursuant to federal law, but in violation of the [Illinois]

eavesdropping statute, is not inadmissible absent evidence of collusion between federal and state agents to avoid the requirements of state law." *People v. Coleman*, 227 Ill. 2d 426, 439 (2008). The *Coleman* court stated that the Supremacy Clause (U.S. Const., art. IV, cl. 2) mandates that the Illinois eavesdropping statute cannot restrict the activities of federal agents or federally authorized state officials. As noted by the trial court, pursuant to *Coleman*, defendant's motion could only have been granted if there was evidence of collusion, or a "secret agreement" between state and federal law enforcement. See *id*. Both defendant and the State acknowledge that the investigation in the instant case started as an investigation conducted by federal agents into federal crimes, and there was no evidence that Illinois law enforcement officers were part of the investigation until after Forrest's homicide on May 17, 2006. Because there is no evidence of collusion, federal law controls.

¶42 It is well established that the interception of communications by law enforcement with the consent of just one of the involved parties does not violate the fourth amendment's prohibition against unreasonable searches and seizures. See *United States v. White*, 401 U.S. 745, 751-54 (1971). The admission of communications obtained with the consensual help of confidential informants does not disrupt the balance between the need for effective law enforcement tools and privacy from unreasonable government intrusion. *Id*. This principle has been upheld in situations similar to the instant case. *See Hoffa v. United States*, 385 U.S. 293 (1966) (testimony by a government informant concerning confidential conversations with defendant did not violate the fourth, fifth, or sixth amendments); *Lopez v. United States*, 373 U.S. 427 (1963) (no fourth amendment violation when an undisclosed agent electronically records a conversation).

¶43 The electronic surveillance at issue here is admissible unless the terms of the Crime Control Act were not satisfied, and, contrary to defendant's assertion on appeal, neither the Crime Control Act nor relevant federal case law contains any requirement of a "connection" between the non-consenting person actually recorded and the non-consenting person who was identified in the cooperating witness's consent form. The Crime Control Act simply states that "[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given *prior consent* to such interception." (Emphasis added.) 18 U.S.C.A. § 2511(2)(c) (West 2015). Consent of one of the participants of a communication is all that the statute requires, and Forrest was indisputably one of the parties to the conversation defendant sought to suppress. Therefore, the only relevant question is whether Forrest gave proper prior consent to the electronic surveillance.

¶44 Defendant claims the FBI had ample time and opportunity to ask Forrest to execute a new document naming defendant as the subject of the recordings and the trial court should have found the evidence of Forrest's consent insufficient and suppressed the recordings gathered by the FBI. The State maintains that Forrest's signed written consent, containing the phrase "and others as yet unknown," coupled with his conduct is sufficient to show the requisite prior consent to the electronic surveillance of defendant.

¶45 The record establishes that Forrest expressly agreed to work with the FBI, as evidenced by his signed consent form, which contained the phrase "others as yet unknown." The trial court found that the electronic surveillance complied with federal law because Forrest had given valid prior consent as a party to the communication. Defendant does not argue that Forrest's original consent forms were invalid, rather, defendant asserts that Forrest's written consent does not

qualify as "prior consent" because it does not specifically state an affirmative assent with regard to defendant in particular.

¶46 We affirm the trial court's ruling that, given the language in the consent form concerning "and others yet unknown," it was unnecessary for the FBI to obtain a new consent form from Forrest naming defendant as a target of an investigation. The fact that the FBI had the opportunity to ask Forrest for a new consent form naming defendant but did not do so is not dispositive of this issue concerning the admissibility of those recordings. The consent form Forrest signed did not have an expiration date, the statute does not contain any such limitation, and all of Forrest's actions up until the moment of his death indicated a high degree of cooperation with law enforcement. While Forrest's written consent is a highly relevant factor in this inquiry, we do not find that it alone authorized the surveillance of defendant. Although the statute requires consent from a party, it does not differentiate between express or implied consent. Moreover, even though the government has the burden of proving an informer's consent, that consent need not take the form of a writing. *United States v. Craig*, 573 F.2d 455, 477 (7th Cir. 1977). The prevailing federal standard is that consent may be shown when "the informer went ahead with a call [or other recorded activity] after knowing what the law enforcement officers were about." *United States v. Bonanno*, 487 F.2d 654, 658-59 (2d Cir. 1973). This standard was adopted by the Seventh Circuit in *United States v. Horton*, 601 F.2d 319, 323 (7th Cir. 1979), which held that "barring some affirmative evidence of will-overbearing coercive threats *** participation in monitoring or recording a telephone or other conversation in which the informant is a participant is merely incidental to the previously determined course of cooperation with law enforcement officials."

