FOURTH DIVISION
JUNE 28, 2013

1-09-2909

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. 07CR7355
	)	
PEDRO FUENTES,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

HELD: Defendant's conviction for first-degree murder affirmed where the evidence was sufficient to sustain his conviction and the trial court did not err in instructing the jury to continue deliberating when it returned an incomplete verdict.

¶ 1 Following a jury trial, defendant Pedro Fuentes was convicted of first-degree murder and home invasion and sentenced to 50 years' and 6 years' imprisonment, respectively, the sentences to be served consecutively. On appeal, defendant contends: (1) the evidence does not support a

finding of guilty of first-degree murder and his conviction should be reduced to second-degree murder; (2) the court erred in ordering the jury to continue deliberating when it returned with a partial verdict, solely finding him guilty of home invasion and felony murder; and (3) the trial court erred in refusing to send an exhibit back to the jury room during deliberations. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 2 I. BACKGROUND

¶ 3 On March 9, 2007, defendant went to his ex-girlfriend's apartment and shot her new boyfriend, Edgar Salvador Cisneros, three times. Cisneros died from injuries. Defendant was subsequently arrested and charged with multiple offenses in connection with the incident, including: intentional murder (720 ILCS 5/9-1(a)(1) (West 2006)), home invasion (720 ILCS 5/12-11(a)(3) (2006)), and felony murder (720 ILCS 5/9-1(a)(3) (West 2006)). Defendant elected to proceed by way of a jury trial.

¶ 4 At trial, Anabella Rojas, defendant's ex-girlfriend, testified that she had been in a relationship with defendant for several years and was the mother of his son, Angel. During their relationship, she and defendant lived together in an apartment located on the south side of Chicago. After they ended their relationship in 2006, Anabella moved into her own apartment with their son. Her new residence was located at 5202 South Winchester. Although Anabella remained in contact with defendant after their break up, she did not tell defendant where she was living. She did, however, continue driving one of defendant's cars, a beige Grand Marquis, and defendant continued paying her cell phone bill.

¶ 5 After their breakup, Anabella began a relationship with Edgar Cisneros. She testified that

she knew Edgar at the time that she was still in a relationship with defendant, but that she did not begin a romantic relationship with Edgar until she ended her relationship with defendant.

¶ 6 On the 5th or 6th of March 2007, defendant called Anabella and asked to borrow her car. She agreed to let defendant use the car and drove over to defendant's apartment. Defendant then drove Anabella to work, and agreed to pick her up that evening and drop her off at her mother's house. When she lent defendant her car that day, she also provided him with her key ring which contained a key to the car as well as keys to her South Winchester apartment.

¶ 7 Defendant borrowed her car again on March 9, 2007. After she arrived at defendant's apartment, he drove her to work and agreed to drop off the vehicle at Anabella's mother's house later that afternoon. After Anabella finished working sometime around 4 or 5 p.m., she went to her mother's house to get her car, but defendant had not returned with the vehicle. Anabella tried calling defendant several times, but his phone was turned off. After waiting several hours, Anabella returned to her South Winchester apartment around 9 or 10 p.m. without her car because she had plans with Edgar that evening. Edgar arrived at her apartment around 10:30 p.m., and they began watching television. Later that evening, Edgar looked out of her apartment window and told her that her car was parked in front of her apartment building. Anabella told Edgar that he had to be mistaken because she never provided defendant with her new address. Shortly thereafter, Anabella heard footsteps on the stairs of her apartment building and then two or three knocks on her door. Before she could get to the door, defendant let himself into her apartment. Edgar was in the kitchen approximately 15 feet away from the front door when defendant entered her apartment. He threw a bottle at defendant, but it missed him.

¶ 8 Defendant then asked Anabella if Edgar was the guy that she was "cheating on [him] with" and walked over to Edgar. The two men started "tussling" and throwing punches. As they fought, they moved from the kitchen into the bedroom where Angel was sleeping. Anabella followed them and suddenly heard two gunshots. Edgar dropped to the ground and Anabella saw defendant holding a gun. Defendant then looked at her, told her "not to tell nobody" and ran out of her apartment. Anabella called 911 and the police arrived shortly thereafter. Anabella testified that she had never seen the gun before that night. She did not keep a weapon in her house and she never saw Edgar pull out a gun.

¶ 9 On cross-examination, Anabella acknowledged that defendant did not make any threatening gestures toward Edgar when he first entered her apartment. The fight started after Edgar threw the bottle at defendant and lasted for about 10 to 15 minutes. Prior to that evening, Anabella had never seen defendant with a gun, but she had no doubts that defendant brought the gun to her apartment the night of the shooting. Anabella also acknowledged that she has visited defendant in jail and written him letters following the incident. In one of the letters, Anabella admitted that Edgar did own a gun and that she was intimidated by the police and told them facts about the shooting that were not true. When she was asked about the letter, Anabella indicated that she did not write those particular passages contained in the letter.

