2013 IL App (1st) 112265-U

SECOND DIVISION
October 29, 2013

No. 1-11-2265

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	No. 08 CR 16129-04
	)	
ANTWAUN THOMPSON,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.

Presiding Justice Quinn and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's felony murder conviction was proper where the predicate offense of mob action was not inherent in the offense of murder and was committed with an independent felonious purpose. Trial counsel was not ineffective for failing to request jury instructions on independent felonious purpose and causation. The trial court did not err in refusing to instruct the jury on involuntary manslaughter and second degree murder. Defendant was not denied his right to prepare a defense when the trial court allowed the State to dismiss the intentional and strong probability murder counts. Defendant's 25-year sentence is not excessive.

¶ 2 Following a simultaneous but severed jury trial with co-defendant Maurice

Evans, defendant Antwaun Thompson was convicted of felony murder (720 ILCS 5/9-1(a)(3)

(West 2008)) and was sentenced to 25 years' imprisonment. On appeal, defendant argues: (1) his conviction must be reversed because the predicate felony of mob action was inherent in the murder and was not committed with an independent felonious purpose; (2) he received ineffective assistance of counsel; (3) the trial court erred in refusing his instructions for involuntary manslaughter and second degree murder; (4) he was denied his right to a fair trial when the trial court allowed the State to dismiss the intentional and strong probability murder counts leaving only one count of felony murder; and (5) his 25-year sentence is excessive. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant and his co-defendants Maurice Evans, Clint Johnson and Martell Johnson[1], were charged by way of indictment with two counts of first degree murder and one count of felony murder for their role in the death of Daniel McKenzie. McKenzie was beaten as he lay on the edge of the subway platform and slipped over the edge onto an electrified train track and died. Two days prior to trial, the State dismissed the first two counts against defendant, leaving only the count of felony murder predicated on mob action.

¶ 5 Defendant and co–defendant Evans were tried in simultaneous but severed jury trials. Michael McKenzie, Daniel's brother, testified that at about 2:00 a.m. on July 27, 2008, he and Daniel arrived at the 22nd Street CTA Red Line station, where they encountered his friend

[1]Maurice Evans, Clint Johnson and Martell Johnson are not parties to this appeal. We affirmed co-defendant Maurice Evan's conviction, but ordered his mittimus to be corrected to reflect the correct number of days of presentence credit in People v. Maurice Evans, No. 1-11-1921 (October 29, 2013) (unpublished order pursuant to Supreme Court Rule 23)

whose nickname was Rob Base. When the northbound train arrived, the three men boarded the train.

¶ 6 On the train, Michael noticed co-defendant Evans, who he described as a shirtless man with braids, standing toward the front of the car.[2] Michael, his brother and Rob sat by the doors on one side of the aisle. There were three other men on the train. As the train began to move, Evans approached Michael and asked him "who he be." Michael understood that to mean what gang was he affiliated with. Although he used to be affiliated with the Gangster Disciples, he replied that "they wasn't on that" and they were just trying to get somewhere. Evans told Michael he was "cool" and could sit down. Michael remained standing. Evans then approached Daniel and asked him the same thing. Michael responded that Daniel was his brother and "we ain't on that." Evans persisted and "got in [Daniel's] face." He asked Daniel "who he be" and put his hands in Daniel's face. Daniel said, "[m]an, get your hands out of my face." Evans continued to put his hands in Daniel's face. Daniel pushed him away so Evans "stole on him," meaning he swung at Daniel and hit him in the jaw.

¶ 7 Daniel stood up but two men came and pushed him toward the rear door. Michael took off his belt. Another man held Michael back so that Michael could not help Daniel. Michael saw Daniel sitting down while the other men were hitting him in the face. Daniel's attackers stopped. Evans swung and hit Rob in the face. Rob pulled out a box cutter and cut Evans in the chest. Two of the men who were with Evans took off their belts. Rob then took his

[2]On appeal, defendant identifies this person as co-defendant Evans.

off and so did Michael. "Everybody got to swinging belt buckles."

¶ 8 When the train stopped at Roosevelt, Michael, Daniel and Rob got off the train car. The train remained in the station for longer than normal. They did not immediately leave the platform because they were exchanging words with the four men still on the train car. When Michael, Daniel and Rob were about to leave the platform, the four young men got off of the train and chased them. As they were running, Daniel stopped to pick up a garbage can top. When he got to street level, he did not see his brother but left the scene. Michael testified that he never went to the police or talked to the State until the day before he testified in court. He explained that he was afraid because he "got a record."

¶ 9 Michael identified photos of each of the four young men who assaulted him, Daniel and Rob. On cross-examination, Michael testified that as he, Daniel and Rob got onto the train, Rob said, "[l]et's get on this car with these gangbangers."

