

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SECOND DIVISION
JUNE 28, 2011

1-09-0891

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. 05 CR 8598 (02)
)	
WILLIAM KENLOW,)	
)	Honorable
Defendant-Appellant.)	Steven J. Goebel,
)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

ORDER

Held: The defendant was not denied effective assistance of counsel because his defense counsel: did not request a jury instruction on the defense of withdrawal; did not request separate jury verdict forms for each first degree murder counts; and failed to review telephone records before stipulating to them at trial. Further, we do not find that the defendant was denied a fair trial because of alleged prosecutorial misconduct. We affirm the defendant's convictions; however, we vacate the defendant's sentence on the felony murder count and remand the case to the trial court with directions for resentencing.

In January 2009 the defendant, William Kenlow, was convicted by a jury in the circuit court of Cook County of the offenses of first degree murder and armed robbery. Additionally, the jury found him accountable for the acts of another man who used a firearm during the commission of the murder. The defendant was sentenced to 25 years' imprisonment for the felony murder count, with an additional 15 years because his accomplice was armed with a firearm. The defendant was given a concurrent term of 20 years' imprisonment for the offense of armed robbery for a total of 60 years' imprisonment. The defendant filed a timely appeal of his convictions and sentences.

On appeal, the defendant claims that he was denied his right to effective assistance of counsel because his defense attorney: (1) failed to request the specific jury instruction: "Responsibility for Act of Another - Withdrawal"; (2) did not submit separate jury verdict forms for each theory of murder; and (3) failed to review the defendant's telephone records before agreeing to a stipulation admitting them into evidence. Further, the defendant argues he was denied a fair trial because the prosecution: (1) made repeated, inflammatory comments about him and his defense counsel; (2) violated the rules of discovery by withholding the defendant's telephone statements; and (3) misled his defense counsel regarding the defendant's telephone statements so that counsel would stipulate to them.

Also in this appeal the State requests that this case be remanded to the trial court to correct the defendant's sentence. The State contends the defendant should have been sentenced on the intentional murder count. Further, the State argues that the trial court improperly imposed concurrent sentences for first degree murder and armed robbery but the law mandates consecutive sentences.

BACKGROUND

At the defendant's trial, Chicago police detective Delroy Taylor testified that he and his partner were in the area of State Street and the Dan Ryan Expressway in Chicago at approximately 7:00 p.m. on March 17, 2005. Taylor observed a white two-door car in an alley with the engine running and the lights turned off. Taylor saw two men, whom he later identified as the defendant and Dorwin Davis, exit the car and walk northbound through the alley and past him. Taylor lost sight of the men and then heard a gunshot from the direction of 94th Street. Taylor saw Davis and the defendant, who was carrying a Nike shoe box in his hand, running southbound in the same alley. The two men entered the white car that was parked in the alley and the car drove away northbound at a high rate of speed. Taylor provided a description of the car over the police radio.

Chicago police officer James Nichols and his partner were patrolling in the area and responded to the message regarding the fleeing car. They stopped the car that was driven by Latrice Burns. Davis was in the front passenger seat and the defendant was in the back seat. Nichols searched the car and a .45 caliber handgun and a Nike shoe box containing a pair of gym shoes were retrieved from the car. The defendant, Burns and Davis were transported separately to the police station for questioning. A test for gunshot residue was positive for Davis and negative for the defendant. The victim died from a single gunshot wound.

Chicago police detective Danny Stover and another detective interviewed the defendant at 12:30 a.m. on March 18. During the interview, the defendant stated that Davis visited him on March 17. Davis told the defendant that he needed money and wanted to commit a robbery. The defendant knew that the victim, Lionell Reed, sold shoes from his car and would be an easy target. Davis

showed the defendant his .45 caliber handgun and the defendant examined it. There was only a single bullet in the gun and no magazine. The two men decided that they would call the victim to set up a place and time to purchase shoes from him. Burns and Davis arrived at the defendant's home later in the day in Burns' car. The defendant talked with Davis about the details of the robbery. The plan was that Davis would meet with the victim and telephone the defendant asking that he bring \$10 to complete the purchase of the shoes. The defendant would then create a diversion and Davis would point the gun at the victim.