¶ 10 Doctor Tera Jones, a Cook County assistant medical examiner, performed an autopsy on Edgar Cisneros on March 11, 2007. Doctor Jones observed multiple signs of injury on Cisneros' body including gunshots to his head, back, and right forearm. There were signs of soot and stippling around the entry wounds, indicating that the shots had been fired from a close distance.

In addition, Doctor Jones observed signs of bruising on Cisneros' lower lip and an abrasion near his eyebrow. She recovered the three bullets from Cisneros' body. In her report, Doctor Jones concluded that Cisneros died from multiple gunshot wounds and ruled his death a homicide.

¶ 11 Chicago police officer Ivan Lopez and his partner, Robert Bell, were on patrol in the early morning hours of March 10, 2007. At approximately 1:30 a.m., Officer Lopez observed a vehicle traveling southbound on Kedzie Avenue at "a high rate of speed." The vehicle was a beige colored four-door sedan. He and his partner followed the vehicle and observed the driver make a left-hand turn onto 58th Street without using a turn signal and pull into an alley. Once the vehicle stopped, Officers Lopez and Bell approached the vehicle. At that time, defendant started getting out of the vehicle, but stopped when he saw the officers walking in his direction. Officer Lopez observed defendant make movements in the vehicle, and as he walked closer, it appeared that defendant was holding a handgun and was attempting to hide it under the drivers' seat. The officers ordered defendant out of the car. Officer Lopez detained defendant and his partner recovered a .22 caliber pistol underneath the driver's seat of the car. The gun was loaded and contained four live rounds. At the time that Officer Lopez detained defendant, he was unaware that defendant was the suspect in a shooting. The gun was inventoried once defendant was transported to the 8th District police station.

¶ 12 Mark Harvey, a forensic investigator with the Chicago police department, testified that on March 10, 2007, at approximately 1:20 a.m., he and his partner, Joseph Bebynista, were assigned to process the crime scene at Anabella's apartment. When they arrived at the scene, they observed some broken glass in the hallway and near the front door of the apartment. Blood was

found in the bedroom along with two Remington .22 caliber cartridge cases that had been fired from an automatic weapon. Because Officer Harvey had been told that the victim had been shot three times, he looked for a third cartridge case but was unable to find one. After processing the crime scene, Officer Harvey and his partner returned to the 8th District police station. Defendant had already been taken into custody. Officer Harvey met with defendant and performed a gunshot residue test on his hands. The evidence collected from defendant's hands as well as the evidence collected from the crime scene were inventoried in accordance with police protocol.

¶ 13 Scott Rochowicz, a forensic scientist employed by the Illinois State Police, received the gunshot residue test kit that had been administered to defendant. Rochowicz testified that he tested the kit and found the results to be inconclusive. Based on the inconclusive results, Rochowicz testified that defendant "may not have discharged the firearm." Rochowicz, however, explained that it is "pretty easy" for someone to remove gunshot residue from his hands, and indicated that the lack of gunshot residue on a person's hands does not mean that he or she did not fire a weapon. Moreover, he indicated that Remmington ammunition does not leave residue that can be detected by standard gunshot residue tests because it does not contain the type of metals that the standard test is designed to detect.

¶ 14 Brian Mayland, a forensic scientist with the Illinois State Police, examined the cartridge cases recovered from Anabella's apartment, the bullets removed from Edgar's body and the .22 caliber Beretta recovered from defendant's car. Mayland concluded that the bullets and casings had been fired from the Beretta.

¶ 15 At the conclusion of the State's case, the defense moved for a directed finding, but the

motion was denied.

¶ 16 The defense then called Laura Garcia, an interpreter employed by the Cook County Public Defender's Office. She read and translated parts of a letter that had been written by Anabella to defendant during his imprisonment. The letter contained the following passages:

> "Another thing I forgot to tell you how the police–them dumb ass police treated me at the station. They yelled at me very ugly, and they told me that if I didn't say the truth, they were going to take Angel away, and, well, I was very afraid that they would take him–that they would take our son away, and I didn't know what to say.
>
> Well I had to make things up. Forgive me, Chahito, for what I did, but it was the best for me and for the kid, and I believe I told them more because they pressure[d] me a lot and they told me that I was gonna go to jail and that I was never going to see my kid and I wasn't going to get out of jail and I told them that you were the one.
>
> The truth and they looked at me real ugly and I couldn't say nothing, that it wasn't your fault. Nothing. I remembered too late that he had the gun, but Chahito take care."

¶ 17 On cross-examination, Garcia acknowledged that she had no opinion as to the origin of the letter and that she did not know whether the letter was written entirely by Anabella or whether portions of the letter were written by someone else.