¶ 10 A video taken by the CTA security cameras was played for the jury. The first clip of the video showed Michael, Daniel and Rob exiting the train car. They are looking behind them as they back away from the train car. The second clip shows defendant and his companions running at the three men from behind. Michael and Rob run straight ahead but Daniel runs to one side and pauses to try to defend himself with a garbage can lid. The four men catch up with him and begin to swing at him. The next clip shows what occurred from a further distance. It shows Daniel being pursued by defendant and his companions. They run him down, beating him with belts until, according to defendant's brief, Daniel either jumped or fell over the edge of the

platform onto the tracks.[3] A later clip shows the beating zoomed in for a much closer view.

¶ 11 Alexander Hammond testified that he was employed as a laborer. He was convicted of aggravated unlawful use of a weapon in 2002. On July 27, 2008, at about 2:00 a.m., Hammond boarded the red line train at 79th Street. A group of four young men boarded the train at 47th Street and sat in the front of the car. Hammond later identified the four men as defendant, Maurice Evans, Clint Johnson, and Martell Johnson. Hammond could hear the men having a conversation about a family dispute. The group told Evans that he needed to calm down. When the train stopped at 22nd Street, three older men, including Daniel McKenzie, boarded the train in the same car and sat down by the rear doors.

¶ 12 Hammond heard the four younger men say, "[y]ou know what? I'm tired of all this talk. Let's see." The four younger men approached the three older men and asked one of them, a man wearing a green suit, "[h]omie, what you be?" Hammond understood that to be a question about the man's gang affiliation. The man in the green suit answered, "[h]uh? Where that come from? What that got to do with anything? What I be?" When the man in the green suit did not answer the question, "they all just emerged on him." The younger men said, "[o]h, okay. You GD, huh. Yeah, we at war with GD's. We New Breeds." They were "touching on the guy." One of the older men stood up and said, "hey, that's my brother." That is when Hammond got up and went to the next car.

¶ 13 Even though he was in the next car, Hammond could see the men shoving and

[3]The State, in it's brief, describes Daniel as "dropping off the platform, losing his balance, and falling onto the third rail."

punching each other. They were swinging their belts at each other. When the train stopped at Roosevelt, Hammond got off the train. The group of older men got off the train also, followed by the group of younger men. As the older men got off, they were backing off of the train and swinging their belts trying to keep the group of younger men on the train. The group of older men eventually walked away. The four younger men said, "man, fuck that. They think we some punks. Let's get their ass," and then rushed the older men.

¶ 14 As he was getting out of the train car, he saw the younger men run past. Hammond went back into the train car to look for his bag and when he came out, he saw one of the older men lying on the track. The young men were saying, "who else down here GD? You can get some, too. Who else wants some?" They eventually left and went up the escalator. Hammond spoke with a CTA employee and then went up the escalator. There, he encountered police officers and went back down with them to the platform. Hammond went to the police station the next day where he viewed some photographs. He recognized one of the men in the photographs as one of the younger men who had been on the train. He later returned to the police station and viewed a line-up. He identified the same individual he earlier identified in the phonographs.

¶ 15 Michelle Martinez, a paramedic with the Chicago fire department, testified that she and her partner were called to the red line station at Roosevelt and State on July 27, 2008, at approximately 2:17 a.m. There, she and her partner found Daniel McKenzie lying face down on the third rail of the tracks. His body was removed by a fireman and was brought to Martinez. At the time, McKenzie was unconscious and was gasping for air. He was taken to Northwestern hospital. A report generated by Martinez indicated that a crack pipe was found in McKenzie's

pants pocket.

¶ 16 Officer Thomas Pierce, a forensic investigator for the Chicago police, found blood spatter evidence on the platform and bodily fluid along the southbound track. It was determined that the blood found on the platform was that of co-defendant Martell Johnson.

¶ 17 Doctor Mitra Kalelkar of the Cook County medical examiner's office, testified about an autopsy performed by another doctor in the Cook County medical examiner's office, Hisham Hashish. Doctor Hashish found a burn mark with singeing of the hair on the left temporal region of Daniel's head and another large burn mark on the back of his head. Daniel also had electrical burns on his left shoulder and on his abdominal wall. The burn on his shoulder penetrated almost to the bone. Daniel also had hemorrhages in the muscles of his neck and under his scalp on the right side, which were consistent with blunt trauma. Doctor Kalelkar opined, after reviewing Doctor Hashish's report, that the cause of death was electrocution and complications from burns caused by electrocution and that the manner of death was homicide.

¶ 18 The defense presented evidence by way of stipulation. The parties stipulated, among other things, that co-defendant Maurice Evans was taken by ambulance to Stroger Hospital about 2:15 a.m. on July 27, 2008. He was treated for two lacerations, one on his left clavicle and one on his back. The parties also stipulated that if called to testify, Vincent Akers, an attorney associate of defense counsel, would testify that he was one of the attorneys who participated in the interview of Michael McKenzie on March 10, 2011. During the interview, Michael stated that once they were on the train car, Rob Base was "saying things about Larry Hoover." In another stipulation, the parties agreed that if called to testify Chicago police officer

Al-Amin would testify that he was the first officer on the scene and interviewed Alexander Hammond. During that interview, Hammond never told officer Al-Amin that he heard one of the young men say, "fuck that, they think we [sic] motherfucking punks, let's get their ass." He would also testify that Hammond never told him that he saw four men standing on the opposite side of the platform. Officer Al-Amin would further testify that Hammond never told him that he heard one of the young men say anything about an argument with a family member and never told the officer that the four young men touched one of the men's face on the train. The parties further stipulated that if called to testify, police officer Dwan, Officer Al-Amin's partner, would testify to the same thing.