The defendant told the officers that he and Burns waited in the car in the alley while Davis went to meet the victim. They received a telephone call from Davis telling the defendant to bring \$10. The defendant approached Davis, handed him the money, turned around and walked away. The defendant looked back to see Davis in the passenger seat of the victim's car. Davis was pointing the gun at the victim, who was sitting in the driver's seat. The defendant saw the victim grab for the gun and a shot was fired. The victim's car started moving and hit a series of cars before crashing. After Davis and the defendant re-entered Burns' car, Davis handed the gun to the defendant and told him to put it in the trunk through the arm rest in the back seat.

Assistant state's attorney Jennifer Bagby testified that she videotaped an interview with the defendant at 11:50 a.m. on March 18. The videotaped interview was shown at trial and the jury was given written transcripts of it. During the interview, the defendant stated that Davis had visited him in the early afternoon on March 17. Davis said he needed some cash quickly and that he wanted to rob the victim, known as the shoe man. Davis showed the defendant his .45 caliber handgun. The defendant pulled the trigger back to confirm that there was a bullet in the chamber. The defendant

was asked by Davis to telephone the victim but declined, so Davis telephoned him. Davis returned to the defendant's house at approximately 6:00 p.m. that evening in Burns' car. The defendant entered the back seat and could see that Davis had the same gun on his lap that the defendant had seen earlier.

The defendant said in his videotaped statement that he told Davis that because Davis needed the money and he did not, Davis should make the robbery plans. Davis telephoned the victim several times from Burns' car. The plan was that the defendant would create a diversion while Davis was talking with the victim. The defendant would get into the back seat of the victim's car and while Davis pointed the gun at the victim, the defendant was to "take [the victim's] car, go through his pockets and that's about it. Yeah, that's it. While [Davis] held the gun to him."

The defendant further stated that when they arrived at the location to meet the victim, the defendant and Burns stayed in the car. Burns asked the defendant what his purpose was if he was not getting out of the car. Burns asked the defendant whether he was supposed to help Davis, and the defendant answered negatively. Burns suggested that the defendant run up to the victim and rob him and the defendant answered, "[N]o, I'm not going at like that. I'm not going that route."

When the defendant received a telephone call from Davis asking for \$10, according to the plan, the defendant took this request to mean that he was to create a diversion. The defendant would physically get into the victim's car and rob him. The plan was to get the victim out of the car and then the defendant would drive the victim's car away. The defendant stated he looked at the victim face to face and the victim smiled at him. The defendant and the victim had a quick conversation. The defendant stated he gave \$10 to Davis and then walked away. The defendant turned around and

saw Davis in the passenger side of the victim's car with his leg halfway out of the car. The defendant saw "a little tussling in the car. I see [Davis] trying to get out. And as he get out, he's pulling and then he fires the gun." Davis started running toward the defendant with the gun in his right hand and the shoe box in his left hand. The defendant started running and they entered Burns' car in the alley. The defendant grabbed the shoe box and sat in the back seat of the car. Davis threw the gun at him and told him to put it into the trunk through the arm rest and the defendant did so.

The defendant was indicted by a grand jury on the following counts which alleged: that he intentionally or knowingly killed the victim while armed with a firearm (720 ILCS 5/9-1(a)(1) (West 2004)) (count 1); that he intentionally or knowingly killed the victim while armed with a firearm during the course of an underlying felony, armed robbery (720 ILCS 5/9-1(a)(1) (West 2004)) (count 2); that he killed the victim while armed with a firearm knowing that such act created a strong probability that death or great bodily harm would result (720 ILCS 5/9-1(a)(2) (West 2004)) (count 3); that he killed the victim while armed with a firearm, knowing that such act created a strong probability of death or great bodily harm to the victim, and an extended sentence should be imposed because the victim was killed during the course of the underlying felony of armed robbery (720 ILCS 5/9-1(a)(2) (West 2004)) (count 4); that the victim was killed with a firearm during the commission of a forcible felony, armed robbery (720 ILCS 5/9-1(a)(3) (West 2004)) (count 5); that he killed the victim while armed with a firearm during the commission of a forcible felony, vehicular invasion (720 ILCS 5/9-1(a)(3) (West 2004)) (count 6); and that he took shoes from the victim by the use of force or by threatening the imminent use of force while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2004)) (count 7). The defendant was also indicted on two counts of vehicular invasion.