¶ 18 Thereafter, the defense proceeded by way of stipulation. Pursuant to the stipulation, assistant State's Attorney Gene Wood would testify that he spoke to Anabella on March 10, 2007, and she provided a handwritten statement in which she indicated that she met Cisneros in the summer of 2006 and began dating him seriously in November 2006.

¶ 19 After the defense concluded its case, the parties took part in a jury instruction conference outside the presence of the jury. The trial court agreed to instruct the jury on two theories of second-degree murder: imperfect self-defense and provocation. The court, however, denied defense counsel's request to give the jury Anabella's letter to take back to the jury room during deliberations. The court expressed concern that the Spanish-speaking jurors would read and translate the entire letter to the non-Spanish speaking jurors and stated: "The jurors cannot interpret evidence that's in the case."

¶ 20 Upon hearing closing arguments and receiving the relevant instructions, the jury commenced deliberations. After approximately 58 minutes of deliberations, the court was informed that the jury had reached a verdict. The court reviewed the verdict forms and discovered that the jury had only signed verdict forms for home invasion and felony murder. The jury had not signed verdict forms pertaining to intentional first degree murder or the firearm enhancement. The court conferred with counsel for both parties outside the presence of the jury to determine the proper course of action:

> [COURT]: "The jurors have–I'll go through these again. These are the instructions that we gave the jurors. Unless I'm missing something. They have two verdict forms. We, the jury, find the defendant guilty of first degree murder, Type B. That's the felony murder. And guilty of home invasion. Shouldn't there be another verdict form for the Type A murder?"
>
> [STATE]: Yeah, it should be in there. If it's a not guilty.
>
> [COURT]: It could be guilty of Type A also.

[STATE]: There's guilty and not guilty of Type A. Absolutely.

[COURT]: Let me see if there's something in here. They don't have the verdict forms for the proving or not proving of the firearms.

[STATE]: Right.

[COURT]: We have to send them back regarding the other allegations, the Type A murder and the enhancement. Don't you agree [Defense counsel]? They didn't sign all verdict forms.

This is the non proven about the firearm enhancement. This is the firearm enhancement. And we have the not guilty of first degree murder Type A. And the guilty of first degree murder of Type A. They should sign those forms also?

[DEFENSE]: If you're going to send them back you have to send all the verdict forms back because the deliberations are incomplete.

[COURT]: I'll send all the verdict forms back.

[STATE]: I agree.

[COURT]: Including–Well I'm not going to send back on not guilty verdict forms for the one's they've already found guilty on.

[DEFENSE]: I think you should. The jury verdict form is incomplete. You can't take that out of their hand at this point in time. If you explain to them that they're incomplete.

[COURT]: All right, fine. I don't think you're right but I'll send them all back."

¶ 21 After this conversation concluded, the court addressed the jury and instructed the jurors as follows:

"Ladies and gentlemen, jurors, that is, we're going to send you back for a few minutes or as long as it might take, I should say. There are other verdict forms that you were supposed to sign, as well, in addition to the ones you did sign. Those being about the additional elements about personal discharge of a firearm. Two verdict forms as to that element. The not guilty and guilty forms for the first degree murder Type A [intentional murder]."

I'm going to send all the verdict forms back with you including the two you did sign for you to review the verdict forms, sign the ones you did not sign and review the ones you did if you choose to do so. Okay take them back."

¶ 22 In accordance with the court's instructions, the jury continued deliberating and returned with a verdict after signing the additional forms. The jury found defendant guilty of intentional murder, home invasion, and felony murder predicated on home invasion. The jury also found the firearm enhancement applicable given that defendant had personally discharged the firearm that proximately caused Edgar Cisneros' death. The jury members were subsequently polled and each juror confirmed that this was their verdict.

¶ 23 The trial court subsequently presided over defendant's sentencing hearing. After hearing the arguments advanced in aggravation and mitigation, the court sentenced defendant to 50 years' imprisonment for first-degree murder, which included the applicable 25-year firearm enhancement, and six years' imprisonment for home invasion, and ordered the sentences to be served consecutively. Defendant's post-trial and post-sentencing motions were denied. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 A. Sufficiency of the Evidence

¶ 26 On appeal, defendant first challenges the sufficiency of the evidence. He argues that the uncontroverted evidence demonstrated that Edgar Cisneros threw a bottle him and that the fight and shooting that ensued was the result of provocation. Accordingly, defendant asserts that the evidence merely proved that he "committed second-[]degree murder [rather than first-degree murder] when he shot Cisneros after serious provocation, in the midst of a mutual quarrel."

