2012 IL App (1st) 11433-U

SECOND DIVISION
April 24, 2012

No. 1-11-1433

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 09 CR 19310
	)	
SILVONUS SHANNON,	)	Honorable
	)	Nicholas J. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

O R D E R

***Held*:** Trial court properly denied defendants' two motions for directed verdicts on the felony murder charge where the underlying forcible felony of mob action was not inherent in, and did not arise from, the act of murder itself; trial court did not improperly participate in *ex parte* communication where the trial court did not respond to a note that accompanied the verdict; trial court properly excluded the police report from jury deliberations on hearsay grounds; trial court did not abuse its discretion in refusing to give additional jury instructions when the ones given were sufficient and not confusing; and the trial court did not abuse its discretion in sentencing defendant where the sentence fell squarely within the sentencing

guidelines and the trial court considered all factors in aggravation and mitigation.

¶ 1 Defendant Silvonus Shannon was convicted by a jury of first degree felony murder in connection with the beating death of 16-year-old Derrion Albert. Defendant was sentenced by the trial court to 32 years in prison. On appeal, he contends that (1) it was error for the trial court to deny his motions for directed verdicts, (2) the trial court improperly participated in *ex parte* communication with the jury which deprived defendant of due process of law, (3) the trial court abused its discretion in excluding a police report from jury deliberations, (4) the trial court abused its discretion by refusing defendant's tendered jury instruction on intent, and (5) the trial court abused its discretion in denying defendant's motion to reconsider his sentence. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On the afternoon of September 24, 2009, a fight broke out near the Agape Community Center (Agape) on 111th Street in the Roseland neighborhood on the south side of Chicago. The neighborhood around the community center is also called "the Ville." Christian Fenger Academy (Fenger) is a high school that is located in the Ville. Due to school closings, students that lived in Altgeld Gardens ("the Gardens"), including defendant, were attending Fenger at the time of this incident.

¶ 4 As a result of the fight, the victim, Derrion Albert, died. Three men were charged in connection with his death: defendant, Eric Carson, and Eugene Riley. The trials occurred separately and this appeal only concerns that of defendant's. Defendant was originally charged

with all three types of first degree murder (720 ILCS 5/ 9-1(a)(1)-(3) (West 2008)). Prior to trial, the State dismissed all charges except for felony murder based on the underlying felony of mob action in that he, along with Carson and Riley:

> "Without lawful justification, struck [the victim] about the body and stomped on [the victim's] head and killed [the victim] with their fists, a piece of wood and their feet, during the commission of a forcible felony, *to wit*: mob action.

¶ 5 At trial, T-Awanda Piper testified that she worked at Agape for 13 years prior to this incident. Agape is an after-school program for first grade through eighth grade, and an outreach and teen ministry program for high school kids. Piper was at work on the afternoon in question when a receptionist told her there was a group of kids outside the building getting ready to fight. Piper went to the front desk area to look out the window. She also looked at the video monitor at the front desk which displayed images from security cameras located on the roof of the building. The monitor showed a group of kids getting ready to fight. Two groups of kids were walking towards each other with their hands up. When Piper saw the kids begin to swing at each other, she told the receptionist to call 9-1-1, then went upstairs to gather other staff members. When she came back down and looked out the window, she saw a young man hit the victim in the head with a board, which caused the victim to stumble and fall. When the victim attempted to get up, another kid punched him and he fell back to the ground. She then saw the victim with his left arm up above his head when another kid came up and kicked him, causing the victim to fall back. A kid then came up and hit the victim over the head with a board and other people around him kicked him as he was lying on the ground.

¶ 6 Piper testified that she then left the front desk and went to assist the victim. With the help of others, she carried him into the building, but he was unresponsive. Piper identified Agape's surveillance video, which was then played for the jury. The video showed many students walking over train tracks towards Agape, and it showed portions of the fight from a distance.

¶ 7 Piper testified on cross-examination that she remembered talking to police officers on the evening of the incident at Christ Hospital. She stated that she was maybe in shock during her conversation with the police officers. She denied ever telling Detective Sullivan or anybody else from the Chicago Police Department that instead of being inside when she witnessed the fight, she was outside on her way to Agape.

¶ 8 Jamal Harding testified that he lived at 114th Street and Steward Street, in the Ville. He graduated from Fenger in June of 2009. On the day in question, at around 3 p.m., Harding was at a corner store about five blocks from his house with a friend named Miesha Walker. They left the store and walked down 111th Street towards Agape. There were a lot of people walking in that same direction because school had just let out and students were leaving Fenger. Harding testified that he was wearing headphones and listening to music. He saw a guy named B.J. ride by in a car with some other people. Harding knew B.J. from Fenger, although B.J. was younger than Harding. B.J. was from the Gardens.

¶ 9 Harding testified that the car was heading in the same direction as he was, and that B.J. was shaking and bobbing his head up and down, but Harding could not hear anything he said. Harding then proceeded to cross over railroad tracks that are located just west of Agape, where

he saw B.J. fighting in the middle of the street. Harding took off his headphones and gave them to Walker. He then started fighting with B.J. using his fists.

¶ 10 Harding testified that he knew a lot of people who were out in the street that day. Most of them were younger than him and still enrolled at Fenger. The victim, Eric Carson (who was wearing a red jacket), and Dantrell Myles (Harding's best friend who was also wearing a red jacket), were from the Ville. Defendant (wearing yellow and black shoes, khaki pants, and a black shirt), whom Harding had known for a year or two but was not friends with, was from the Gardens. A guy named Dionte Johnson, known as "Tito," who was wearing red and black shorts, was also present, but Harding did not know where he was from. Harding testified that he was wearing a white t-shirt and blue jeans on the day in question.

¶ 11 A video of the fight, played in slow motion, was shown to the jury while Harding was on the witness stand. In the video, Agape is on the opposite side of the street, and Harding is with B.J. behind a white car. Tito and Carson are seen picking up sticks and swinging them. Then Carson hits the victim with the stick while Tito punches the victim. Harding testified that he was pulling Tito back at this point so that Tito would not hit the victim anymore. Someone that Harding could not identify then kicks the victim. B.J.'s brother, Eugene, appears in the video dressed in all black. Someone wearing a red jacket throws a board at B.J. A car travels on the wrong side of the street down 111th Street. The video then shows the victim. Defendant appears to kick the victim in the head, and a guy named "Lapoleon" also is seen kicking the victim.

¶ 12 The video then shows Eugene Riley swing a piece of wood that hits the victim in the head. On the far left of the screen, defendant is seen kicking the victim in the face and head, and

stomping on the victim's head with both feet. The video then shows Harding with a stick in his hand approaching the victim. He asks the victim is he is okay. The victim just looks at Harding, who testified that he tried to talk but did not say anything. Harding then chased after "those guys" but eventually turned back and went home.

¶ 13 Harding testified that he did not know earlier in the day that there was going to be a fight that day, and he denied punching defendant that day.