¶ 19 The parties also stipulated that if called to testify, Chicago police detective Notting would testify that he interviewed Hammond on July 28, 2008. Detective Notting would testify that Hammond did not tell him that he heard one of the young men say "fuck that, they think we [sic] motherfucking punks, let's get their ass." Hammond also never said that the fourth younger man approached an older man and was touching his face on the train. In another stipulation, the parties agreed that if called to testify, Barbara Dawkins, an assistant State's attorney would state that she also interviewed Hammond and at no time did he tell her that he saw the four younger men go up to an older man and touch his face.

¶ 20 After hearing all of the evidence, the jury found defendant guilty of felony murder. Defendant was sentenced to 25 years' imprisonment. It is from this judgment that defendant now appeals

¶ 21 ANALYSIS

¶ 22 Independent Felonious Intent

¶ 23 Defendant argues that his felony murder conviction must be reversed because the predicate felony, mob action, was inherent in the murder of Daniel McKenzie and was not committed with independent felonious purpose.

¶ 24 In this case, defendant was charged with felony murder predicated on mob action. An individual commits felony murder if, while "attempting or committing a forcible felony other than second degree murder," a death occurs. 720 ILCS 5/9-1(a)(3) (West 2008). Mob action is considered a forcible felony and can serve as a predicate offense for felony murder. 720 ILCS 5/2-8 (2008). Mob action is defined as "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). The question of whether mob action improperly served as the predicate forcible felony of a first-degree felony murder conviction is reviewed *de novo*. *People v. Davison*, 236 Ill. 2d 232, 239 (2010) (citing *People v. Pelt*, 207 Ill. 2d 434, 439 (2003)).

¶ 25 The purpose of the felony-murder statute is to limit violence caused by the commission of a forcible felony, and therefore subjects an offender to a first-degree murder charge if another person is killed during that felony. *Davison*, 236 Ill. 2d at 239. The prosecution of felony murder "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." *Id*. at 239-40; 720 ILCS 5/9-1(a)(1), (a)(2) (West 2008). Because of the nature of felony murder, our supreme court has expressed its view that a felony murder charge may

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. *Davis*, 213 Ill. 2d at 471. Addressing the potential problem, our supreme court has held 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)).

¶ 26 Defendant cites *Morgan*, 197 Ill. 2d 404 and *Pelt*, 207 Ill. 2d 434, in support of his position that the mob action in this case did not have a felonious purpose independent of the killing. In *Morgan*, the defendant admitted that because he feared for his life, he shot his grandfather, and then his grandmother as she attempted to flee. He was ultimately convicted of felony murder predicated on aggravated discharge of a firearm. *Morgan*, 197 Ill. 2d at 444. On appeal to our supreme court, the defendant argued that his conviction should be overturned because the predicate felony, aggravated discharge of a firearm, was not independent of the killings. *Morgan*, 197 Ill. 2d at 444-45. The *Morgan* court agreed, finding that the offense of aggravated discharge of a firearm could not support a conviction for felony murder because, given the facts of the case, aggravated battery and aggravated discharge of a firearm were inherent in the murders of the defendant's grandparents. *Morgan,* 197 Ill. 2d at 447. The court noted "every [act of] shooting necessarily encompasses conduct constituting aggravated battery, *i.e.*, great bodily harm, as well as conduct constituting aggravated discharge of a firearm, *i.e.*, discharging a firearm in the direction of another. *Id.* at 447. The court concluded that "the

predicate felony underlying a charge of felony murder must have an independent felonious purpose." *Id.* at 458. After a close examination of the facts, the court held that the aggravated battery and aggravated discharge counts "[arose] from and [were] inherent in the act of murder itself," and therefore the trial court erred in instructing the jury on felony murder. *Id*. at 447-48.

¶ 27 In *Pelt*, the defendant threw his infant son against a bedroom dresser, which resulted in the child's death. The defendant was convicted of felony murder predicated on the 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 then conduct which killed the infant." *Id.* at 442.

¶ 28 Defendant argues that similar to *Morgan* and *Pelt*, the predicate felony of mob action in this case did not involve conduct with a felonious purpose other than the conduct that killed Daniel McKenzie. Defendant contends that in this case, just as in *Morgan* and *Pelt*, it was not the mob action that caused the murder, but rather, the murder of Daniel that gave rise to the mob action. Defendant claims "the predicate felony was inherent in the act of killing Daniel because the video evidence consisted of mere seconds where Antwaun and his co-defendant's

(sic) chase Daniel on the platform, briefly beat him (less than five seconds), and Daniel fell on the third rail." Therefore, defendant suggests, the "chas[ing], stri[king] and kill[ing]" was an instantaneous act.