The State proceeded against the defendant on an accountability theory for first degree murder and armed robbery. The jury convicted the defendant of first degree murder and armed robbery. They found that the allegation was proven that he, or one for whose conduct the defendant was legally responsible, was armed with a firearm during the commission of the murder.

The defendant filed a motion for a new trial, which the trial court denied. At the defendant's sentencing hearing, the trial court stated that counts 1 and 3 would merge. The trial court sentenced the defendant to 25 years' imprisonment for murder, with an additional 15 years because his accomplice had a firearm. The trial court stated that it wanted to make it clear on the sentencing order that the defendant was being sentenced on count 5, the felony murder count. The defendant was sentenced to a concurrent term of 20 years' imprisonment for the offense of armed robbery. The defendant filed a motion to reconsider his sentence, which was denied by the trial court. The defendant filed a timely appeal from his convictions and sentences.

ANALYSIS

The first issue that the defendant raises is that he was denied effective assistance of counsel because of three errors committed by his defense counsel. In order to prove that his conviction must be reversed because of ineffective assistance of counsel, a defendant must satisfy the two-pronged test as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The first prong requires that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 684, 104 S. Ct. at 2064. The second prong requires that the defendant show that this deficient performance by defense counsel prejudiced him. *Id.* "The 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.” *Id.* at 694, 104 S. Ct. at 2068. A reviewing court will defer to the trier of fact’s findings of fact unless they are against the weight of the evidence, but will make a *de novo* assessment of the legal question of whether the defendant’s claim of ineffective assistance of counsel is supported. *People v. Nowicki*, 385 Ill. App. 3d 53, 81, 894 N.E.2d 896, 924 (2008).

The defendant argues that his defense counsel was ineffective for not requesting the jury instruction dealing with withdrawing from the commission of an offense. That instruction reads:

“A person is not legally responsible for the conduct of another, if, before the commission of the offense charged, he terminates his effort to promote or facilitate the commission of the offense charged and *[(wholly deprives his prior efforts of effectiveness in the commission of that offense) (gives timely warning to the proper law enforcement authorities) (makes proper effort to prevent the commission of that offense)]*.” Illinois Pattern Jury Instructions, Criminal, No. 5.04 (4th ed. 2000).

The defendant claims that there was sufficient evidence presented at trial to support giving this instruction, and his counsel was ineffective for not requesting it. The defendant notes that he is only required to show some evidence, even slight evidence, that he had communicated his desire to abandon the robbery plan in order to justify the jury instruction. See *People v. Johns*, 387 Ill. App. 3d 8, 13-14, 898 N.E.2d 1142, 1147 (2008).

In his videotaped statement to the police, the defendant stated that he did not telephone the victim as requested by Davis and that he communicated to Burns that he would not rob the victim while Davis was buying shoes. Davis had asked the defendant to create a diversion, then get into the victim's car and go through the victim's pockets while Davis held a gun to the victim's head. Part of Davis's proposed plan was that the defendant would drive away in the victim's car after Davis shoved the victim out of the car. Instead, the defendant claims, he showed that he had abandoned the robbery plan when all he did was hand Davis \$10 for the shoes and then he walked away. The defendant argues that Davis had recently suffered a gunshot wound to his left shoulder and needed his assistance in order commit the robbery. The defendant further argues that through his actions, he showed that he made a proper effort to prevent the commission of the crime.