¶ 14 Dominic Johnson, who was in the custody of the Cook County Jail for a pending residential burglary case on the day he testified, stated that he had not been made any promises in exchange for his testimony in this case. In September of 2009, Johnson was a sophomore at Fenger, and lived in the Ville. His friends from the Ville included Carson, Tito (his cousin), Harding, Myles, B.J., and "Little Carl." At school on the day in question, B.J. got into a fight with a guy named Eugene. As a result of that fight, the fight in question occurred after school. Johnson testified that he knew there was going to be a fight that day after school because everyone was talking about it at school.

¶ 15 Johnson left school with Tito and Little Carl at 2:50 p.m. They headed towards Agape. Johnson saw B.J. sitting in the passenger seat of a car that was carrying several other people. B.J. was hanging out the window and screaming "it ain't over." Johnson kept walking over the railroad tracks. B.J. and Little Carl then began to fight. Then Little Carl, Myles, and Harding were behind a car jumping on B.J. Johnson saw Carson hit the victim in the head with a plank of wood. The victim fell and then got back up, at which point Tito hit him with his fist and the victim fell back down again and tried to protect himself. Johnson testified that he did not see

what happened to the victim but that the next time he saw him, the victim was by the alley trying to protect himself.

¶ 16 Johnson testified that the victim was lying on the ground with his hands covering his face when defendant approached the victim and "stomped him." Johnson knew defendant's first name, but not his last name. He testified that defendant was wearing shoes with "some kind of yellow" in them. B.J.'s brother hit the victim in the head with a board. Johnson saw defendant kick or stomp the victim twice: first when the victim was covering his face, and second when defendant jumped on the victim's head.

¶ 17 Johnson viewed the slow version of the video in front of the jury. He identified himself in the video wearing a white and green Pelle shirt with horizontal stripes. His testimony regarding the video was substantially the same as that of Harding's. Johnson testified that he saw, in person and on the video, defendant stomp the victim in the head. The video showed defendant walking towards the victim, kicking the victim, and then jumping in the air and landing on the victim's head.

¶ 18 Doctor Hilary McElligott performed the autopsy on the victim, who was 5'8" tall, and 158 pounds. Dr. McElligott testified that her external examination revealed five groups of injuries. The first one was on the right side of the face where there were abrasions and scratches. The second was around the mouth where there were bruises, abrasions, and lacerations. The third consisted of abrasions on the chest and bruises on the abdomen. The fourth consisted of multiple abrasions on the front and back of his hands, and the fifth was on the back, where there were abrasions and bruises.

¶ 19 Dr. McElligott testified that the internal exam showed several injuries to the head. There was a subgaleal hemorrhage on the right side of his head. There was bleeding across the surface of the brain. There was a subarachnoid hemorrhage which was concentrated on the right side of the brain. Dr. McElligott testified that a subarachnoid hemorrhage is a very devastating injury and half the cases where people have it in association with head trauma results in death. Dr. McElligott concluded that the victim died as a result of blunt head trauma which caused multiple cerebral injuries.

¶ 20 After viewing the video, Dr. McElligott testified that the types of strikes shown on the video were all forms of blunt head trauma. She could not tell which strikes caused which injuries and she could not directly correlate any one hit to any specific injury in the brain. Instead, she noted that many of the injuries could have been fatal in and of themselves and that all of the injuries to the head would have contributed to the type of injury seen in the victim's brain. She further testified that a concussion is a possible result of a sharp blow to the head and that swelling of the brain takes a few minutes. This could be why the victim stumbled again 15 seconds after being hit in the head with a board.

¶ 21 Chicago Police Detective William Sullivan testified that he interviewed Sandy Hinckle, a member of the staff at Agape, who said that when she looked out the window during the incident in question, she saw a person recording the beating. Detective Sullivan learned that a copy of the video had been given to police headquarters at 35th and Michigan Avenue, so he went there and obtained a copy. Defendant was one of several people eventually arrested and charged with the first degree murder of the victim. When defendant was arrested, he was wearing black gym

shoes that had a yellow sole and a yellow emblem on the side.

¶ 22 Detective Sullivan further testified that he interviewed T-Awanda Piper at Christ Hospital on the night in question. Piper told him that she was on her way outside of Agape that day.

¶ 23 The State then rested its case. Defendant moved for a directed verdict, which was denied by the trial court, and defendant then presented evidence in his defense.

¶ 24 Defendant testified that in September of 2009, he lived in the Gardens and went to school at Fenger. Kids from the Ville did not think that kids from the Gardens belonged in their neighborhood, and he had been taunted in the past by kids from the Ville. Defendant quit the baseball team because he was chased by some kids from the Ville one day after practice and he thought one of them had a gun.

¶ 25 During the week before the victim's death, there was an altercation at school between Latoine Gibson, one of defendant's friends from the Gardens, and Pervis, a kid from the Ville. As Latoine and Pervis "got into it," defendant noticed some guys from the Ville approaching Latoine, so defendant warned him. Latoine stopped fighting and started running, as did defendant. Defendant testified that eight or ten kids from the Ville chased them including Little Carl, the victim, and a guy named Quenterria. They ran from the second floor of Fenger to the first floor, and then to the bus stop and eventually went home.

¶ 26 Defendant testified that on the day in question, he got a ride to school from Eugene Riley. That morning, Vashion Bullock ("B.J.") got into an altercation with a guy from the Ville named Eugene Bailey. During school, defendant and others were followed around by some kids from the Ville. They followed defendant and B.J. to one of their classes and said they had better go

home or they were going to get beat up. Defendant testified that he did nothing in response. In his last period of class, Marquise Keefer, from the Ville, asked defendant if he was going to help the kids from the Gardens fight after school. Defendant said he was not, and Keefer replied, "that's what I thought bitch." Defendant did not respond.

¶ 27 Defendant stated that after the bell rang at the end of the day, defendant left the building and was not "positively sure" that there was going to be a fight after school. Defendant exited the school and walked towards the bus stop. Eugene Riley drove up in a car with B.J. and two other kids from the Gardens and asked defendant if he wanted a ride home. Defendant got into the car. Some kids from the Ville were standing outside the school yelling at the Gardens kids who were waiting at the bus stop. People were yelling at the car defendant was in, and throwing rocks and bricks at it. Defendant testified that he heard someone say he was going to shoot the car if it did not get out of the neighborhood.

¶ 28 Defendant further testified that when the vehicle he was riding in got to the intersection of Wallace Street and 111th Street, it made a right. There were some Gardens kids at the stop sign who were walking towards Michigan Avenue. Defendant heard Ville kids say that they were going to beat them up. Defendant testified that he was scared, so he got out of the car. He bought some chips and juice at a corner store. Then he, Montrell Truitt, Eric Parks, Andrea Gray, and a couple other kids from the Gardens left the store and started walking east towards 111th Street and Wallace Street. After passing the railroad tracks, defendant was hit in the arm by a glass bottle and his arm started to bleed. He dropped his book bag and turned around and noticed Harding and Quinterria running toward him. They punched him and he started punching

them back. Then the victim came up and punched defendant in the jaw with his left fist.

