2013 IL App (1st) 112464-U

SECOND DIVISION
January 29, 2013

No. 1-11-2464

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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
	)	
EUGENE RILEY,	)	Honorable
	)	Nicholas J. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

O R D E R

***Held*:** Jury properly convicted defendant of felony murder 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 commit plain error when it failed to instruct the jury regarding an independent felonious purpose; defense counsel was not ineffective for failing to request an instruction on independent felonious purpose; and the trial court properly adhered to Rule 431(b).

¶ 1 Defendant Eugene Riley 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) his conviction must be vacated because his felony murder conviction was inherent in the murder, (2) the trial court failed to instruct the jury that in order to convict defendant of felony murder, the State had to prove he had an independent felonious purpose, (3) defense counsel was ineffective for failing to tender instructions informing the jury that in order to convict defendant of felony murder, the State had to prove an independent felonious purpose, and (4) the trial court failed to ask potential jurors whether they understood and accepted all four *Zehr* principles in compliance with Illinois Supreme Court Rule 431(b). 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 in Chicago. The neighborhood surrounding the community center is referred to as "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 the fight.

¶ 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 Silvonus Shannon. The trials occurred separately and this appeal only concerns defendant. Defendant was originally charged with one count of intentional first-degree murder, one count of strong probability first-degree murder, one

count of felony murder predicated on mob action, and one count of mob action. On October 5, 2010, the State moved to *nolle prosequi* the mob action, intentional first-degree murder, and strong probability first-degree murder counts, leaving only the felony murder count. That count alleged that defendant and the two other offenders:

> "committed the offense of First Degree Murder in that they, without lawful justification, struck Derrion Albert about the body and stomped on Derrion Albert's head and killed Derrion Albert with their fists, a piece of wood and their feet, during the commission of a forcible felony, *to wit*: Mob Action."

¶ 5 At trial, the following evidence was presented. Latanya Albert, the victim's mother, testified that the victim was a junior at Fenger at the time of the incident. T-Awannda Piper, who worked at Agape at the time of the incident, testified that at around 2:45 p.m. on the afternoon in question, after Fenger school had let out, the receptionist told Piper that there were kids outside that looked like they were about to get into a fight. Piper looked out the window, and also looked at the camera monitors. She saw crowds of kids that looked like they were about to fight. She told the receptionist to call 9-1-1. Piper then went upstairs of Agape to see if there were extra staff to help out. When she came back down, she looked out the window and saw a young man hit the victim over the head with a board. The victim then fell to his knees. He tried to get up, but another young man came and punched him in the face. The victim fell to the ground. He was sitting up with his hands in the air. Piper then saw another young man come over and kick the victim, which caused the victim to fall back. Then some other young men began to kick him as well.

¶ 6 Piper testified that she was able to observe all this from the window, which was about 12 feet away from the fight. After she saw the victim being kicked and hit with a board, she went outside to try and break up the fight. When she got outside, an SUV drove through the alley next to Agape, and Piper asked the driver to help her. Together she and the driver dragged the victim inside Agape. The victim had a pulse. She was able to identify him by his Fenger school I.D. badge. Piper called his name, and the victim gasped for breath several times. An ambulance then arrived and took the victim away.

¶ 7 A videotape of the Agape surveillance video was then played for the jury. Piper testified that there was an unusual amount of foot traffic displayed in the video. Another videotape of the incident was then played for the jury. It had been taken on someone's phone. Piper testified that both videos accurately depicted what she witnessed that afternoon.

¶ 8 Detective William Sullivan testified that he was working with his partner, Detective Michelle Moore-Grose on the afternoon in question. They were assigned to go to Christ Hospital. When they arrived, they were informed that the victim had died from his injuries. Detective Sullivan later learned that Fox News had obtained a copy of the video of the beating. Detective Sullivan and his partner obtained a copy of the video, and after talking to several people, arrests were made. Defendant was one of the people arrested in connection with the beating death of the victim. Detective Sullivan and Detective Moore-Grose met with him at approximately 4 a.m. on September 27, 2010, in an interview room at Area 2 police department. There was a camera in the room, which recorded a 23-minute conversation between the detectives and defendant. The video of that interview was then played for the jury.

¶ 9 During the interview, defendant states that on the day in question he and BJ (his brother) went to pick up their cousin, Silvonus, from school. There had been "talk" that Silovnus was going to be "jumped" after school. After picking Silvonus up, they drove down the block and saw "some dudes" who made gestures at their car. BJ got out of the car with Silvonus, and were approached by the young men. Defendant stated that he then got out of the car and "ran towards them and we just started fighting, whatever." Defendant denied hitting anyone and said he was just looking out for his brother. He denied having a stick, and only said he was hit with one.

¶ 10 Defendant was then confronted with the videotape of the beating, after which he stated that he was not trying to hit the victim, but rather was trying to defend himself and his brother. When the detective noted that the victim was lying on the ground defenseless, defendant stated that he "was with them dudes" and that they "was fittin' to do the same thing to my little brother."

¶ 11 A DVD containing the video footage of the beating, which had been slowed down and altered to include an arrow pointing out where defendant was during the course of the beating, was entered into evidence. The video showed defendant, dressed in all black, standing by a white car. Defendant is shown (identified by an arrow) hitting a young man wearing a white shirt several times. A young man wearing a black shirt is then hit over the head with a board. A young man in a red coat then hits defendant with a board. The young man wearing a red coat hits a young man wearing a black shirt (the victim) over the head. The victim then falls to the ground where he is kicked.