¶47 Defendant does not allege that Forrest's consent was the result of coercion, nor does defendant provide evidence that Forrest's "cooperation had been secured by actual threats of a physical nature or of prosecutorial action which had no realistic foundation." See *Id*. at 322-23. Defendant argues only that Forrest's consent does not comply with a requirement which neither the statute nor applicable case law mandates. Even though the FBI could have asked Forrest to sign a consent form naming defendant as a target of the investigation, the record establishes that Forrest could have withdrawn his consent from the investigation at any time and yet did not do so. Forrest's actions demonstrate active cooperation in a predetermined plan with law enforcement and therefore the presence of implied consent.

¶48 Forrest's assistance was instrumental in the FBI investigation. He brought defendant, an acquaintance, to their attention and was their only contact with a suspected arms dealer for months. Forrest also provided agent Bloniarz with key identifying information—a license plate number—which revealed defendant's legal name. As planned and agreed, Forrest immediately contacted the agents to let them know about the change of the meeting location. He secreted two surveillance devices on his person and had the opportunity to remove them or turn them off once he was out of the presence of the FBI agents, but obviously did not. Finally, Forrest never told anyone that he did not want to participate, and he was never prohibited from withdrawing his consent at any time. He was free to face the federal charges against him, and chose otherwise.

¶49 We reject defendant's assertion that even though the FBI had obtained Forrest's written consent at the onset of the investigation, the FBI was required to update his consent form as people who initially qualified under the language of the federal statute as "others yet unknown" became known as the investigation progressed. We conclude that, given the absence of coercion as well as the presence of both express consent to ongoing investigations regardless of the target

and implied "prior consent" with regard to defendant in particular, the trial court did not err in denying defendant's motion to suppress the electronic evidence.

¶50 C. Sufficiency of the Evidence

¶51 Defendant contends the State failed to prove beyond a reasonable doubt that he committed the felony of armed robbery. Defendant argues the evidence fails to establish that he entered Forrest's vehicle with the intent to rob him, that defendant brought the gun to the meeting, and that the money recovered at his girlfriend's apartment was the money the FBI had given Forrest before the meeting.

¶52 When assessing a challenge to the sufficiency of the evidence, a court considers " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *People v. Collins*, 106 Ill. 2d 237, 261 (1985), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If we find that the evidence meets this standard, we must affirm the conviction (*People v. Herrett*, 137 Ill. 2d, 195, 203 (1990)); we will not retry the defendant (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007); *People v. Smith*, 185 Ill. 2d 532, 541 (1999)). A jury's findings are accorded great weight because the jury observed and heard the witnesses and, thus, is best equipped to determine the credibility of witnesses, weigh their testimony, draw reasonable inferences from the evidence, and ultimately choose among conflicting accounts of events. *See Wheeler*, 226 Ill. 2d at 114-15; *Smith*, 185 Ill. 2d at 541-42; *People v. Williams*, 193 Ill. 2d 306, 338 (2000). On review, this court must consider all of the evidence in the light most favorable to the State (*Collins*, 106 Ill. 2d at 261), and we will not substitute our judgment for that of the trier of fact unless the sufficiency of the evidence is so

improbable, unsatisfactory, or unreasonable that it justifies a reasonable doubt of defendant's guilt (*Wheeler*, 226 Ill. 2d at 115; *Smith*, 185 Ill. 2d at 541).