¶ 29 Defendant then went through the slowed version of the videotape with the jury. He pointed out Andrea Gray on the left side by the van, with a black and white checkered book bag. Defendant identified himself in front of the crowd at the beginning of the video. Then he was shown moving in front of Harding, who was wearing a white t-shirt. Harding hit defendant and then ran off camera. Defendant then identified himself walking across the street wearing a black t-shirt and khaki pants (school uniform), and black and yellow Air Force One shoes. Defendant identified someone named Damien from the Ville who was wearing a white t-shirt and blue jeans. Defendant identified Eric Carson, from the Ville, wearing a red jacket, and B.J., wearing a white shirt and khaki pants, and standing near a white car.

¶ 30 Defendant then identified himself in the right corner of the screen walking towards the fight. He testified that he was not with anyone. Kendall Smith and Damien were in the middle of the screen. Kendall was wearing a black t-shirt and khaki pants. Defendant testified that he got between Kendall and Damien to break up their fight but that he was not acting with anyone. He said he tried to break up the fight by putting his arm out, and denied trying to swing at the other kids. Defendant admitted getting into a fighting stance, but claimed it was only to brace himself in case someone swung at him.

¶ 31 Defendant was then shown on the video in the far right hand corner of the screen running towards another fight. Defendant again testified that he was not with anyone at this point. The video then showed him get hit in the head with a board. He identified the kid who hit him as Andrew McCullon, who was known as "Drew Down" from the Ville.

¶ 32 Defendant testified that after he was hit with the board, it looked like he backed out of the group of people fighting on the sidewalk and went into the street, but he did not remember that. He did not remember being in that fight.

¶ 33 Defendant next stated that Eric Carson and Dionte both had boards in their hands in the video. Defendant denied punching anyone and testified that he did not talk to anyone that day. Defendant saw the victim get hit in the head with a board by Carson. He denied kicking the victim in the head. When asked if he kicked the victim, defendant stated, "[n]ot that I remember," and, "[i]t doesn't look like it from the camera." He stated that he did not remember because everything happened so fast. He testified that even though it looked like he kicked the victim, his foot was in front of the victim's head. He further testified that he jumped in the air, but that he did not think he landed on the victim's head, and that his foot was in front of the victim's head in the video.

¶ 34 Defendant testified that he remembered being chased off by the Ville kids, who were throwing bottles and sticks at him. He denied ever picking up a glass bottle, board or brick on the day in question. He claimed he was not acting together with anyone that day, and that he was walking with kids from the Gardens that day, but "not as a crowd."

¶ 35 On cross-examination, defendant denied that he ran towards the fight at the beginning of the video to get involved, but rather claimed that he ran towards the fight to break it up. After he got hit with a board, defendant does not remember going into the street to fight. He admitted that he was the only one in the video wearing black and yellow gym shoes.

¶ 36 Defendant testified that he saw the victim get hit with a board by Carson but did not help

him because the victim was associated with the Ville kids. Defendant identified himself in a photo and stated that other people were pictured walking with him. He stated that it appeared from the video that once the victim came out of the entrance to the alley, the kids defendant was standing with started to surround the victim. Defendant claimed he walked up to the victim on his own, not with the other people he was with. Defendant stated that he could see on the video that he pushed the victim back towards the ground by his shoulder. Then the other kids started to kick him. Defendant then exited the screen. When he came back in to view, Eugene Riley hit the victim in the head with a board. Defendant denied kicking the victim in the head at that time, and stated that from the videotape, "it looked like I missed his head."

¶ 37 The video was then played for defendant starting from when the victim was on the ground. Defendant stated that when the victim put his arm out, it meant "stop," that he surrendered. Defendant did not know who the victim had his hand up to protect himself against, but admitted that it was his foot that was in the air at the time. Defendant said his foot was pushing the victim back to the ground. The victim was then hit in the head with a board. Defendant did not remember kicking the victim in the head after that, and stated that it looked like his foot missed the victim's head in the video, although he stated that he could see the victim's head move in the video after defendant makes a kicking motion on the video. Defendant stated that in the video, he jumped in the air as high as he could jump, but did not remember coming down on the victim's head. He did not remember the victim's whole body reacting to the strike.

¶ 38 Defendant called two of his high school teachers, Sokoni Davis and David Little, who

both testified that defendant was non-violent. He was respectful in class and what he did on videotape was out of character.

¶ 39 Latoine Gibson, a senior at Fenger at the time of the incident, testified that he was defendant's best friend. He stated that fighting was common between the Ville kids and the Gardens kids.

¶ 40 Andrea Gray was a senior at Fenger on the date in question and was a friend of defendant. After school that day, she walked towards 111th Street and stopped into a store. Gardens kids were walking towards Michigan Avenue when the Ville kids started following them and fighting with them. She saw defendant fighting with Little Carl. Defendant crossed the tracks with other guys from the Gardens.

¶ 41 In rebuttal, the State called Detective Michelle Moore-Grose, who had met with defendant at the police station on September 27, 2009. Her partner, Detective Sullivan, was also present at that time. The 22-minute conversation that they had with defendant was taped and played for the jury. During the conversation, defendant verbally acknowledged his *Miranda* rights. He then stated that he was never in a vehicle on the day in question, but that he saw B.J. and other people in a car outside of school. Defendant stated that he did not know the victim on the day of the fight, but later found out that the victim was one of the guys that had followed him in school the day before the fight. Defendant stated that he remembered the victim being on the ground, but did not remember any of the Gardens people with sticks. Defendant admitted to kicking the victim three times in the body and once in the face. He responded "yes," when asked if he remembered jumping on the victim's head.

¶ 42 Discussions regarding the evidence to go back to the jury during deliberations, as well as what jury instructions were to be given, then took place. Defense counsel argued that the police report which purportedly stated that Piper said she was outside when the fight broke out, should go back to the jury during deliberations. Defense counsel admitted that police reports were generally considered hearsay, but argued that the hearsay rule is to protect defendants, not the State, and thus it should go back if defendant wanted it to. The trial court stated that it did not send police reports back, and that defense counsel had perfected her impeachment when Piper was on the witness stand.

¶ 43 In terms of jury instructions, defense counsel argued that instructions for "intent," as well as "knowledge-willfulness" should go back to the jury. The trial court stated that knowledge was a word that people knew in the regular course of life, and the definition would not be given. The trial judge further stated that he did not usually give an instruction on the word "intent" because it is generally a word that did not need to be defined. The court noted, though, that if the jury asked for a definition, it would be given.