¶ 29 We find *Morgan* and *Pelt* to be factually distinguishable because neither *Morgan* nor *Pelt* dealt with the offense of felony murder predicated on mob action. For that reason, we find *People v. Davis*, 213 Ill. 2d 459 (2004), and *People v. Davison*, 236 Ill. 2d 232 (2010), both of which were decided after *Morgan* and *Pelt* and deal with the issue of whether the offense of mob action can have an independent felonious purpose from murder, to be instructive here.

¶ 30 In *Davis*, the defendant was prosecuted and convicted of felony murder predicated on the forcible felony of mob action. Defendant and a group of 10 to 20 individuals fatally beat the victim after an argument over a stolen television. The defendant admitted to police officers that he hit the victim. However, at trial, the defendant denied hitting the victim but said that he swung at the victim twice. It was undisputed that the other individuals inflicted many of the victim's injuries. *Id*. at 474.

¶ 31 After looking at the evidence presented at trial, the *Davis* court concluded that the defendant's conduct was not an act inherent in the victim's murder. The court stated, "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." *Id.* The court observed that the same evidence was not used to prove both the predicate felony of mob action and the murder, and concluded that the predicate felony involved conduct with a felonious purpose other than the conduct that killed the victim, and found mob action properly served as the predicate felony for defendant's

felony murder conviction. *Id*.

¶ 32 In *Davison*, the evidence established that the victim and one of the defendant's co-defendants had argued over stolen money a few hours before the murder occurred. Sometime after the argument, the defendant and his co-defendants searched for the victim. After locating him, they pursued him on foot and by car. The defendant admitted that he threw a bat at the victim during the pursuit and also engaged in some sort of physical interaction with him, causing the victim to fall and drop a knife. The defendant stabbed the victim. He then watched his three co-offenders repeatedly stab and hit the victim with a bat. The court found that based on the facts, 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*. at 242-43. Consequently, our supreme court concluded that the defendant acted with the felonious purpose to commit mob action. *Id*. at 242-43.

¶ 33 Similar to the evidence in *Davis* and *Davison*, the evidence here showed that after Daniel, Michael and Rob exited the train, walking backwards to keep an eye on their attackers, defendant and his companions ran from the train and pursued them along the platform. While Michael and Rob were able to escape, Daniel was not. When he paused to try to defend himself with a garbage can lid, defendant and his co-defendants began swinging at him. The evidence is clear that defendant was acting with others to use force or violence to disturb the public at this point. During the course of the beating, Daniel fell, went over the edge of the platform and onto the third rail. Daniel's death was clearly the result of the chain of events set into motion by the

defendant's commission of mob action. We find no support for defendant's argument that the offense of mob action cannot be completed in "mere seconds." The video evidence in this case establishes otherwise. Therefore, we find that the offense of mob action had a felonious purpose independent of the murder in this case.

¶ 34 Ineffective Assistance of Counsel

¶ 35 Defendant argues that trial counsel was ineffective for failing to request certain jury instructions. First, defendant argues that counsel was ineffective for failing to request an instruction tasking the jury with deciding whether there was an independent felonious purpose for the predicate mob action independent of the murder. Defendant also faults counsel for failing to request a jury instruction on proximate cause in accordance with Illinois Pattern Jury Instruction, Criminal, No. 7.15A (4th ed. 2000) (hereinafter IPI Criminal 4th No. 7.15A) because causation was an issue in defendant's case.

¶ 36 Under the first prong of the *Strickland* test, defendant must overcome a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). A defendant satisfies the second prong of *Strickland* if he can show that a reasonable probability exists that, had counsel not erred, the trier of fact would not have found him guilty beyond a reasonable doubt. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989). Where the defendant fails to prove prejudice, the reviewing court need not determine whether counsel's performance constitutes less than

reasonable assistance. *Strickland*, 466 U.S. at 697, 699; *People v. Flores*, 153 Ill.2d 264, 284 (1992).

¶ 37 The burden is on the defendant to overcome the strong presumption that defense counsel rendered adequate assistance using reasonable professional judgment pursuant to sound trial strategy. *Strickland*, 466 U.S. at 689-90. It is not enough that trial counsel failed to meet the competence standard; defendant must also show that he was prejudiced as a result. *Strickland*, 466 U.S. at 692-93.

¶ 38 Defendant argues that the issue of whether an independent felonious purpose existed for the predicate forcible felony is a question of fact and therefore, he was entitled to a jury determination of that question. Therefore, counsel was ineffective for failing to request such an instruction. Defendant points out that co-defendant Evan's defense counsel proposed instructions on independent felonious intent. See People v. Evans, No. 1-11-1921 (DATE of FILING) (unpublished order pursuant to Supreme Court Rule 23). Defendant argues that because his counsel failed to do so, her conduct fell below the objective standard of reasonableness.