¶ 27 The State, in turn, responds that defendant was convicted of felony murder in addition to intentional murder, and argues that because the jury found that defendant "committed the murder for which he was convicted during the course of a home invasion, *** second[-] degree murder is no longer available to him." The State further argues that the evidence does not support a second-degree murder conviction; rather, the evidence showed, and the jury found, that defendant "acte[d] by design" when he appeared at Anabella's house with a gun to confront the man she was "cheating" on him with and that he "was the aggressor" in the physical altercation that ensued.

¶ 28 Due process requires proof beyond a reasonable doubt to convict a defendant of a criminal offense. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses,

drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 29 Second-degree murder is a lesser mitigated offense of first-degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995); *People v. Toney*, 2011 IL App (1st) 090933, ¶ 47. A person commits second-degree murder when he commits first-degree murder while acting under a sudden and intense passion in response to serious provocation initiated by the victim. 725 ILCS 5/9-2(a)(1) (West 2006); *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 49. "Serious provocation" is defined as "conduct sufficient to excite an intense passion in a reasonable person." 725 ILCS 5/9-2(b) (West 2006). The supreme court has identified four categories of serious provocation: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the offender's spouse. *People v. Garcia*, 165 Ill. 2d 409, 429 (1995). Under the Criminal Code, it is the burden of the State to prove each element of first-degree murder beyond a reasonable doubt. 720 ILCS 5/9-2(c) (West 2006); *Jeffries*, 164 Ill. 2d at 114; *People v. Thompson*, 354 Ill. App. 3d 579, 586 (2004). The burden then shifts to defendant to prove, by the preponderance of the evidence, any of the aforementioned mitigating factors. 720 ILCS 5/9-2(c) (West 2006); *Thompson*, 354 Ill. App. 3d at 586. Although defendant suggests otherwise, the State is not required to prove the absence of the mitigating factor beyond

a reasonable doubt. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 51, citing *People v. Shumpert*, 126 Ill. 2d 344, 352 (1989). In the context of a challenge to the sufficiency of the evidence to prove a mitigating factor, the test is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the absence of applicable mitigating factors. *Thompson*, 354 Ill. App. 3d at 587.

¶ 30 Initially, we reject the State's argument that second-degree murder is inapplicable given that defendant was charged with, and convicted of, felony murder. The State is correct that second-degree murder is not a lesser-included offense of felony murder and that a defendant charged solely with felony murder is precluded from having the jury instructed on second-degree murder. 720 ILCS 5/9-1(a)(3) (West 2008) (a person commits felony murder when he or she, without lawful justification, causes another person's death while "attempting or committing a forcible felony *other than second degree murder*") (Emphasis added); *People v. Walker*, 392 Ill. App. 3d 277, 286 (2009) (recognizing that "a charge of *solely* felony murder precludes instructions on second-degree murder"). (Emphasis added.) Here, however, defendant was not solely charged with felony murder; rather he was charged with, and convicted of, both intentional and felony murder and was subsequently sentenced on the intentional murder count. Based on the charges and the sentence imposed, we find defendant is entitled to challenge the sufficiency of the evidence to support his intentional murder conviction.

¶ 31 Here, defendant argues that he established by a preponderance of the evidence he was acting under serious provocation, specifically mutual combat, when he shot and killed Edward Cisneros. " 'Mutual combat is a fight or struggle which both parties enter into willingly or where

two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat.' " *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶ 26, quoting *People v. Austin*, 133 Ill. 2d 118, 125 (1989). A defendant who initiates a quarrel or an altercation may not rely on the victim's response as evidence of mutual combat. *People v. Lopez*, 371 Ill. App. 3d 920, 935 (2007); *People v. Delgado*, 282 Ill. App. 3d 851, 859 (1996). In considering whether the defendant has met his threshold burden of providing some evidence of mutual combat, " 'the alleged provocation of the victim must cause the same passionate state of mind in an ordinary person under the same circumstances. The crime is murder when a defendant attacks a victim with violence out of all proportion to the provocation.' " *Lauderdale*, 2012 IL App (1st) 100939, ¶ 26, quoting *Austin*, 133 Ill. 2d at 126-27. In addition, a defendant may not be convicted of second-degree murder if there is evidence that the killing was deliberate and premeditated. *People v. Bartley*, 263 Ill. 69, 75-76 (1914). Whether mutual combat is so serious that it mitigates against a finding that the defendant is guilty of first-degree murder is a question for the jury. *Garcia*, 165 Ill. 2d at 430.