¶ 44 The jury found defendant guilty of first degree felony murder. At the sentencing hearing, the State presented victim impact statements from five of the victim's relatives. Defendant presented the testimony of his uncle, his best friend, a cousin, an English teacher from Fenger, and himself. At the close of evidence, the trial court noted that in sentencing defendant, it took into consideration the evidence presented at trial, the presentence investigation, the evidence offered in aggravation, and the evidence offered in mitigation. The trial judge stated that he could see that defendant had a lot going on in his life other than the few minutes depicted on the

videotape, and that he would "consider that along with all the mitigating factors in this case." He further stated, "I'm also considering the impact of incarceration, the arguments of the attorneys in this case, and what [defendant] said here a few moments ago."

¶ 45 The trial judge noted that he wanted to identify a factual distinction between defendant's case and co-offender Eric Carson's case. When he saw Carson, he saw a person who admitted his guilt, "took responsibility, and was sentenced to 26 years." When Carson injured the victim, the victim was still ambulatory. When defendant injured the victim, the victim was horizontal on the ground and incapacitated. The trial judge stated that he did not believe that defendant did not strike the victim, and that the jury obviously believed defendant contributed to the victim's death.

¶ 46 The trial judge further stated that he hoped and prayed that "whatever sentence I say today, will make some of these young men and woman (*sic*) out there understand that you can't get involved in these incidents. You can't hurt people."

¶ 47 The trial judge noted that there were many people in the video who did not get involved in the fight, and that "these children and young adults confronted with the same social economic issues and social issues that [defendant] is confronted with, chose the right path." He continued, stating that what he saw in the video did not represent the community, rather "[w]hat I saw in that video that does represent the community, are the young men and women that walked right by, that dragged [the victim] off the street into that community center. They, to me, define that video."

¶ 48 The trial judge then sentenced defendant to 32 years in prison. Defendant then moved for a directed verdict a second time, which was denied. He now appeals.

¶ 49 II. ANALYSIS

¶ 50 On appeal, defendant makes five arguments: (1) the trial court erred in denying defendant's motions for directed verdicts, (2) the trial court improperly participated in *ex parte* communication with the jury, (3) the trial court abused its discretion when it excluded a police report from jury deliberations, (4) the trial court abused its discretion by refusing defendant's proffered jury instructions, and (5) the trial court abused its discretion in denying defendant's motion to reconsider his 32-year sentence.

¶ 51 A. Felony Murder

¶ 52 Defendant contends that the trial court erred in denying his motions for directed verdicts on the felony murder charge because the conduct constituting the underlying felony of mob action arose from, and was inherent in, the act of murder itself, and therefore did not have an independent felonious purpose as required by statute. Defendant further contends that the state improperly avoided its burden of proving a knowing or intentional murder by solely charging him with felony murder. Because this is a question of law, we review it *de novo*. See *People v. Davison*, 236 Ill. 2d 232, 239 (2010) (question of whether mob action improperly served as predicate forcible felony of first degree felony murder conviction reviewed *de novo*) (citing *People v. Pelt*, 207 Ill. 2d 434, 439 (2003)).

¶ 53 The Criminal Code of 1961 defines the offense of felony murder as follows:

> "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause death:
>
> ***

(3) he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 2002).

¶ 54 The Code defines the term "forcible felony" to encompass several enumerated felonies, including "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2002). The Code section at issue here defines "mob action" as consisting of "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law." 720 ILCS 5/25-1(a)(1) (West 2008). Defendant admits that the felony of mob action is a "forcible felony" within the felony murder statute.

¶ 55 "The offense of felony murder is unique because it does not require the state to prove the intent to kill, distinguishing it from other forms of first degree murder when the State must prove either an intentional killing or a knowing killing." *Davison*, 236 Ill. 2d at 239-40 (citing 720 ILCS 5/9-1(a)(1), (a)(2) (West 2002)). Our supreme court has repeatedly expressed the view that a felony murder charge may, in effect, improperly allow the State to both eliminate the offense of second degree murder and avoid the burden of proving an intentional or knowing first degree murder because many murders are accompanied by certain predicate felonies. *Davison*, 236 Ill. 2d at 240 (citing *Davis*, 213 Ill. 2d at 471). Our supreme court has concluded that " 'where the acts constituting forcible felonies arise from and are inherent in the act of murder itself, those acts cannot serve as predicate felonies for a charge of felony murder.' " *Davison*, 236 Ill. 2d at 240 (quoting *People v. Morgan*, 197 Ill. 2d 404, 447 (2001)).

¶ 56 Defendant contends, relying on *Pelt* and *Morgan*, that the acts in this case constituting

mob action arise from, and are inherent in, the act of the murder itself, and thus cannot serve as the predicate felony. In *Morgan*, our supreme court rejected felony murder charges predicated on the forcible felonies of aggravated battery and aggravated discharge of a firearm for a 14-year-old defendant who fatally shot his grandfather and grandmother, because those felonies were inherent in, and arose from, the fatal shootings. The *Morgan* court explained that it was arguable that the murders gave rise to the predicate felonies, rather than the predicate felonies resulting in the murders. The court also held that the predicate felony underlying a charge of felony murder must have an independent felonious purpose. *Morgan*, 197 Ill. 2d at 458.

¶ 57 Two years after *Morgan*, our supreme court in *Pelt* revisited the issue of what constituted a proper predicate forcible felony for a felony murder charge. In that case, the defendant threw his infant son against a bedroom dresser, which caused the child's death. The defendant was convicted of first degree felony murder predicated on the forcible felony of aggravated battery of a child. In determining that the defendant's conduct was an act inherent in, and arising from, the child's murder, the *Pelt* court explained:

> "Defendant's statement indicated that he was upset when the infant would not stop crying, and that he tried to throw him to the bed. He stated that he apparently threw him too far '[be]cause he hit the dresser.' The act of throwing the infant forms the basis of defendant's aggravated battery conviction, but it is also the same act underlying the killing. Therefore, as in *Morgan*, it is difficult to conclude that the predicate felony underlying the charge of felony murder involved conduct with a felonious purpose other than the conduct which killed the

infant." *Pelt*, 207 Ill. 2d at 442.

¶ 58 Defendant contends that his actions in the case at bar fall under the *Pelt* and *Morgan* exception to felony murder. Defendant claims that he acted as an individual in self-defense or defense of others before, and during, the "kicking sequence," as defendant calls the portion of the video where he is seen either: kicking or pushing the victim to the ground, kicking at or on the victim's head, and jumping in the air and landing on or near the victim's head. He argues, however, that even if his actions during the kicking sequence were sufficient to support a finding that he joined a mob with others, and used force knowingly and without the authority of law, he cannot be convicted of first degree murder on account of those actions because those actions were inherent in the murder itself, and he did not have an independent felonious purpose.

¶ 59 We do not agree with defendant's reliance on *Morgan* and *Pelt*. Unlike *Morgan* and *Pelt*, defendant's conduct constituting the mob action was neither inherent in, nor arose from, the murder itself. Rather, defendant had an independent felonious purpose of mob action. We find the supreme court cases of *Davis* and *Davison* instructive, and conclude that the charged predicate felony of mob action properly formed the basis of defendant's felony murder conviction.