¶ 39 The failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel only if the instruction was so " 'critical' " to the defense that its omission "den[ied] the right of the accused to a fair trial." *People v. Johnson*, 385 Ill. App. 3d 585, 599 (2008), quoting *People v. Pegram*, 124 Ill. 2d 166, 174 (1988). The omission of a particular instruction must be judged in light of the other instructions given. *Johnson*, 385 Ill. App. 3d at 599. Jury instructions are evaluated in their entirety to determine if they fairly, fully

and comprehensively informed the jury of the relevant law. *Id*. Where a jury is fully instructed as to the law, the defendant cannot establish an ineffective assistance of counsel claim because there is no prejudice to the defendant. See *Id.* at 600.

¶ 40 Defendant was not prejudiced by defense counsel's failure to request an instruction on independent felonious intent in this case. The jury was properly instructed on the law in this case and was given the following instructions:

> "To sustain the charge of first degree murder, the State must prove the following propositions:
>
> First: That the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of Daniel McKenzie; and
>
> Second: That when the defendant, or one for whose conduct he is legally responsible, did so, he was committing the offense of mob action.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." Illinois Pattern Jury Instruction, Criminal, No. 7.02 (4th ed. 2000).
>
> "A person commits the offense of mob action when he, acting together with one or more persons and without authority of law, knowingly disturbs the public peace by use of force or violence." Illinois Pattern Jury Instruction, Criminal, No. 19.01 (4th ed.

2000).

In addition, the jury was instructed,

> "A person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death, he was committing the offense of mob action." Illinois Pattern Jury Instruction, Criminal, No. 7.01 (4th ed. 2000).

The jury was further instructed:

> "To sustain the charge of first degree murder, it is not necessary for the State to show that it was or may have been the original intent of the defendant or one for whose conduct he is legally responsible to kill the deceased, Daniel McKenzie.
>
> It is sufficient if the jury believes from the evidence beyond a reasonable doubt that the defendant and one for whose conduct he is legally responsible combined to do an unlawful act, such as to commit mob action, and that the deceased was killed by one of the parties committing that unlawful act." Illinois Pattern Jury Instruction, Criminal, No. 7.01 (4th ed. 2000).

¶ 41 These instructions, read together, properly apprised the jury that it must find that defendant acted with the felonious purpose of mob action that was independent of a felonious purpose for murder. Therefore, we cannot say that defendant suffered prejudice from counsel's failure to request jury instructions on independent felonious intent. We also find no support for defendant's argument, nor has he provided any, that an independent felonious intent is an element of the offense of felony murder that must be pled and proven to the jury.

¶ 42 Defendant next argues that counsel was ineffective for failing to request an

instruction on proximate cause in accordance with IPI Criminal 4th No. 7.15A because causation was an issue in his case. Defendant claims that the proximate cause instruction was particularly important here because a reasonable juror could have found that neither defendant, nor any of his co-defendants, could have possibly foreseen that Daniel would have jumped or fallen onto the tracks and electrocuted to death.

¶ 43 Indeed, Illinois law provides that a defendant may be charged with murder pursuant to the "proximate cause" theory of felony murder. *People v. Lowery*, 178 Ill.2d 462 (1997).

> "It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act. Thus, there is no reason why the principle underlying the doctrine of proximate cause should not apply to criminal cases. Moreover, we believe that the intent behind the felony-murder doctrine would be thwarted if we did not hold felons responsible for the foreseeable consequences of their actions." *Id*. at 467.

¶ 44 IPI Criminal 4th No. 7.15A, which defendant argues should have been given to the jury, instructs the jury about foreseeable causation in felony-murder cases. It states:

> "A person commits the offense of first degree murder when he commits the offense of_____, and the death of an individual results as a direct and foreseeable consequence of a chain of events set into motion by his commission of the offense of

____.

It is immaterial whether the killing is intentional or accidental [(or committed by a confederate without the connivance of the defendant) (or committed by a third person trying to prevent the commission of the offense of ____)]." *Id.*

The committee notes for IPI Criminal 4th No. 7.15A state that the instruction should be given when causation is an issue.

In *People v. Walker*, the defendant argued that the trial court erred when it did not *sua sponte* give the jury IPI Criminal 4th No. 7.15A where causation was an issue at trial for felony murder. This court rejected the defendant's claim and reasoned that a trial court need only advise the jury on the essential elements of the crime charged. *People v. Walker*, 2012 IL App (2nd) 110288 ¶ 22. The court found that the causation instruction contained in IPI Criminal 4th No. 7.15A does not set out an essential element of felony murder. *Id.* In addition, the *Walker* court found that the trial court was not required to give the jury IPI Criminal 4th No. 7.15A because defendant's theory of the case was not that the victim died from an unforseeable circumstance, but that defendant was not the perpetrator who injured the victim. *Id.* at ¶ 24.