The defendant relies on the supreme court case of *People v. Pegram*, 124 Ill. 2d 166, 529 N.E.2d 506 (1988) for support. In that case, the defendant testified that he was forced to take part in a robbery, but his defense counsel did not tender a jury instruction on the defense of compulsion. The Illinois supreme court reversed the defendant's conviction and held that "the failure of the defendant's attorney to tender an instruction on the defense of compulsion and on the prosecution's burden of proof for that defense must be regarded as constituting ineffective assistance of counsel. This critical omission so prejudiced the defense as to deny the right of the accused to a fair trial." *Id.* at 174, 529 N.E.2d at 509. The defendant argues that the *Pegram* case contains a relevant example of ineffective assistance of counsel when a defense instruction was supported by the evidence but not given by the trial court and the omission "removed from the jury's consideration a disputed issue essential to the determination of defendant's guilt or innocence." *Id.* (quoting

People v. Ogunsola, 87 Ill. 2d 216, 223, 429 N.E.2d 861, 865 (1981)). The defendant argues that his defense counsel's failure to request a withdrawal instruction resulted in a fundamentally unfair trial and there is a reasonable probability that the outcome of his case would have been different.

The State counters that the defendant had to present sufficient evidence of his withdrawal from the offense that would raise a question of fact for the jury resulting in a reasonable doubt as to the defendant's guilt. *Johns*, 387 Ill. App. 3d at 14, 898 N.E.2d at 1147. Under the Criminal Code of 1961, a defendant is not accountable for the conduct of another if:

“(3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.” 720 ILCS 5/5-2(c)(3) (West 2004).

The State points to the facts which demonstrate that the defendant fully participated in the crimes and did not withdraw. The defendant entered the car and saw that Davis had the gun that the defendant knew contained a bullet and the defendant still created a diversion so that Davis could rob the victim. The defendant left Burns' car and handed Davis the \$10 as planned. The defendant ran with Davis after the shooting and hid the gun and shoe box in the trunk of Burns' car as they drove away from the scene. The State claims that these actions by the defendant demonstrate that the defendant did not satisfy any of the statutory elements for withdrawal from the commission of the crime. The State concludes that even if the defendant deviated from an initial plan that he and Davis

had developed, the defendant's actions did not show that he withdrew his participation in the robbery. We agree. At most, the defendant's actions show a modification of the original plan, not a withdrawal from participation in the crime.

Our review of the record confirms the conclusion that the evidence did not justify a jury instruction regarding the defense of withdrawal. Therefore, defense counsel was not ineffective for failing to request the instruction and the first prong of *Strickland* is not satisfied

The defendant also claims that his defense counsel provided him ineffective representation because he failed to request separate verdict forms for differing murder counts. He argues that if there had been a separate jury form for felony murder, he may have been convicted of that specific offense. The underlying felony of armed robbery is a lesser included offense of felony murder, which precludes separate sentences for murder and armed robbery. The defendant further claims that it is likely he received a higher sentence because his counsel did not request separate jury verdict forms.

The defendant was sentenced to 25 years' imprisonment for first degree murder, to be served consecutively with an additional 15 years' imprisonment for use of a firearm during the crime. The defendant was also sentenced to a concurrent term of 20 years' imprisonment for armed robbery. The trial court's comments at the time of sentencing made it clear that the defendant was sentenced on the felony murder conviction.

Subsequent to the defendant's trial, the Illinois Supreme Court decided the case of *People v. Smith*, 233 Ill. 2d 1, 906 N.E.2d 529 (2009). In the *Smith* case, the supreme court held that the trial court's denial of the defendant's request to submit separate verdict forms for intentional,

knowing and felony murder can only be harmless error if the jury's finding may be ascertained from the general verdicts entered. *Id.* at 25, 906 N.E.2d at 543. The supreme court held that under the circumstances of that case, it could not be said that the jury found the defendants guilty on each of the theories of murder and it was error for the trial court to presume that the defendants were found guilty of intentional murder. *Id.* at 27-28, 906 N.E.2d at 544. The supreme court later explained that its holding in the *Smith* case was based on the fact that defense counsel had requested separate verdict forms and the trial court had denied that request. *People v. Davis*, 233 Ill. 2d 244, 273, 909 N.E.2d 766, 781-82 (2009). The supreme court noted that the *Smith* case did not establish a rule that a trial court must *sua sponte* tender separate verdict forms. *Id.*