¶ 60 In *Davis*, the felony murder charge was predicated on the forcible felony of mob action. *People v. Davis*, 213 Ill. 2d 459, 474 (2004). The State alleged that a group of 10 to 20 individuals, including the defendant, fatally beat the victim after an argument over a stolen television. The defendant admitted to police officers that he hit the victim a few times, but at trial denied actually hitting the victim and claimed to have only swung at the victim two times. It

was undisputed that the other individuals inflicted many of the victim's injuries. *Davis*, 213 Ill. 2d at 474.

¶ 61 Based on the evidence presented at trial, the court in *Davis* concluded that the defendant's conduct was not an act inherent in the victim's murder. In other words, the same evidence was not used to prove both the predicate felony of mob action and the murder. The court stated that "to convict defendant of mob action, it was not necessary to prove that defendant struck [the victim], much less performed the act that caused the killing." The *Davis* court concluded that the predicate felony involved conduct with a felonious purpose other than the conduct that killed the victim. Accordingly, mob action properly served as the predicate felony for defendant's felony murder conviction. *Davis*, 213 Ill. 2d at 474.

¶ 62 Similarly in *Davison*, the evidence showed that a few hours before the murder occurred the victim fought with one of defendant's co-offenders over stolen money. *People v. Davison*, 236 Ill. 2d 232, 239 (2010). It was undisputed that sometime after the fight, defendant and his co-offenders searched for and pursued the victim. The defendant threw a bat at the victim during the pursuit. He also engaged in some sort of physical interaction with the victim during the pursuit, causing the victim to fall and drop a knife. The defendant stabbed the victim only toward the end of the pursuit. After stabbing the victim, the defendant retreated and watched his three co-offenders repeatedly stab and hit the victim with a bat. *Davison*, 236 Ill. 2d at 242. The court found that the evidence "supported a conclusion that [the] defendant acted with other individuals to use force or violence to disturb the public peace, completing the predicate felony of mob action, before the end of the aggression that eventually resulted in the victim's death." *Id.*

¶ 63 Our supreme court in *Davison* further found that the defendant did not claim he intended to kill the victim. The evidence showed that he participated in the group pursuit and use of force against the victim. Consequently, our supreme court concluded that the "defendant acted with the felonious purpose to commit mob action." *Davison*, 236 Ill. 2d at 243.

¶ 64 As in *Davis* and *Davison*, evidence apart from the actual murder supported defendant's conviction for mob action in the case at bar, and defendant acted with the independent felonious purpose to commit mob action.

¶ 65 The evidence showed that while at school on the day in question, defendant learned of a possible fight that was going to happen after school. He was specifically asked if he was going to participate in it. He took a ride home from school with B.J. and Eugene, two kids from the Gardens. Defendant got out of the car while at a stop light in the Ville when he knew there could be a potential fight. Thereafter, a fight broke out between kids from the Ville, including the victim, and kids from the Gardens, including defendant. Defendant is shown on the video running towards two kids who are fighting, one from the Ville and one from the Gardens, and appears to take a swing at the kid from the Ville. Defendant then runs off camera with other kids from the Gardens. The next time he is seen, he is standing by the entrance of the alley with other Gardens kids. The victim is hit with a board by someone from the Gardens, and he falls to the ground. Defendant then runs up to the victim and kicks him in or near the head which causes the victim's head to move. He then turns around and jumps up with both feet in the air and lands on or near the victim's head, which causes the victim's body to convulse. Defendant runs away with

other kids from the Gardens. We are unpersuaded by defendant's contention that he was acting alone and in self-defense.

¶ 66 The evidence shows that defendant participated in the group use of force against the victim. The jury found that defendant acted together with one or more persons without authority of law; knowingly disturbed the public peace by the use of force or violence; and at least one of the participants in the mob action violently inflicted injury to the victim. See 720 ILCS 5/25-1(a)(1) (West 2002). Consequently, we conclude that defendant acted with the independent felonious purpose to commit mob action. See *Davison*, 236 Ill. 2d at 243.

¶ 67 Moreover, unlike *Morgan* and *Pelt*, defendant's conduct constituting mob action was neither inherent in, nor arose from, the murder itself. Instead, the evidence established that the victim died as a result of blunt head trauma, rather than any particular injury inflicted by defendant alone. The video clearly shows other people, besides defendant, inflicting harm upon the victim. Accordingly, as in *Davis* and *Davison*, we conclude that the charged predicate felony of mob action properly formed the basis of defendant's felony-murder conviction. See *Davis*, 213 Ill. 2d at 475, and *Davison*, 235 Ill. 2d at 243 (both cases allowing felony murder charges predicated on mob action involving the defendant's participation in fatal group attacks on the victim when there was no clear evidence that the defendant caused the fatal injuries).

¶ 68 In reaching our conclusion, we also carefully considered whether the State improperly used felony murder charges to avoid the burden of proving an intentional or knowing murder. See *Davison*, 236 Ill. 2d at 244 (citing *Morgan*, 197 Ill. 2d at 447; *Pelt*, 207 Ill. 2d at 441; *Davis*, 213 Ill. 2d at 473-74).

¶ 69 B. *Ex Parte* Communication

¶ 70 Defendant's next contention on appeal is that the trial judge failed to disclose a note that it received from the jury, in violation of defendant's Sixth Amendment right to participate in every stage of his trial. A criminal defendant has a constitutional right to a public trial, and to appear and participate in person and by counsel at all proceedings which involve his substantial rights (U.S. Const., amend. VI; Ill. Const. 1970, art. I, 8; Ill. Rev. Stat. 1987, ch. 38, par. 115-4; *People v. Mallett*, 30 Ill. 2d 136, 141-42 (1964)), so that he may know what is being done, make objections, and take such action as he deems best to secure his rights and for his protection and defense. *People v. Childs*, 159 Ill. 2d 217, 227 (1994). An *ex parte* communication between the judge and the jury after the jury has retired to deliberate, except one held in open court and in defendant's presence, deprives defendant of those fundamental rights. *Childs*, 159 Ill. 2d at 227.

¶ 71 The record here reveals that after deliberating for over three hours, the jury indicated that it had reached a verdict. The jury was brought out, and the court asked the foreperson if the jury had reached a verdict. The foreperson responded in the affirmative. The judge asked the foreperson to hand the verdict to the deputy sheriff. The trial judge then stated, "I am in receipt of a verdict. It reads as follows: 'We, the jury, find the defendant *** guilty of first degree murder.' " The trial court noted that the verdict had been signed by all of the jurors and asked defense counsel if he wished to poll the jurors. Defense counsel then asked each juror if that was his or her verdict, to which each juror responded in the affirmative.

¶ 72 Apparently, several weeks later, defense counsel found a note in the court file from members of the jury. The note, which had been signed by seven jurors, read:

"Dear Judge Ford,

We the jurors ask that you show mercy in sentencing [defendant]."