¶ 45 Notwithstanding that causation is not an essential element of felony murder, causation was not an issue in this case. Our reading of the record establishes that defendant's theory of the case was not that Daniel died from an unforseeable circumstance. Defense counsel argued that defendant was the victim of Daniel's crimes. At closing argument, defense counsel repeatedly argued that Daniel, Michael and Rob who were the aggressors, got onto the train looking for a fight, looking for trouble. Defense counsel argued that Daniel died because of what "they started

on the train." Defense counsel further argued that "this death was accidental, and it wasn't because him or the three guys he was with were looking to disturb the peace ***." Defense counsel stated that "he is not swinging [his belt] at anyone random. These people just viciously attacked him," and "[t]hese guys weren't disturbing the public peace. They were chasing after the guys that just attacked them." The evidence in this case did not support an instruction on causation where Daniel's death was clearly the result of the chain of events set into motion by the defendant's commission of mob action. Defendant was not prejudiced by counsel's failure to request this instruction.

¶ 46 Involuntary Manslaughter and Second-Degree Murder Instructions

¶ 47 Defendant next argues that the trial court erred when it refused his instruction on involuntary manslaughter. Specifically, defendant argues that he was entitled to an involuntary manslaughter instruction because involuntary manslaughter is a lesser-included offense of felony murder under the charging instrument theory outlined in *People v. Davis,* 213 Ill. 2d 459 (2004) . Furthermore, even if the instruction was not proper under *Davis*, he was entitled to the instruction under *People v. Golden,* 29 Ill. App. 3d 502 (1975). In addition, defendant argues that he was entitled to an instruction on second degree murder based on serious provocation where it was a lesser-included offense of felony murder because the provocation occurred before defendant formed the intent to commit the underlying felony of mob action.

¶ 48 The purpose of jury instructions is to provide the jury with correct legal rules that can be applied to the evidence to guide the jury toward a proper verdict. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). The task of the reviewing court is to determine whether the instructions,

considered together, fully and fairly announce the law applicable to the theories of the State and the defense. *People v. Mohr*, 228 Ill. 2d 53, 65 (2000). The decision to give a certain instruction rests with the trial court, and we will not reverse its judgment absent an abuse of discretion. *Id* at 66. However, the question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review. *People v. Washington*, 2012 IL 110283 ¶19.

¶ 49 Defendant is entitled to an involuntary manslaughter instruction if there is "slight" evidence upon which that theory could be based. *People v. Trotter*, 178 Ill. App. 3d 292, 298 (1988). However, such an instruction should not be given if there is no evidence that would reduce the murder charge to manslaughter. *Trotter*, 178 Ill. App. 3d at 298. The trial court's determination to give a specific jury instruction will not be reversed absent an abuse of discretion. *People v. Austin*, 133 Ill. 2d 118, 124 (1989).

¶ 50 In *Davis*, 213 Ill. 2d 459 (2004), the defendant argued that the trial court erred when it refused to instruct the jury on involuntary manslaughter. In determining whether an involuntary manslaughter instruction should have been given, our supreme court noted that it had "adopted and applied the charging instrument approach to determine if one offense is a lesser-included offense of a charged offense so that jury instructions can be given for the lesser-included offense." *Id*. at 476-77 (citing *People v. Novak*, 163 Ill. 2d 93, 106-14 (1994); *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997). Under the charging instrument approach, the analysis is focused on whether: (1) the charging instrument includes a " 'broad foundation or main outline' " of the lesser-included offense so that it can be considered a lesser-included offense; and (2) the

evidence at trial rationally could support a conviction for the lesser-included offense. *Id*. at 477. The first step in this analysis is to look at the indictment or information. *Id.*

¶ 51 The *Davis* court noted that neither the indictment nor the statutory definition of felony murder indicates a mental state for the killing. The court further noted that it had previously confirmed that the offense of felony murder does not include an intent to kill, while the offense of involuntary manslaughter requires the perpetrator have a reckless mental state. *Id*. Because a lesser-included offense is proved by lesser facts and/or a lesser mental state, for involuntary manslaughter to be a lesser offense of felony murder, the charge of felony murder must contain a culpable mental state, equal to or greater than involuntary manslaughter. In looking at the defendant's indictment, the court found that the felony murder described therein did not contain a culpable mental state as to the killing, while the offense of involuntary manslaughter requires a reckless mental state. Consequently, the court held that the charging instrument did not contain a broad outline of involuntary manslaughter and as such, involuntary manslaughter was not a lesser-included offense of felony murder. *Id*.

¶ 52 Following the charging instrument approach, we look to the indictment in this case. The felony murder count alleged that defendants committed the offense of first degree murder, "in that they without legal justification, chased, struck and killed Daniel McKenzie during the commission of a forcible felony, to wit: mob action, in violation of chapter 720 act 5 section 9-1(A)(3) * * *." The felony murder outlined in this indictment does not include a culpable mental state and therefore does not include a broad outline of involuntary manslaughter. Therefore, similar to *Davis*, involuntary manslaughter is not a lesser-included offense of felony

murder in this case. Given our conclusion, we need not reach the second step of the charging instrument approach.