¶ 32 In this case, at trial, Anabella Rojas testified that defendant entered her residence uninvited while in possession of a gun and accused Cisneros of being the man with whom Rojas was cheating. It is undisputed that Cisneros threw a glass bottle in defendant's direction, which did not hit defendant. In response, defendant walked over to Cisneros and the two men started "tussling" and "throwing punches." The physical altercation lasted 10 to 15 minutes and ended when defendant fired three shots at Cisneros, hitting him in the head, arm and back. Defendant then fled the scene and attempted to hide the weapon when he was stopped by police. Based on

the evidence, the jury could have concluded that defendant was the aggressor when he entered Anabella's apartment without permission and that his actions were premeditated when he brought a gun to the apartment to confront her new boyfriend. *Delgado*, 282 Ill. App. 3d at 859 ("One who initiates combat cannot rely on the victim[']s response as evidence of mutual combat sufficient to mitigate the killing of the victim[] from first-degree murder to second-degree murder"). Although defendant argues that there was at least "some evidence" that Cisneros was the individual with the gun based on the contents of a letter written by Anabella, we note that the fact-finder is responsible for determining whether a defendant is guilty of first-degree murder or second-degree murder, and in doing so, is responsible for determining the credibility and weight to afford to witness testimony and resolving any inconsistencies in the evidence. *Simon*, 2011 IL App (1st) 091197, ¶ 52. Here, when viewing the facts in the light most favorable to the State, we conclude that a rational trier of fact could have found that defendant was the aggressor and that he failed to prove that the shooting was the result of serious provocation by a preponderance of the evidence.

¶ 33 Moreover, even if Cisneros' actions in throwing the bottle at defendant could be deemed provocation, the jury could have nonetheless found that defendant's response in starting a physical fight and shooting Cisneros three times, including once in the back, was wholly disproportionate to the provocation. See, *e.g.*, *Lauderdale*, 2012 IL App (1st) 100939, ¶ 29 (finding that the record did not support the defendant's claim of serious provocation due to mutual quarrel or combat where the defendant fired multiple shots at the victim after the victim punched the defendant because the defendant's actions were "out of all proportion" to the victim's

actions); *Thompson*, 354 Ill. App. 3d at 589-90 (finding that a rational trier of fact could have found that the defendant's actions in fighting with the victim and shooting him twice in the back was wholly disproportionate to the provocation, which "consist[ed] of angry words and one punch to the face"). Ultimately, we reiterate that the presence or absence of a mitigating factor is a question for the finder of fact, and conclude that based on the evidence contained in the record, the jury could have found that defendant's retaliation was grossly disproportionate to the provocation, thus defeating his theory of mitigation. Accordingly, we reject defendant's challenge to the sufficiency of the evidence.

¶ 34 B. Exhibits[1]

¶ 35 Defendant next argues that trial court erred in refusing to provide the jury with a letter written by Anabella to take back to the jury room during deliberations. Although the letter was written in Spanish, defendant argues that it should have been provided to the jury during deliberations because it was the "linchpin" of his defense. He argues that the trial court's ruling "prevented the jury from reviewing a critical piece of evidence" and necessarily deprived him of his right to a fair trial.

¶ 36 The State, in turn, observes that the trial court has broad discretion to determine whether an exhibit should be sent back to the jury during deliberations. Because Anabella's letter was written in Spanish, the court had a valid concern that Spanish-speaking jurors would be put in the

[1] We will address the arguments raised by defendant on appeal in a different order than the way they are discussed in defendant's brief and will resolve both evidentiary issues before addressing his procedural challenge.

position of acting as interpreters of the letter. Accordingly, given the court's concern, the State argues that the court did not abuse its discretion in deciding not to provide the jury with Anabella's letter during deliberations.

¶ 37 The trial court is afforded the discretion to determine which exhibits, if any, should be sent back to the jury room during deliberations. *People v. White*, 2011 IL App (1st) 092852, ¶ 59; *People v. Hunley*, 313 Ill. App. 3d 16, 37-38 (2000). Accordingly, a trial court's decision concerning the use of exhibits during deliberations will not be reversed absent an abuse of discretion resulting in prejudice to the defendant. *White*, 2011 IL App (1st) 092852, ¶ 59.

¶ 38 Here, the jury heard testimony from Anabella as well as defense witness Laura Garcia about the letter. The handwritten letter, translated from Spanish into English by Garcia, contained a passage in which Anabella purportedly wrote that the police pressured and threatened her after Cisneros' death and she was forced to "make things up" and "remembered too late that he had the gun." On cross-examination, Anabella admitted writing the letter to defendant, but denied that she had written the aforementioned passage. She reiterated that it was defendant, not Cisneros, who had a gun that night. The letter was put on an Elmo projection device and Anaballa identified the portion of the letter that she denied writing. The jury was shown the letter again when defense witness Garcia translated the disputed portion of the letter. She confirmed the language contained in the letter, but acknowledged she had no opinion as to identity of the person who included that language in the letter or whether the entire letter was written by the same person. When defense counsel asked the court to send the letter back with the jury during deliberations, the court denied defense counsel's request. Because the letter was

written in Spanish, the court expressed concern that Spanish-speaking jurors would read and translate the letter to non-Spanish speaking jurors and stated: "The jurors cannot interpret evidence that's in the case."