¶ 73 Defense counsel raised the issue of the note at the hearing on defendant's motion for a new trial, and the trial court stated that the note had been "handed up along with the verdict" after deliberations. The trial court placed the noted in the court file that day, where the note had remained available to the public.

¶ 74 Defendant contends that the trial court acted improperly by not disclosing the note at the time of receipt, thus depriving him of his right to be present at every aspect of his trial. Specifically, defendant claims that when the trial court failed to disclose the note it received from the jury, it deprived him of the ability to poll the jurors on whether the guilty verdict would have been rendered had the jurors known that the trial judge did not have to grant their request to show mercy in sentencing. Defendant further contends that had the jurors been instructed that the court was not bound by their request to show mercy in sentencing, it might have changed a vote or two.

¶ 75 Defendant relies heavily on the United States Supreme Court case of *Rogers v. United States*, 422 U.S. 35 (1975). In *Rogers*, after the jury had been deliberating for two hours, it sent out a note asking the trial judge whether he would accept a verdict of "Guilty as charged with extreme mercy of the Court." Without notifying the defendant or his counsel, the court instructed the marshal "to advise the jury that the Court's answer was in the affirmative." Five minutes later, the jury returned a verdict of guilty with the indicated recommendation of extreme mercy. *Rogers*, 422 U.S. at 36-37.

¶ 76 The Supreme Court in *Rogers* noted that generally, "a recommendation of leniency made

by a jury without statutory authorization does not affect the validity of the verdict and may be disregarded by the sentencing judge." 422 U.S. at 38 (citing *Cook v. United States*, 379 F. 2d 966, 970 (5th Circuit 1967)). However, an exception to this general rule arises "where the circumstances of the recommendation cast doubt upon the unqualified nature of the verdict." *Id.* In *Rogers*, the Supreme Court found that the fact that the jury, which had been deliberating for almost two hours without reaching a verdict, returned a verdict of "guilty with extreme mercy" within five minutes of being told " ' unconditionally and unequivocally that it could recommend leniency,' " strongly suggested that the trial judge's response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise. *Rogers*, 422 U.S. at 40 (citing *United States v. Glick*, 463, F. 2d 491, (2nd Circuit 1972)). The Court went on to state that defense counsel did not learn of the "court's communication" until after the fact, and the only indication that the "court had unilaterally communicated with the jury comes from the note itself." *Id*. at 41.

¶ 77 We find the circumstances in *Rogers* to be inapposite to the case at bar. Here, the guilty verdict was reached before the jury sent a note to the trial court. The note was handed to the trial judge at the same time as the guilty verdict was handed to him. The jury did not ask for a response from the trial court regarding leniency during deliberations, and it did not indicate that its finding of guilt was based on an understanding that the trial court would show leniency. Moreover, the impropriety that the Supreme Court noted on the part of the trial court was not present in the case at bar. The Court in *Rogers* emphasized that the trial judge's response could

have induced certain jurors into reaching a guilty verdict if they were under the impression that the recommendation would be taken under advisement. Here, there was no question posed to the trial court, and no response given, before the guilty verdict was reached. Thus, it cannot be inferred that the trial court induced any jurors to make a decision that they otherwise would not have made. Rather, the jurors indicated that they had reached a verdict before the trial judge had even seen the note.

¶ 78 Furthermore, our supreme court in *Childs* stated that "the jury verdict will not be set aside where it is apparent that no injury or prejudice resulted from a *communication to the jury* either by the trial court or a third person outside the presence of the defendant and his counsel." (Emphasis added). *Childs*, 159 Ill. 2d at 227. Here, there was no communication whatsoever made by the trial court to the jury which indicated that it was going to grant the juror's request to show mercy. We therefore find that there was no improper *ex parte* communication on the part of the trial court in the case at bar, and thus defendant was not deprived of his Sixth Amendment right to be present at trial. Because there was no *ex parte* communication, we need not consider whether the State met its burden of proving the *ex parte* communication was harmless. See *Childs*, 159 Ill. 2d at 227.

¶ 79 C. Police Report

¶ 80 Defendant's next argument on appeal is that the trial court refused to allow the jury to view a police report during deliberations, which deprived him of his right to present a defense and to confront the witnesses against him. Defendant concedes that police reports are generally hearsay and therefore not admissible as evidence, but nevertheless contends that where hearsay

testimony bears persuasive assurances of trustworthiness, and is critical to the accused's defense, its exclusion deprives the defendant of a fair trial in accord with due process.

¶ 81 Defendant argues that T-Awanda Piper's testimony stating that she viewed the fight from inside Agape, was in conflict with Detective Sullivan's police report which indicated that Piper told him she was on her way outside of Agape when the fight broke out. Defendant claims that Piper was a "key eyewitness" for the State, as she was the only eyewitness that had not been involved in the fight. Defendant argues that her prior inconsistent statement that she made to police undermined her credibility and should have gone to the jury during deliberations. We reject this argument.

¶ 82 At the close of trial, the parties and the trial court had a discussion regarding what evidence could go back with the jury for deliberations. Defense counsel argued that the police report in question should go back because, "the hearsay rule is designed to protect the defendant, not the State." The trial court denied the request stating, "I don't send police reports back. *** [Y]ou perfected your impeachment on the witness stand."

¶ 83 The decision as to whether evidentiary items should be taken to the jury room rests with the discretion of the trial court, whose decision will not be disturbed absent the showing of an abuse of discretion to the prejudice of the defendant. *People v. Williams*, 97 Ill. 2d 252, 292 (1983) (citing *People v. Greer*, 79 Ill. 2d 103 (1980)). There was no abuse of discretion here, as the police report was hearsay evidence. See *People v. Shinohara*, 374 Ill. App. 3d 85, 113 (2007) (police reports are generally inadmissible as substantive evidence because of the rule against hearsay).

¶ 84 Defendant maintains, however, that one of the primary reasons for the hearsay rule is to protect defendants against serious confrontation clause concerns. See *People v. Gray*, 378 Ill. App. 3d 701, 710 (2008) ("strict requirements imposed on hearsay statements which inculpate the defendant were designed to satisfy confrontation-clause concerns, but the confrontation clause protects defendants, not prosecutors.") Therefore, defendant argues, relying on *Chambers v. Mississippi*, 410 U.S. 284 (1972), that where the hearsay testimony bears persuasive assurances of trustworthiness and is critical to the accused's defense, its exclusion deprives the defendant of a fair trial. Defendant maintains that the police report impeached Piper's testimony and that the exclusion of it from jury deliberations deprived him of a fair trial.