The State highlights, and the defendant acknowledges, that the appellate court rejected an ineffective assistance of counsel argument similar to the defendant's in *People v. Braboy*, 393 Ill. App. 3d 100, 911 N.E.2d 1189 (2009). In that case, the appellate court ruled that the defendant had not shown that his counsel was ineffective because counsel failed to request separate verdict forms for various degrees of first degree murder. "Specifically, defendant has failed to overcome the presumption that counsel's decision not to request specific verdict forms was trial strategy." *Id.* at 108, 911 N.E.2d at 1197. We find the *Braboy* case instructive in concluding that in the case at bar, counsel's decision to proceed with a general verdict form was reasonable since the law did not and does not mandate separate verdict forms. *Id.* See also *People v. Calhoun*, 404 Ill. App. 3d 362, 383-84, 935 N.E.2d 663, 682 (2010).

In light of our conclusion that defense counsel was not ineffective regarding this issue, it follows that the first prong of the *Strickland* test is not satisfied as to this issue.

The third error raised by the defendant is that his defense counsel failed to review the defendant's telephone records submitted by the prosecutor and then stipulated to them at trial. The defendant refused to sign the stipulation at trial. The stipulation stated that a representative from the telephone company would testify that the records were kept in the ordinary course of business and that the records correspond to the telephone identified at trial as the one used by the defendant.

The defendant claims that when discovery was declared complete, there were no telephone records that indicated that a call was placed to the victim from the defendant's cell telephone on the day of the shooting. The State counters, however, that defense counsel did have records from the victim's telephone which showed that the victim received a call from the defendant's telephone at 2:12 p.m. on the day of the shooting.

According to the State, while the prosecutor was preparing for trial, he realized that the defendant's cell telephone records from the pertinent date were missing. The prosecutor then subpoenaed the records from the telephone company. The prosecutor obtained the records and emailed them with the proposed stipulation to defense counsel on Friday before the trial began on the following Monday. The prosecutor tendered hard copies of the records to defense counsel at the beginning of trial. The records showed that a call was placed from the defendant's telephone to the victim's telephone at 2:12 p.m. on the day of the shooting.

The defendant claims that his counsel was ineffective for not requesting a continuance to review the records before stipulating to them. Further, the defendant argues that his defense counsel should have objected to the admission into evidence of the telephone records. The defendant notes that his counsel's actions may have been the result of the prosecutor's false representation that the

records did not contain new evidence.

The defendant points out that during closing argument, the prosecutor emphasized the fact that the defendant handed Davis his telephone in order to set up the meeting with the victim, thereby proving the defendant's involvement in the crime. The defendant argues that since his trial strategy was to prove that he repeatedly refused to participate in the robbery, defense counsel's consent to the admission of the telephone records "resulted in the elimination of a fundamental question with respect to the State's burden to prove that [the defendant] helped Davis plan the robbery."

We note that the defendant's telephone records were redundant evidence because the victim's telephone records showed that the victim received a call from the defendant's cell telephone. Those records were admitted into evidence without challenge by the defendant. The prosecutor did not argue during trial that the defendant himself made the call to the victim. In his statement to police, the defendant denied that he made the call to the victim, but rather stated that Davis made the call. The jury could have reasonably inferred from the evidence that the defendant allowed, or at least was aware, that Davis had used his cell telephone to call the victim.

We conclude that defense counsel was not ineffective for agreeing to the stipulation regarding the telephone records. Thus, the first prong of the *Strickland* test is not met. We note in passing that the State had the option of calling a telephone company employee as a witness to lay the foundation for the records thereby making them admissible. Thus the defendant's argument is a nullity.

The next three issues raised by the defendant relate to prosecutorial misconduct, which the defendant claims prevented him from receiving a fair trial. The defendant notes that he is entitled to a fair, orderly and impartial jury (U.S. Const., amend XIV; Ill. Const. 1970, art. 1, §2) and the

prosecutor has a duty to safeguard his rights to ensure that he was afforded a fair trial. *People v. Sales*, 151 Ill. App. 3d 226, 233, 502 N.E.2d 1221, 1226 (1986). The defendant argues that just one error on the part of the prosecution that endangers the integrity of our judicial process is enough to justify reversal. *People v. Young*, 347 Ill. App. 3d 909, 926, 807 N.E.2d 1125, 1139-40 (2004).