¶53 A person commits first degree felony murder when he kills an individual without lawful justification and commits a forcible felony other than second degree murder. 720 ILCS 5/9-1(a)(3) (West 2016). Armed robbery is a forcible felony. A person commits armed robbery when he knowingly takes property from another by use of force (720 ILCS 5/18-1(a) (West 2016)), and during the commission of the offense personally discharges a firearm that proximately causes death to another person (720 ILCS 5/18-2(a)(4) (West 2016)). "Intent may be inferred from the character of defendant's acts as well as the circumstances surrounding the commission of the offense." *People v. Perez*, 189 Ill. 2d 254, 266 (2000). Proof that the defendant was present at the crime scene, that he fled from the scene, and that he failed to report the crime are all factors that a trier of fact may consider. *Id.* at 267. In order for the State to prevail on this claim, the evidence must establish that defendant had the intent to take Forrest's money at gunpoint, that defendant did so, and that Forrest died as a result.

¶54 A review of the evidence and circumstances surrounding Forrest's death establishes beyond a reasonable doubt that defendant shot Forrest in the course of committing armed robbery. Defendant testified at trial that he shot Forrest in Forrest's vehicle. Moreover, the recorded telephone conversations established that defendant and Forrest had agreed on the price for Forrest to buy rifles, handguns and hand grenades from defendant, so defendant knew Forrest was bringing a large sum of money to the meeting. Whereas the FBI searched Forrest and his vehicle before the meeting with defendant and did not find any weapon in the possession of their cooperating witness, the FBI had no opportunity to search defendant before the meeting. In addition, defendant engaged in conter-surveilance of Forrest by changing the meeting location a

couple of times, and parked at the meeting with his Camry facing outward in order to facilitate a quick escape.

¶55 On the recording of the meeting, defendant counted the money, stated that he would have been willing to kill someone over $15,000, and shortly thereafter was heard opening and closing the door as he exited Forrest's vehicle. The testimony of multiple FBI agents established that defendant was the only person with Forrest at the time of his death. While none of the agents observed or heard the shooting, Forrest was discovered with two gunshot wounds to the head immediately after defendant left Forrest's vehicle. Although none of the agents observed defendant leave the scene with any money in his hands, defendant could have easily concealed the envelope of money under his clothing. Moreover, the $15,000 in rubber-banded stacks was not found on Forrest's person or in his vehicle. Defendant testified that he left that scene with the gun and did not dispose of it, but instead took it home with him, which is suggestive of ownership.

¶56 When defendant was arrested the next morning outside the apartment he shared with his girlfriend, $13,050 in rubber-banded stacks was found in his bedroom nightstand and the murder weapon, a Ruger, which was stained with Forrest's DNA, was found in the laundry room in a manila envelope. The recovered manila envelope was consistent with the envelope the FBI had given Forrest before the meeting containing the FBI's money, and the recovered $13,050 was bundled in the same manner as the FBI's money. Defendant's girlfriend testified that defendant was the only other person who had access to her apartment, the recovered money was not hers, and she did not know how it came to be at her residence. In addition, expert testimony established that the bullets extracted from Forrest's skull were fired from the recovered Ruger.

¶57 Although defendant argued to the jury that the money found in the nightstand was simply gambling proceeds and the FBI failed to record the serial numbers of the $15,000, the jury was in the best position to determine the credibility of the witnesses, weigh their testimony, draw reasonable inferences from the evidence, and ultimately choose among conflicting accounts of events. Defendant also argued that the lack of any evidence of a struggle or distress call from Forrest indicated that Forrest was the initial aggressor. However, the absence of a struggle, viewed in the light most favorable to the State, can reasonably be understood as the result of a "cold-blooded," sudden, and deliberate shooting.

¶58 The evidence, viewed in the light most favorable to the State, establishes that defendant came to the meeting armed with the gun and the intent to rob Forrest, that defendant took Forrest's money by use of force, and that Forrest died as a result. The evidence is sufficient to find that defendant committed the felony of armed robbery beyond a reasonable doubt. Accordingly, we affirm his conviction of first degree murder.