¶ 85 In *Chambers*, the defendant was prevented under Mississippi's evidentiary rules from cross-examining a witness who had confessed to the crime, but subsequently recanted, and from introducing testimony of people who had heard the witness' confessions. The United States Supreme Court reversed the conviction because the indicia of trustworthiness of the witness' confession were so overwhelming that exclusion of evidence of the confession violated fundamental fairness. Each confession the witness had made was corroborated by other evidence, and the witness had given a sworn confession. *Chambers*, 410 U.S. at 287-301.

¶ 86 *Chambers* identified four factors to help determine the reliability of a hearsay statement: (1) the statement was spontaneously made to a close acquaintance shortly after the crime occurred; (2) the statement is corroborated by some other evidence; (3) the statement is self-incriminating and against the declarant's interests, and (4) there was adequate opportunity for cross-examination of the declarant. *Id.* at 300-01. The question to be considered in deciding the

admissibility of such an extrajudicial statement is whether it was made under circumstances which provide considerable assurance of its reliability by objective indicia of trustworthiness. *People v. Tenney*, 205 Ill. 2d 411, 435 (2002).

¶ 87 We find that the statement Piper purportedly made to police later that evening at Christ Hospital, which was contained in a police report, was not the type of statement contemplated by *Chambers*. It was not an excited utterance made to an acquaintance, it was not against Piper's interest to make, and it was not corroborated by other evidence.

¶ 88 Additionally, even if, *arguendo*, the trial court's exclusion of the police report was erroneous, the error was harmless beyond a reasonable doubt. Defendant contends that the police report would have undermined Piper's credibility, but as the trial court noted, defense counsel perfected his impeachment while she was on the witness stand, and while Detective Sullivan was on the witness stand. Moreover, even if defense counsel had not perfected Piper's impeachment, her testimony was not as crucial to this case as defendant would like us to believe. The other eyewitness testimony, of people involved in the fight, as well as the video evidence, was more than overwhelming to convict defendant of felony murder. In short, the jury correctly found defendant guilty of felony murder, and there is nothing contained in the police report which would have affected this outcome, even if it impeached Piper. Accordingly, the trial court did not abuse its discretion in excluding the police report from jury deliberations.

¶ 89 D. Jury Instructions

¶ 90 Defendant's next contention is that the trial court erred when it refused to instruct the jury on the definitions of "intent" and "knowledge-willfulness." Defendant argues that the

instructions given on mob action were insufficient to convey the correct burden of proof to the jury in light of the facts of this case, and in light of the State's closing argument. The State responds that the words "intent" and "willfulness" did not appear anywhere in the jury instructions and thus did not need to be defined; and that "knowingly" appeared only once, and was not ambiguous.

¶ 91 The function of jury instructions is to convey to the jurors the correct principles of law applicable to the facts so that they can arrive at a correct conclusion according to the law and the evidence. *People v. Fuller*, 205 Ill. 2d 308, 343 (2002) (citing *People v. Williams*, 181 Ill. 2d 297, 318 (1998)). Fundamental fairness requires the trial court to give correct instructions on the elements of the offense in order to insure a fair determination of a case by a jury. *Fuller*, 205 Ill. 2d at 344; *Williams*, 181 Ill. 2d at 318. We review a trial court's decision on whether to give a jury instruction on an abuse of discretion standard. *People v. Jones*, 175 Ill. 2d 126, 132 (1887); *People v. Mohr*, 228 Ill. 2d 53, 66 (2008). A trial court abuses its discretion if the jury instructions are not clear enough to avoid misleading the jury. *Mohr*, 228 Ill. 2d at 66.

¶ 92 In the case bar, Illinois Pattern Jury Instruction 19.03, which defined mob action, was given to the jury:

> "A person commits the offense of mob action involving the violent infliction of injury when he, acting together with one or more persons and without authority of law, *knowingly* disturbs the public peace by the use of force or violence; and one of the participants in the mob action violently inflicts injury to the person of another." (Emphasis added.)

¶ 93 The word "intent" does not appear anywhere in this jury instruction on mob action. Nevertheless, defense counsel requested that the trial judge give Illinois Pattern Jury Instructions 5.01A and 5.01B, defining "intent" and "knowledge-willfulness." The requested jury instructions read:

¶ 94 "5.01A Intent

A person [(intends) (acts intentionally) (acts with intent)] to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct."

5.01B Knowledge - Willfulness

[1] A person [(knows) (acts knowingly with regard to) (acts with knowledge of) the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

[2] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct.

[3] [Conduct performed knowingly or with knowledge is performed willfully.]"

¶ 95 Regarding IPI 5.01A, defining intent, the trial judge stated that the instruction related more readily to the issue of volitional murder or intentional murder. The trial court stated that

felony murder "doesn't require any intent." Defense counsel then stated that "intent is relevant to mob action," to which the court responded, "I do agree." The trial judge then stated that he did not usually give the instruction on intent because it is generally a word that "doesn't need re-definition." The trial court stated that in terms of IPI 5.01B, "knowing" was a word that "someone could know in the regular course of life," and it was not going to be given. The court then stated that if he got a request from the jury he would give them the definitions. He further stated that he was confident that they would understand the meaning of the words without additional direction.

¶ 96 Defendant now contends that it was an abuse of the trial court's discretion to refuse to send back the requested instructions because the instructions given were insufficient to convey the correct law to the jury. Defendant argues that the State was required to prove mob action, the underlying felony, and that a requirement of mob action is knowing and intentional action.

¶ 97 Here, the word "intent" did not appear in the jury instruction for mob action, and thus did not need to be defined. Additionally, the trial judge did not abuse its discretion in finding that "knowingly" was a general term and did not need to be defined. Where terms employed in instructions are of general use and are not necessarily technical terms, they need not be defined in the absence of anything in the charge to obscure their meaning. *People v. Johnson*, 98 Ill. App. 3d 228, 234 (1981). "Generally speaking, a jury need not be instructed on the term 'knowingly' because that term has a plain meaning within the jury's common knowledge." *People v. Sanders*, 368 Ill. App. 3d 533, 537 (2006) (citing *People v. Powell*, 159 Ill. App. 3d 1005, 1013 (1987)). However, the trial court has a duty to instruct the jury further when clarification is requested,

when the original instructions are insufficient, or when the jurors are manifestly confused. *Sanders*, 368 Ill. App. 3d at 537 (citing *People v. Reid*, 136 Ill. 2d 27, 39 (1990)).

¶ 98 Moreover, we note that clarification was not requested by the jurors, there is no indication that the original instructions were insufficient, and there is no indication that the jurors were manifestly confused. Accordingly, we find that the trial court did not abuse its discretion in refusing to send back jury instructions on "intent" and "knowledge - wilfulness."

¶ 99 Defendant maintains that "several" circumstances in this case suggest that instructions defining knowledge and intent were required. First, because whether defendant committed the underlying offense of mob action was a central issue to the case, and second, because during closing argument the State "obscured" the fact that intent was an element of mob action by stating "[i]ntent has nothing to do with it." We are unpersuaded by defendant's assertions. The jury instruction given on mob action adequately described the offense, and we find that no further instruction was needed. If the jury was confused about the definition of "knowingly," which appeared in IPI 19.03, then it could have requested clarification. We find nothing to suggest that the jurors were confused in this case, and thus conclude that the trial court did not abuse its discretion in refusing to tender the requested definitions. See *Mohr*, 228 Ill. 2d at 66.