The instances of prosecutorial misconduct that the defendant raises include statements in the State's closing argument, specifically:

“The law recognizes, ladies and gentlemen, that what one coward will think about, two cowards will plan. And you add Latrice Burns into [the] mix and three cowards are going to do it.

That ladies and gentlemen of the jury is called the law of accountability. And you can also refer to it if you like as the law of cowards.”

Defense counsel objected to this comment and the objection was sustained. The prosecutor then outlined the definition of accountability as described in the jury instruction.

The prosecutor further stated during rebuttal argument that:

“See, [the victim] didn't know at the moment he was smiling at the Defendant over here that he was looking into the face of evil. So despite what Counsel said in opening statements, when you do nothing in the face of evil, you do wrong. Ladies and gentlemen, [the victim] looked into the face of evil that night, and there is that face.”

The defendant claims that this highly improper characterization by the prosecutor was meant to

assassinate his character by calling him “evil” and a “coward.” The defendant notes that a prosecutor may dwell on the evil of a crime, but must refrain from making inflammatory appeals to the fears and passions of the jury. *People v. Gutierrez*, 205 Ill. App. 3d 231, 263, 564 N.E.2d 850, 871 (1990). The defendant reminds this court that the Illinois Supreme Court has commented that the increasing prosecutorial misconduct it has observed cannot continue unchecked because it represents “an attempt to subvert a defendant’s fundamental right to a fair trial.” *People v. Johnson*, 208 Ill. 2d 53, 88, 803 N.E.2d 405, 425 (2003).

The State notes that the standard of review for this issue is abuse of discretion. *People v. Meeks*, 382 Ill. App. 3d 81, 84, 887 N.E.2d 870, 873 (2008). A “[d]efendant faces a substantial burden to achieve reversal of his conviction based upon improper remarks during closing argument.” *Id.* The arguments of both the prosecutor and the defendant must be placed in their proper context and reviewed in their entirety. *Id.* at 84, 887 N.E.2d at 874. In order to justify a reversal of a defendant’s conviction, the comments of the prosecutor must have been such that they would have affected the verdict, otherwise, the remarks are harmless errors. *People v. Ward*, 154 Ill. 2d 272, 319, 609 N.E.2d 252, 272 (1992).

In this case, the defendant did not object to the “evil” comment at trial. Defense counsel did object to the prosecutor’s remark during closing argument regarding the law of accountability being the “law of cowards” and the objection was sustained by the trial court. We note that the jury was given an instruction to disregard any testimony which the trial court struck or any testimony to which objections were sustained. The defendant’s posttrial motion only generally referenced “numerous instances of prosecutorial misconduct throughout this trial.” A defendant must include specific

instances of prosecutorial misconduct in his posttrial motion so that the trial court can be apprised of the issues with specificity in order to rule on the motion. Therefore, the defendant has forfeited these issues and they must be reviewed under the plain error doctrine. The plain error doctrine allows for review of unpreserved issues when: (1) the evidence is closely balanced and the defendant was prejudiced so that the scales of justice were tipped against him, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of how closely the evidence is balanced. *People v. Nicholas*, 218 Ill. 2d 104, 120-21, 842 N.E.2d 674, 684 (2005).

The State notes that the prosecutor's remarks were in response to the comments made by defense counsel during his opening statement:

“And, ladies and gentlemen, there is an expression that when you do nothing in the face of evil, you do wrong. And I agree with that, and that's why I'm telling you [the defendant] was wrong not to do anything to stop [Davis].”

Defense counsel went on to argue that the prosecutor was not going to ask the jury to find the defendant guilty of being wrong, but guilty of first degree murder “when he didn't kill anyone.” The State argues that because defense counsel characterized Davis as evil, that it was proper for the prosecutor to likewise describe the defendant as evil.