¶ 53 Defendant argues that even if involuntary manslaughter is not considered a lesser-included offense of felony murder under *Davis*, he was still entitled to an involuntary manslaughter instruction under *Golden*, 29 Ill. App. 3d 502. Defendant argues that the *Davis* court declined to overrule the holding in *Golden* finding involuntary manslaughter to be a lesser-included offense of felony murder. *Davis*, 213 Ill. 2d at 477 (stating "involuntary manslaughter is not a lesser-included offense of felony murder in this case [citations omitted]; but see [*Golden*], 29 Ill. App. 3d at 507.")

¶ 54 In *Golden*, the defendant was charged with felony murder predicated on armed robbery where during the robbery of a cab driver, he shot and killed another individual. There was conflicting testimony presented regarding whether the shooting was deliberate or accidental. Over the defendant's objection, the jury was instructed that involuntary murder was a lesser included offense of murder. The jury convicted the defendant of involuntary manslaughter and armed robbery. The defendant appealed. *Id.* at 502-3.

¶ 55 On appeal, the court upheld the defendant's conviction for involuntary manslaughter. The court stated,

> "A review of the record in the case at bar indicates the jury could reasonably have determined the defendant acted recklessly when he brandished the gun to scare the cab driver. * * *We hold that involuntary manslaughter is a lesser-included offense of felony murder. Involuntary manslaughter was therefore an issue in the present case,

and the court properly instructed the jury as to that offense." *Id.* at 505-507.

¶ 56 We disagree with defendant's assertion that *Golden* is controlling here. Although the *Davis* court did not expressly overrule *Golden*, our supreme court has issued several decisions since *Golden* that led to the adoption and implementation of the charging instrument approach that became *the* test utilized in determining whether a jury could be instructed on a lesser-included offense. See *Novak*, 163 Ill. 2d 106-14; *Hamilton*, 179 Ill. 2d 324; *People v. Kolton*, 219 Ill. 2d 353, 367 (2006); *Davis*, 213 Ill. 2d at 476. *Golden* was decided before this line of cases so the court did not did not have the benefit of the charging instrument approach in determining that involuntary manslaughter was a lesser-included offense of felony murder. Even if the *Golden* court considered an approach similar to that of the charging instrument approach, the court expressly limited its findings to the facts of that case. Accordingly, the trial court did not abuse its discretion in denying defendant's request for a jury instruction on involuntary manslaughter.

¶ 57 We similarly reject defendant's argument that he was entitled to an instruction on second degree murder based on serious provocation as a lesser included offense of felony murder under *Davis* or *Golden.* First degree murder may be reduced to second degree murder when, "[a]t the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill * * *, but negligently or accidentally causes the death of the individual killed." 720 ILCS 5/9-2(a) (1),(2) (West 2008).

¶ 58 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 ILCS5/9-2(a)(1) (West 2008); *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 2008). 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).

¶ 59 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.) However, provocation and belief in the need for self-defense can be partial defenses to felony murder, if the provocation or the belief in the need for self-defense occurred before defendant formed the intent to commit the underlying felony. *People v. Williams*, 315 Ill. App. 3d 22, 34 (2000).

¶ 60 Defendant claims he was entitled to a second degree murder instruction because there was substantial evidence that serious provocation occurred before defendant formed the intent to commit mob action because the State limited the scope of mob action to the events on the platform.

¶ 61 A defendant is entitled to have the jury instructed as to any theory of the case that is supported by at least some evidence. *Davis*, 213 Ill. 2d at 478. Although the amount of evidence needed to support the giving of an instruction is slight, the instruction must still be supported by some evidence. It is not error to decline to give a requested instruction that is not supported by the evidence. *People v. Wolf*, 185 Ill. App. 3d 552, 559 (1989).

¶ 62 There is simply no evidence to support defendant's theory that he was sufficiently provoked before he formed the intent to commit mob action on the platform and therefore the trial court properly denied defendant's request for a second degree murder instruction. There was no evidence whatsoever that Daniel, Michael or Rob threatened defendant in any way. Indeed, all of the evidence established that defendant and his co-defendants were the aggressors. Michael testified that Evans approached him and demanded to know his gang affiliation. Evans asked the same question of Daniel. Evans put his hands in Daniels' face and Daniel swatted them away. Evans hit Daniel in the jaw. Evans, defendant and the other men pushed Daniel to the back of the car and beat him. As soon as Daniel, Michael and Rob turned their backs after exiting the trial car, defendant and his friends rushed the older men, catching up with Daniel and beating him with their belts. The instruction was properly refused.