¶ 100 Even if we were to find that the trial court abused its discretion in refusing to instruct the jury on "intent" and "knowing-willfulness," we would find that any error in the felony murder instruction was harmless. See *People v. Jones*, 81 Ill. 2d 1, 9-10 (1979) (an erroneous intent instruction does not warrant reversal where intent to kill is evident from the circumstances; the question was not one of intent, but rather if defendant was one of the perpetrators). It is clear to

us in the case at bar that the addition of the definitions requested by defense counsel in the jury instructions would not have altered the jury's deliberation, and that error, if any, was harmless. See *People v. Bryant*, 123 Ill. App. 3d 266, 274 (1984).

¶ 101 E. Sentencing

¶ 102 Defendant's final contention on appeal is that the trial court abused its discretion by denying defendant's motion to reconsider its sentence of 32 years. Defendant claims that the trial court only considered aggravating factors in sentencing defendant, and that the resulting sentence was excessive. Defendant contends that his 32-year sentence should be vacated, and that the minimum 20-year sentence should be imposed instead.

¶ 103 "It is well established that the trial court's judgment as to the appropriate punishment is entitled to great deference." *People v. Illgen*, 145 Ill. 2d 353, 379 (1991) (citing *People v. Godinez*, 91 Ill. 2d 47, 55 (1982)). The trial court is in the best position to determine an appropriate sentence because of its ability to hear evidence and view witnesses. *People v. Phillips*, 265 Ill. App. 3d 438, 449 (1994). The imposition of a sentence is a matter of judicial discretion, and "[a] sentence may not be altered absent a showing that the punishment constituted an abuse of discretion." *Illgen*, 145 Ill. 2d at 379; see also *Phillips*, 265 Ill. App. 3d at 449.

¶ 104 "Moreover, a sentence which is within the statutory guidelines will not be disturbed upon review unless it is grossly disproportionate to the nature of the offense." *Phillips*, 265 Ill. App. 3d at 449 (citing *People v. Moore*, 178 Ill. App. 3d 531, 542 (1988)). The offense of first degree murder is punishable by a prison term of not less than 20 years and not more than 60 years. 730 ILCS 5/5-4.5-20 (West 2010). Defendant was sentenced to 32 years' incarceration, which falls

squarely within the sentencing guidelines established in the statute.

¶ 105 The record clearly reflects that the trial court considered aggravating and mitigating factors before imposing the sentence. The trial court stated that it would consider all the evidence presented at trial as well as "the evidence offered in aggravation, mitigation, which included the victim impact statement." The trial judge expressed his heartfelt sorrow to the victim of the family and then stated that he considered "the family of [defendant]. I can see that [defendant] had a lot going on in his life other than those few minutes on the videotape. I will consider that along with all the mitigating factors in this case." The trial judge then stated that he was also considering "the impact of incarceration, the arguments of the attorneys in this case, and what [defendant] said here a few moments ago." He further stated that he hoped and prayed that whatever sentence he gave that day, would make some of the young men and women out there understand that they could not get involved in these incidents. Accordingly, it is clear to us that the trial judge considered both factors in aggravation and mitigation when sentencing defendant. When both aggravating and mitigating factors are considered, it cannot be said that the trial court abused its discretion in imposing a 32-year term of imprisonment. See *Illgen*, 145 Ill. 2d at 379.

¶ 106 Defendant nevertheless maintains that his sentence should be vacated because it is in excess of co-defendant Eric Carson's 26-year term, and that the difference constitutes disparate treatment in violation of Illinois law. The general rule is that each defendant is to be sentenced as an individual. *People v. Ralon*, 211 Ill. App. 3d 927, 958 (1991) . "Fundamental fairness and respect for the law require that defendants similarly situated may not receive grossly disparate treatment." *People v. Kline*, 99 Ill. App. 3d 540, 553 (1981), *aff'd in part and rev'd in part*, 92

Ill. 2d 490 (1982). Although an arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated is impermissible, the mere fact that one defendant receives a substantially longer sentence does not, by itself, establish a violation of fundamental fairness. *Ralon*, 211 Ill. App. 3d at 958. A disparate sentence imposed upon a codefendant is only justified by "a more serious criminal record [citation] or greater participation in the offense." *Kline*, 99 Ill. App. 3d at 553 (citing *People v. Martin*, 81 Ill. App. 3d 238, 245 (1980)). We note, however, that Carson pled guilty to the offense, and that "[i]t is absolutely acceptable for a defendant who pleads guilty and saves the State the expense of proving his culpability to be sentenced to a lighter sentence than he may have received if he had proceeded to trial." *Banks*, 241 Ill. App. 3d at 985.

¶ 107 Additionally, defendant's participation in the offense was not the same as that of Carson's. During sentencing, the trial judge explained defendant's actions as compared to Carson's by saying:

> "I want to identify a factual distinction for [defendant's] circumstance than that of Mr. Carson right now so there can be no ambiguity about it. When I saw Mr. Carson, I saw a person who admitted their guilt, took responsibility and was sentenced to 26 years.
>
> But the time that Mr. Carson did the injury to [the victim], [the victim] was still ambulatory. I don't think it's a stretch of the imagination to point out the fact that [the victim] had entered the fray himself on his own volition. But, he was still vertical. He was still standing up.

> It's a distinction between the encounter that [defendant] had with [the victim], which was at a point and time when he had been incapacitated, for him to be horizontal on the ground. If you look at the video, you could see him jump, both feet in the air, above [the victim] and then land.
>
> ***
>
> Quite frankly, I don't think I could consider Mr. Carson's background and [defendant's] lack of background as being in any way a factor in sentencing. I have considered the fact that [defendant] doesn't have a background. I'm considering the words that he said today."

¶ 108 As can be seen by the above statements, the trial judge considered the fact that Carson had pled guilty, and considered the different roles that each defendant played in the offense, when sentencing defendant. We find that there was no abuse of discretion.

¶ 109 Defendant 's reliance on *Banks* does not convince us otherwise. In *Banks*, the defendant received 20 years' imprisonment for armed robbery, while his three codefendants were sentenced to 7 years each. Each of the men equally participated in the beating of the robbery victim, defendant's criminal record was not as extensive as those of the other three men, and the evidence introduced in mitigation was much more detailed and illustrated greater rehabilitative potential than that introduced on behalf of the other codefendants. *Banks* is inapposite to the case at bar, where Carson pled guilty, defendant's participation was not the same as that of Carson's, and the difference in sentencing was not gross or arbitrary. We uphold defendant's 32-year sentence.

¶ 110 III. CONCLUSION

¶ 111 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 112 Affirmed.