The defendant relies on the case of *People v. Smothers*, 55 Ill. 2d 172, 302 N.E.2d 324 (1973) for support of his argument that the prosecutorial comments in this case crossed the line. In that case, the prosecutor repeatedly referred to the defendant as a sociopath who hated people and society

and defense counsel did not object to the comments. The supreme court held, however, that the comments did not require a reversal of the defendant's conviction. The court stated, "we are unable to say that the improper remarks were so prejudicial that defendant did not receive a fair trial or were so flagrant as to threaten deterioration of the judicial process." *Id.* at 176, 302 N.E.2d at 326.

Likewise, in this case, we conclude that in the context of the entire argument, the prosecutorial comments do not amount to plain error. Further, the evidence was not closely balanced and we see no prejudice to the defendant from the comments. Accordingly, the defendant is not entitled to a reversal of his conviction on this basis.

The defendant next argues that the State accused defense counsel of urging the jury to disregard the law and ridiculed defense counsel for his "absurd" trial strategy. During closing argument the prosecutor said that when defense counsel jumps and shouts and repeats himself, that is not evidence and "[w]hat counsel's asking you to do is disregard the evidence and the law." Defense counsel's objection to the prosecutor's comment was sustained.

During his closing argument, defense counsel highlighted the fact that the State's forensic expert had been paid \$1,000 to testify. The prosecutor commented in rebuttal, "So [the defendant] didn't do what he did because [the expert witness] made a thousand dollars?" The prosecutor also commented that the defense attempted to get the witness to agree that the victim was shot from outside of the car. The prosecutor said of this theory, "Absurdity? You bet." Defense counsel objected and stated that the witness had admitted that the theory was a possibility. The trial court overruled the objection, stating: "[t]he jury's heard the evidence." The prosecutor continued with the use of the word "absurd" regarding the defense theory that the victim may have been shot from

outside of his car. The State argues that these comments were invited by defense counsel and were proper.

The defendant also complains about the prosecutor's response to defense counsel's attack on one of the State's witnesses during closing argument. Officer Taylor's report stated that the identified subject who was stopped by the second set of officers was the same subject seen fleeing from the alley. Taylor testified that the report should have said "subjects" instead of "subject." The prosecutor said in rebuttal, "[the defendant] is not guilty because there is not an S? ***. And prior to that [Taylor] says that he identified the two [men] that he saw in the alley. So there is no S. Who cares?" The defendant claims that these remarks ridiculed the defense and "improperly suggested to the jury that defense counsel was trying to free his client through trickery and deception with a fabricated defense." See *People v. Clark*, 114 Ill. App. 3d 252, 255, 448 N.E.2d 926, 928 (1983) (where court held that repeated verbal attacks on the defense counsel violated the defendant's right to a fair trial). We note that police reports may be used to refresh the memory of a witness and are not generally admissible into evidence.

We do not agree with the defendant's interpretation of the prosecutor's comments. The comments, even if improper, were not such that they would have affected the jury's verdict and therefore require a reversal of the defendant's convictions.

The next issue the defendant raises is whether the State purposely withheld evidence from defense counsel in violation of Supreme Court Rule 412 that requires the disclosure to defense counsel of "any written or recorded statements." Ill. S. Ct. R. 412(a)(ii) (eff. Mar. 1, 2001). The defendant did not object at trial, nor include this issue in his posttrial motion. The defendant alleged

in his posttrial motion that because the stipulation with the prosecutor was not personally signed by him, it was error for the jury to receive copies of the telephone records that are the subject of this issue. This issue was not properly included in the defendant's posttrial motion and is now being presented pursuant to Rule 412. We analyze the issue under the plain error doctrine.

The defendant argues that the prosecutor failed to meet his obligation to act with due diligence. The defendant argues that the prosecutor knew that the telephone records were incomplete, yet he did not advise defense counsel that new records would be forthcoming. The defendant claims that the prosecutor misinformed defense counsel and stated that no new information was contained in the records in order to get defense counsel to stipulate to them.