¶ 39 Based on the record, we are unable to conclude that the court abused its discretion in refusing to allow the letter to go back to the jury room. Where, as here, the jury was shown the exhibit, heard testimony about the exhibit, and never requested use of the letter during deliberations, we do not find that defendant was prejudiced by the court's decision to exclude the exhibit from the jury room. See, *e.g.*, *People v. McDonald*, 329 Ill. App. 3d 938, 948 (2002) (concluding that the trial court did not err in refusing to provide the jury with diary entries written by the defendant during deliberations where the jury heard extensive testimony about the diaries during the trial and made no request to see the exhibits during the deliberation process); *Hunley*, 313 Ill. App. 3d at 37-38 (finding that the trial court did not abuse its discretion in declining to send back an exhibit to the jury room during deliberations where the jury was shown the exhibit during trial and never requested the exhibit during deliberations). Although defendant correctly observes that the court could have provided the jury with a limiting instruction and instructed members of the jury to simply examine the handwriting and not translate the letter, we are not persuaded that the court's decision not to do so was an abuse of discretion.

¶ 40 In a related claim, defendant suggests that defense counsel should have alleviated the court's concern about providing the jurors with Anabella's letter during deliberations by requesting the court to provide them with a translated copy rather than the original letter. He

contends that counsel's failure to do so amounted to ineffective assistance of counsel.

¶ 41 Every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A reasonable probability that the trial result would have differed is "a probability sufficient to undermine confidence in the outcome-or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans,* 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). A reviewing court may resolve a defendant's ineffective assistance of counsel claim by "reaching only the prejudice component,

for lack of prejudice renders irrelevant the issue of counsel's performance." *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 42 Here, defendant's ineffective assistance of counsel claim necessarily fails because he cannot satisfy the prejudice prong of the *Strickland* test. As set forth above, the jury heard testimony from two witnesses about the contents of the letter and was shown excerpts of the letter on both occasions. Although defendant suggests that "counsel's failure to introduce the English translation prevented the jury from being able to review the letter and assess the believability of [Anabella's] in-court testimony," we note that a translated copy of the letter would not have afforded the jury with an opportunity to review any inconsistencies contained in the handwriting, itself. Ultimately, we conclude that defendant cannot show that but for counsel's failure to request that the court provide the jury with an English translation of the letter, there is a reasonable probability that the outcome of his trial would have been different. Accordingly, we find his ineffective assistance of counsel claim to be without merit.

¶ 43 C. Verdict Forms

¶ 44 Defendant next argues that the court erred when it failed to accept the jury's original verdict, finding defendant solely guilty of home invasion and felony murder. Defendant maintains that when the jury failed to sign any verdict forms pertaining to the charges of intentional murder, second degree murder or the firearm enhancement, the judge should have questioned the jurors about their intended verdict instead of sending the jury back to continue deliberations and complete all of the verdict forms. He argues that trial court "effectively directed a verdict against [him] on the more serious charge[] of [first-degree murder] and

violated his right to be free from double jeopardy." Defendant acknowledges that he failed to properly preserve this issue for appellate review, but urges this court to review his claim for plain error.

¶ 45 The State, in turn, responds that the court acted properly when it ordered the jury to resume deliberations when it initially returned with a partial verdict. The State observes that the finding of the jury does not become a verdict until it is accepted and entered by the court and that a court may require corrections to the jury's verdict until judgment is entered and the jury is discharged. Accordingly, the State argues that the judge's instructions to the jury did not have the effect of improperly directing a verdict on the remaining counts or violate defendant's double jeopardy rights.

¶ 46 To properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). A defendant's failure to abide by both requirements results in forfeiture of appellate review of his claim. *Enoch*, 122 Ill. 2d at 186; *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007); *People v. Gabriel*, 398 Ill. App. 332, 353 (2010). Here, it is undisputed that defense counsel did not object to the court's instructions to the jury after receiving the incomplete jury forms at trial or include a challenge to the procedure in a post-trial motion, and thus failed to properly preserve this issue for appellate review.

¶ 47 The plain error doctrine, however, provides a limited exception to the forfeiture rule and permits review of otherwise improperly preserved issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial

process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Aug. 1999); *Bannister*, 232 Ill. 2d at 65. The first step in any such analysis is to determine whether any error actually occurred *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009); *Gabriel*, 398 Ill. App. 3d at 353. If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Keeping these principles in mind, we review defendant's claim.