¶ 63 Dismissal of Intentional and Strong Probability Murder Counts

¶ 64 Defendant next argues that the trial court denied him his right to prepare a competent defense when it allowed the State to dismiss the intentional and strong probability first degree murder counts. As previously mentioned, the State *nolle prossed* the first two counts of the indictment two days before trial, choosing to proceed only on the felony murder count.

¶ 65 The State has discretion in deciding whether to nol-pros a charge. *People v. Olson*, 128 Ill. App. 3d 560, 562 (1984). While the court must consent and approve of the State's request to nol-pros a charge, the court must not preclude the State from nol-prosing a charge unless the State's action is "capriciously or vexatiously repetitious" or will cause substantial prejudice to the defendant. *Id.* at 562. The State may nol-pros a charge up until the time that sentence is imposed. *Id.*

¶ 66 In *People v. Rixie*, 190 Ill. App. 3d 818 (1989), the defendant was charged with one count of intentional murder and one count of felony murder. After the jury instruction conference, the State nol-prossed the intentional murder, leaving only the felony murder count. Defendant requested jury instructions on the lesser included offenses. Those instructions were refused and defendant was convicted of felony murder. On appeal, the *Rixie* court found that the defendant was not substantially prejudiced by the State's determination to nol-pros the intentional murder count. The court stated:

> "Defendant knew of the felony murder charge since the inception of the proceedings. He was given a full opportunity to prepare and present a defense to felony murder. The jury was presented with all the evidence in this matter along with counsel's argument that Rixie was not involved in any plan or attempt to rob [the victim]. The jury could have concluded that Rixie may have been guilty of something, but not felony murder. This determination would have required the jury to find Rixie not guilty. * * * The court did not err in allowing the State to nol-pros the murder charge and to proceed on only the felony murder charge." *Id.* at 831

¶ 67 Similarly, in *People v. Williams*, 315 Ill. App. 3d 22 (2000), the defendant was charged with intentional and knowing murder, and felony murder. After jury selection, the State nol-prossed the first count of murder. During the jury instruction conference, the State nol-prossed the second murder count leaving only felony murder. The defendant was convicted of felony murder and appealed. On appeal, the defendant argued that he was substantially prejudiced when the State was allowed to nol-pros two counts of murder leaving only the felony murder.

¶ 68 Relying on *Rixie*, the *Williams* court found that defendant suffered no prejudice. The court found that the defendant was charged with felony murder from the inception and was able to defend against that charge. Furthermore, the jury was properly instructed on the offense of felony-murder. Consequently, as in *Rixie*, the defendant was not prejudiced and the trial court properly granted the State's request to nol-pros the intentional murder counts. *Williams*, 315 Ill. App. 3d at 31.

¶ 69 Like the defendants in *Rixie* and *Williams,* defendant knew of the felony murder charge since the beginning of the proceedings and should have been prepared to defend against it. Given that defendant had notice of the charges against him and was able to prepare a defense to the charge of felony murder predicated on mob action, we cannot see how defendant suffered any prejudice as a result of the trial court granting the State's motion to nol-pros the intentional and strong probability murder counts.

¶ 70 Excessive Sentence

¶ 71 Finally, defendant contends that his 25-year sentence is excessive given his great potential for rehabilitation due to his youth, limited criminal past, history of employment and strong family

support.

¶ 72 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). A reasoned judgment as to the proper sentence to be imposed must be based upon the particular circumstances of each individual case and depends upon many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). "In determining an appropriate sentence, the defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment must be equally weighed." *People v. Jones*, 295 Ill. App. 3d 444, 455 (1998). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation that is before it. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). The imposition of a sentence is a matter within the trial court's discretion, and a reviewing court has the power to disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74.

¶ 73 We find no abuse of discretion in this case where the trial court sentenced defendant to 25 years' imprisonment for felony murder predicated on mob action. At sentencing, the court heard that defendant, who was 25-years-old at the time of the offense, had several non-violent misdemeanors and one violent felony in his background. The court also heard that defendant earned his GED while in jail awaiting trial, was employed before his arrest and had strong family support. In imposing the 25-year sentence, the court indicated that it had considered the evidence

that was presented at trial, the pre-sentence investigation report, the evidence offered in aggravation and mitigation and the statutory factors in aggravation and mitigation. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). The court noted that defendant only had one prior conviction and while defendant was not the prime instigator, he "[wasn't] too far behind." Based on the record, the court clearly considered defendant's potential for rehabilitation, his limited criminal past, his history of employment and his strong family support.

¶ 74 Furthermore, felony murder is an offense punishable by not less than 20 years and not more than 60 years' imprisonment. 730 ILCS 5/5-8-1 (West 2008). A sentence which falls within the statutory range is presumptively proper and does not constitute an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Therefore, the 25-year sentence fell within the statutory range and is presumed proper and this presumption has not been rebutted. Consequently, we cannot say the trial court abused its discretion in imposing the 25-year sentence.

¶ 75 CONCLUSION

¶ 76 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 77 Affirmed.