The defendant does not dispute that the victim's telephone records had been in the possession of defense counsel for a long period of time before trial. Those records show that the victim received a call from the defendant's telephone at 2:12 p.m. on the day of the shooting. At trial, defense counsel agreed to the stipulations for the records of the telephones used by Latrice Burns, the victim and the defendant. The prosecutor asked that the jury be allowed to see the records and defense counsel objected, saying that the State told him that his *client's telephone* never called the victim on the day in question. The prosecutor replied that defense counsel had asked whether his *client* had made a call. The prosecutor answered negatively because the State's theory was that Davis used the defendant's cell telephone to call the victim. The trial court allowed the jury to see the telephone records since there had been a stipulation by the parties in front of the jury. We note that there is no duty on the part of the prosecutor to answer an inquiry from defense counsel regarding the presence or absence of incriminating evidence contained in telephone records to which

both parties had access. Further, the State's explanation of why the records were provided to defense counsel immediately before trial was not refuted by any evidence provided by the defense.

Our review of the record leads us to conclude that the State did not purposely withhold evidence from defense counsel in violation of Supreme Court Rule 412. Nor does the record support the argument that the prosecutor purposely misled defense counsel. The defendant's argument on this issue is meritless.

The State contends on appeal that the defendant's case must be remanded to the trial court for resentencing because the trial court improperly imposed concurrent sentences for first degree murder and armed robbery when consecutive sentences are mandated by Illinois law. The State argues that Illinois law provides that whenever a defendant commits multiple offenses, including first degree murder, consecutive sentences must be imposed. 730 ILCS 5/5-8-4(a)(i) (West 2004). The imposition of consecutive sentences is mandatory and failure to impose them renders the defendant's sentence void. *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995). An appellate court has the authority to correct a void sentence at any time. *Id.*

The State notes that "[i]t is well settled that when an indictment alleges three forms for a single murder - intentional, knowing and felony murder - and a general verdict is returned, the net effect is that the defendant is guilty as charged on each count and there is a presumption that the jury found that the defendant committed the most serious of the crimes alleged, which is intentional murder." *People v. Davis*, 233 Ill. 2d 244, 263, 909 N.E.2d 766, 776 (2009). The State urges this court to remand the case to the trial court for judgment on the most serious intentional first degree murder count with the armed robbery sentence to be served consecutively.

The defendant counters that the trial court correctly sentenced him on the felony murder count. The defendant acknowledges the principle cited by the State that a general verdict on first degree murder counts charging three different theories presumes a conviction on the most serious charge. He argues that there must be evidence to support that conclusion. See *People v. Ruiz*, 342 Ill. App. 3d 750, 757, 795 N.E.2d 912, 919 (2003) (where the court weighed the evidence to see if the sentence on one of three counts of murder was justified). The defendant notes that a trial court has the authority to enter judgment on the lesser form of murder. *Id.* (where the court stated that “it may well be that a reviewing court can and possibly should ‘disregard the presumption’ raised by a general verdict ***.”) The defendant contends that his sentence is void on the ground that armed robbery is the lesser included offense in the felony murder count and thus his sentence for armed robbery must be vacated. *People v. Reed*, 405 Ill. App. 3d 279, 286, 938 N.E.2d 199, 205 (2010).

Current Illinois case law compels us to vacate the defendant’s sentence for felony murder. We must presume that the jury’s determination of conviction as reflected on the general verdict form found the defendant guilty on all three counts of first degree murder, that is; intentional, knowing and felony murder. *Davis*, 233 Ill. 2d at 263, 909 N.E.2d at 776. There is a long standing rule in Illinois, the one-good-count rule, which provides that “a general verdict of guilty on a multiple-count indictment is interpreted to be a finding of guilt on each count.” *People v. Moore*, 397 Ill. App. 3d 555, 564, 922 N.E.2d 435, 443 (2009). Pursuant to this rule, the defendant in this case must be sentenced on the most serious of the offenses for which he was convicted, specifically, intentional murder. *Id.*; *Calhoun*, 404 Ill. App. 3d at 382-83, 935 N.E.2d at 681 (2010). Although the defendant urges us to agree with the trial court that the defendant should be sentenced on the felony murder

1-09-0891

count, established law requires otherwise.

For the reasons stated, we affirm the defendant's convictions but vacate the defendant's sentences. We remand the case to the trial court with directions to sentence the defendant on the intentional first degree murder count, with imposition of a consecutive sentence for the armed robbery conviction.

Affirmed in part, vacated in part, remanded to the trial court with directions.