¶ 48 In Illinois, "[t]he finding of a jury does not become a verdict until it has been received, accepted by the court and entered of record." *People v. Wilson*, 51 Ill. 2d 302, 309 (1972), citing *People v. Arnett*, 408 Ill.164, 171 (1951). Accordingly, the trial court upon receiving a verdict tendered by the jury and discovering that there appears some kind of "technical" error (*People v. Katalinich*, 153 Ill. App. 3d 778, 782 (1987)) with the verdict, may instruct the jury to correct the error before accepting the verdict and entering it in the record. *People v. Almo*, 108 Ill. 2d 54, 63 (1985); *Wilson*, 51 Ill. 2d at 309-10; *Arnett*, 408 Ill. at 170-71. However, there is no technical error when a jury returns a verdict that includes a finding of guilty regarding a lesser-included offense but is silent as to the greater charged offense. *Katalinich*, 153 Ill. App. 3d at 782. That is because under Illinois law, "[a] conviction of an included offense *** is an acquittal of the [greater] offense charged." 720 ILCS 5/3-4 (West 2008); see also *Katalinich*, 153 Ill. App. 3d at 781, quoting *People ex rel. Daley v. Limperis*, 86 Ill. 2d 459, 466 (1981) ("It is a well-established principle of our jurisprudence that conviction of a lesser offense operates as an acquittal of a greater offense"). Accordingly, if a jury returns a guilty verdict on a lesser offense, but is silent as to the greater charged offense, the jury's decision operates as an implied acquittal of the greater

offense. *People v. Hoffer*, 106 Ill. 2d 186, 198 (1985). In those instances, the constitutional prohibition against double jeopardy applies and a defendant may not subsequently be prosecuted for an offense of which he has previously been acquitted. *Hoffer*, 106 Ill. 2d at 197.

¶ 49 Here, the State, citing the supreme court's prior decisions in *People v. Arnett,* 408 Ill. 164 (1951), *People v. Wilson*, 51 Ill. 2d 302 (1972), and *People v. Almo*, 108 Ill. 2d 54 (1985) argues that the trial court did not err in refusing to accept the jury's findings until it had completed its deliberations and returned verdicts on all counts because the jury's initial findings were incomplete and returned in error.

¶ 50 In *People v. Arnett*, 408 Ill. 164 (1951) the defendant was charged with larceny and burglary. After deliberating, the jury informed the court that it had reached a verdict, however, the court realized that the jury had signed the jury instructions and not the verdict forms. The court ordered the jury to return to the jury room and amend its verdict to put it in proper form. The jury returned with a verdict finding the defendant guilty of both charged offenses. When polled, each jury member confirmed the accuracy of the verdict. In response to the defendant's challenge on appeal, the supreme court found that the procedure followed by the trial court was not erroneous, reasoning: "The clerk of the court polled the jury and each juror verified the verdict of guilty. The [defendant] and his counsel were present at all times during the proceedings having to do with the verdict. The verdict as first returned was insufficient to authorize the court to enter a judgment on the verdict. It was not error to permit the jury to retire and amend its verdict by putting it in proper form." *Arnett*, 408 Ill. at 170-71.

¶ 51 In *Wilson*, the defendant was charged with murder, felony murder and attempt burglary

and the jury was furnished with three sets of verdict forms for each of the three counts in the indictment, but the jury returned with only one signed verdict. The record was silent as to which of the verdicts the jury initially signed. The court refused to accept the verdict and ordered the jury to continue deliberating and return verdicts for each of the three counts. The defendant was subsequently convicted of all three counts. When polled, each member of the jury confirmed the accuracy of the verdict. On appeal, the supreme court upheld the defendant's conviction, observing that "[t]he finding of a jury does not become a verdict until it has been received, accepted by the court and entered of record." *Wilson*, 51 Ill. 2d at 309. Citing its prior decision in *Arnett*, the court concluded that the trial court did not err in ordering the jury to resume deliberations and amend the verdict and "put[] it in proper form." *Id*. at 310.

¶ 52 Finally, in *People v. Almo*, the jury returned verdicts finding the defendant guilty of murder, voluntary manslaughter, and armed violence. In response, the court provided the jury with a new set of instructions and ordered the jury to continue to deliberate because the jury's initial verdict, finding the defendant guilty of both murder and the lesser-included offense of voluntary manslaughter, was legally inconsistent. The jury subsequently returned a verdict finding the defendant guilty of murder but did not return a verdict for the lesser-included offense. Defendant appealed and challenged his conviction, arguing that the court erred in ordering the jury to continue deliberations because "the trial was over the moment the verdict forms were returned by the jury with the word 'guilty' written on the voluntary-manslaughter verdict form, and that anything that took place thereafter was a nullity." *Almo*, 108 Ill. 2d at 63. The supreme court disagreed. Citing its prior decision in *Wilson*, the court observed that a jury's finding does

not become a verdict until it is accepted by the trial court and concluded that the trial court acted properly when it refused to accept inconsistent verdicts and ordered the jury to continue deliberating. *Id*.