¶59 D. Sentencing

¶60 Defendant argues that, in light of his limited criminal history and lack of proof of malicious intent, the trial court abused its discretion in sentencing him to 80 years' imprisonment. The State, however, correctly notes that defendant has forfeited this claim. To preserve a claim of sentencing error for review, a defendant must make both a contemporaneous objection and file a written post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010), *People v. Bannister*, 232 Ill. 2d 52, 76 (2008), *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Defendant did not raise this objection at his sentencing hearing and did not file a written post-sentencing motion to reconsider the sentence. Thus, this argument was not preserved for review.

¶61 A reviewing court may still consider an otherwise forfeited claim under the doctrine of plain error. Ill. Sup. Ct. R. 615. The plain error doctrine serves as a "narrow and limited exception to the general waiver rule." *People v. Herron*, 215 Ill. 2d 167, 177 (2005); *People v. Hampton*, 149 Ill. 2d 71, 100 (1992); *People v. Szabo*, 113 Ill. 2d 83, 94 (1986); *People v. Pastorino*, 91 Ill. 2d 178, 189 (1982). In order to proceed with a forfeited claim, a defendant has the burden of establishing that a clear or obvious error occurred which has affected a substantial right. *Hillier*, 237 Ill. 2d at 545. In the sentencing context, a defendant must show that either (1) the evidence at the sentencing hearing was so closely balanced that the error threatened to tip the balance, or (2) that the error was so egregious as to deny respondent a fair proceeding. *Id.* at 545-46. The defendant bears the burden of persuasion on both prongs of the plain error doctrine. *Id.* When a defendant fails to make a plain error claim or argument, courts will generally affirm the procedural default. *Id.*, *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010), *People v. Nieves*, 192 Ill. 2d 487, 503 (2000).

¶62 Defendant does not allege that he has been denied a substantial right, but only that the trial court abused its discretion by imposing an excessive sentence. The trial court consecutively sentenced him to 40 years for felony murder and 40 years due to the aggravating factor of personally discharging a firearm that led to the death of another. A trial court has broad discretion in imposing a sentence, and the trial court's determination is granted great deference from a reviewing court. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The legislature empowers trial courts to impose sentences of 20 to 60 years for the offense of first degree murder (730 ILCS 5/5-8-1(a)(1) (West 2016)), and courts are authorized to impose an additional 25 years to life when the offender personally discharges a firearm that caused the death of another during the commission of the crime (730 ILCS 5/5-8-

1(a)(1)(d)(iii) (West 2016)). Therefore, even a term of natural life would fall within the statutory guidelines for defendant's conviction, so an equivalent sentence cannot be deemed "greatly at variance with the spirit and purpose of the law." *Stacey*, 193 Ill. 2d at 210.

¶63 Defendant, however, has not requested plain error review on appeal, makes no argument regarding either prong of plain error in his opening brief, and has dropped the argument entirely in his reply brief. Therefore, we decline to consider the issue of whether the trial court abused its discretion in sentencing due to the procedural forfeiture of this claim.

¶64 III. CONCLUSION

¶65 We affirm the judgment of the trial court.

¶66 Affirmed.

¶67 JUSTICE GORDON, specially concurring.

¶68 I agree with the majority that defendant was not denied effective assistance of counsel when his lawyer presented evidence and arguments of self-defense even though self-defense is not a legal defense to a felony murder charge, but I must write separately. Defendant's trial strategy was based on defendant's testimony that he grabbed the victim's gun because he was in fear of his life. This strategy was being used to convince the jury that the victim was attempting to shoot and kill defendant so that the jury would find defendant not guilty of felony murder. There is no claim by defendant that his lawyer made up the story and suggested to defendant that he lie on the stand. Defendant's only claim is that he did not obtain a jury instruction for self-defense and an instruction for second-degree murder because self-defense is not a legal defense to a felony murder charge. Defendant is in effect saying that he was denied effective assistance of counsel because he told the truth and his lawyer let him do it when it was the only way he could have been found not guilty by the jury.

¶69 I agree with the majority that defendant forfeited his claim under the doctrine of plain error (Ill. S. Ct. R. 615 (eff. Jan. 1, 1967)) because defendant has failed to meet his burden of establishing plain error. A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion. As our supreme court explained in *People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000), when a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review. Here, defendant failed to raise plain error in the appellate court.

¶70 I agree with the majority on all the other issues in this order.