¶ 53 Defendant, however, argues that the verdict initially returned by the jury in this case was not an obvious "technical" error. Relying on *People v. Katalinich*, 153 Ill. App. 3d 778 (1987), defendant argues that the jury's decision not to return a verdict with respect to the greater offense of intentional murder or the firearm enhancement operated as an acquittal of the greater offense, and thus the trial court erred in instructing the jury to complete all of the verdict forms.

¶ 54 In *Katalinich*, the defendant was charged with three counts of aggravated battery. The jury was given instructions and verdict forms for each count of the charged offense as well as instructions and verdict forms for the lesser-included offense of battery. After deliberating, the jury returned with two completed verdict forms, finding the defendant guilty of battery. The jury did not return any verdicts pertaining to the charged offense of aggravated battery. After receiving the two completed verdict forms, the trial court did not inquire into the reason the jury failed to sign verdict forms for aggravated battery, but simply ordered the jury to return to jury room and complete the missing forms. The jury returned with the additional verdict forms, finding the defendant guilty of aggravated battery. The defendant subsequently challenged his aggravated battery conviction, arguing that the jury implicitly acquitted him of aggravated battery when it initially returned with verdict forms convicting him of the lesser-included offense of battery and made no finding as to greater offense of aggravated battery.

¶ 55 The Fourth District agreed with the defendant and reversed his conviction on appeal,

finding that "the jury's original verdicts of the two included offenses of battery operated as an implied acquittal on the two aggravated battery charges." *Katalinich*, 153 Ill. App. 3d at 781. In doing so, the court distinguished *Wilson* and *Arnett*, explaining:

> "We interpret *Wilson* and *Arnett* to stand for the proposition that before judgment is entered on a verdict and before the jury has separated, the trial court may require emendations to the verdict so that it may truly reflect the jury's finding. *** However, this principle should only be employed to correct 'technical errors,' such as when the jury accidentally signs the instructions rather than the verdict forms (*Arnett*), or where the jury simply forgets to sign the proper verdict form after reaching an agreement on a particular charge. Furthermore, we do not interpret *Wilson* and *Arnett* as altering the general rule that a conviction of an included offense operates as an implied acquittal of the more serious offense." *Katalinich*, 153 Ill. App. 3d at 782.

¶ 56 Here, after reviewing the record, we find that *Wilson* rather than *Katalinic*h controls. When the jury returned with verdict forms finding defendant guilty of home invasion and felony murder, the verdict was incomplete as the jury had made no finding as to the applicability of the firearm enhancement. The jury had previously been instructed if they found defendant guilty of murder Type A (intentional murder) *or* murder type B (felony murder), they were then to determine whether the State had proven that the defendant had personally discharged a firearm during the commission of that offense. Specifically, the jury was instructed as follows:

> "The State has also alleged that during the commission of the offense of first degree murder (Type A and B) the defendant personally discharged a firearm that

proximately caused death to another person.

If you find the defendant is not guilty of the offense of first degree murder (Type A and B), you should not consider the State's additional allegation regarding the offense of first degree murder (Type A and B).

If you find the defendant is guilty of first degree murder (Type A) and not guilty of second degree murder or you find the defendant is guilty of first degree murder (Type B) you should then go on with your deliberation to decide whether the State has proven beyond a reasonable doubt the allegation that during the commission of the offense of first degree murder (Type A and B) the defendant personally discharged a firearm that proximately caused death to another person.

Accordingly, you will be provided with two forms of verdict as to the allegation: 'We, the jury, find the allegation was not proven' that during the commission of the offense of first degree murder (Type A and B) the defendant personally discharged a firearm that proximately caused death to another person and: 'We, the jury, find the allegation was proven' that during the commission of the offense of first degree murder (Type A and B) the defendant personally discharged a firearm that proximately caused death to another person.

From these two verdict forms you should select the one verdict form that reflects your verdict and sign it as I have stated."

¶ 57 Given the jury's incomplete findings, the court did not err in not accepting the verdict. *Wilson*, 51 Ill. 2d 309-10. Rather, the court, in accordance with defense counsel's suggestion,

sent all of the verdict forms back to the jury and ordered them to continue deliberations and return verdicts on each of the charges as well as findings pertaining to the firearm enhancement. Although defendant suggests that the trial court essentially directed a verdict against him by refusing to accept the incomplete verdict and ordering the jury to continue deliberating, we note that as in *Wilson*, the jury in this case was subsequently polled and confirmed the latter verdict finding defendant guilty of all charges. Ultimately, because the verdict as first returned was incomplete and insufficient to authorize the court to enter judgment on the verdict, we conclude that the court did not err in instructing the jury to complete its deliberations and return verdicts on each of the courts. *Wilson*, 51 Ill. 2d at 309-10; *Arnett*, 408 Ill. at 170-71. Accordingly, we affirm defendant's conviction and sentence.

¶ 58 III. CONCLUSION

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

¶ 60 Affirmed.

1-09-2909