¶ 12 The video then shows defendant in the middle of the street along with a young man wearing no shirt (defendant's brother) and one wearing a white shirt. The three young men are

facing a young man with a board in his hand. The young man with the board swings the board at defendant's brother, then the board is thrown at the young man in a white shirt. Defendant then picks up the board and runs after people. Defendant's brother also has a board at this point. The victim is then shown in the street, and defendant is shown holding a board over his head.

¶ 13 Two other young men are shown kicking the victim while he is on the ground. Defendant's brother then walks away holding a board. Defendant is shown taking a running start with the board over his head and hits the victim over the head with it. The others keep kicking the victim while defendant hits the victim with the board again. Defendant then walks off with the board and the others follow. People are shown rushing to help the victim.

¶ 14 Dominic Johnson testified that he was 15 years old at the time of the incident and had been attending Fenger high school. He was from Roseland, or the Ville, which is where Fenger was located, but there were students from Altgeld Gardens (the Gardens) attending Fenger that year as well. Johnson testified that on the day in question, BJ and "Eugene from the Ville" had been fighting at school. When Johnson left school, he "kind of" knew there was going to be a fight.

¶ 15 Johnson further testified he left school on the day in question with Deonte Johnson and Little Carl. As they were walking, a white car pulled up next to them and BJ, who was from the Gardens, leaned out of the car and said "this ain't over." The car kept going, but eventually stopped. BJ and defendant got out of the car with other people.

¶ 16 Johnson testified that after they crossed the railroad tracks, as they were approaching Agape, BJ, defendant, and the other people in the car approached Johnson and his two friends.

BJ started fighting with Little Carl. Eric Carson, Drew Down, and BJ were also involved in the fighting, as well as Deonte and other people. Johnson testified that he saw Eric hit the victim with a board on the side of his head. The victim fell down, and when he got back up, Deonte punched him in the side of the head and he fell down again.

¶ 17 Johnson testified that he saw Drew Down hit BJ with a stick. He also saw the victim trying to protect himself by the alley. As he was lying down, Silvonus Shannon stomped on his head. Johnson testified that defendant hit the victim in the head with a stick while the victim was trying to protect himself. After defendant hit the victim with the stick, the victim just laid there. People from the Ville then began chasing people from the Gardens down 111th Street.

¶ 18 The slowed-down version of the videotape of the beating was then shown to Johnson. Johnson was able to identify Eric Carson as the person whom he saw hit the victim with the board initially, Deonte Johnson as the person who punched the victim, Silvonus Shannon as the person who kicked the victim, and defendant as the person who was wearing all black and who hit the victim over the head with a board.

¶ 19 On cross-examination, Johnson admitted that he was in custody for residential burglary.

¶ 20 Doctor Hilary McElligott, an assistant medical examiner, performed the autopsy on the victim. McElligott testified that there was a large bruise on the right side of the victim's scalp which also involved the temporalis muscle. There was bleeding across the surface of the brain. There was swelling of the brain, and it had started to "move through the bottom of the skull." McElligott testified that the injuries were caused by significant blunt force trauma. There were abrasions on the right side of the victim's face that could have been caused by being struck with a

board. There were also injuries on the victim's hands, consistent with defending himself. McElligott testified that being struck in the head with a wooden board contributed to the victim's brain injuries, as well as being punched, kicked, and stomped in the face and head. McElligott testified that in her opinion, the victim died of "cerebral injuries that were caused by blunt head trauma as a result of assault."

¶ 21 On cross-examination, McElligott testified that it was possible that after the initial blows to his head, the victim could have eventually died from those independent of any other injury.

¶ 22 The State then rested.

¶ 23 Defense counsel first called Sherry Smith on behalf of defendant. Smith testified that defendant was her oldest son, and that she lives in Altgeld Gardens. Her other son is named Vashion Bullock ("BJ"). BJ was attending Fenger at the time of the incident, while defendant was not. Defendant had graduated from a different high school. On the day in question, Smith got a call that BJ was suspended. She went and picked him up and brought him home, but then realized that defendant had brought BJ and Silvonus Shannon to school that day, so Silvonus would still need a ride home. Smith sent defendant to pick up Silvonus from Fenger.

¶ 24 Vashion Bullock ("BJ"), then testified. Vashion testified that back in 2009, he went by the nickname of "BJ," and was a senior at Fenger high school. He had been suspended on the day in question and rode back to get Silvonus along with his brother (defendant) because defendant did not know the area. They picked Silvonus up and as they were driving they heard something hit the car window. Defendant pulled over to the right so BJ could inspect the car for damage. BJ then approached Little Carl. Little Carl brought up an incident that BJ had with his

friend the day before, and then Little Carl pushed him.

¶ 25 BJ testified that his first instinct was to defend himself, but then he was "bum rushed" by a group of guys to the alley by Agape. He slipped out of his shirt to get away and ended up in the middle of the street. He was being hit by blunt objects, and then saw defendant amongst the mob. BJ stated that he got hit with sticks, and that he did not bring any sticks or bottles with him that afternoon. BJ testified that as a result of that afternoon, he experienced brain damage and swelling and cannot see out of his left eye.

¶ 26 On cross-examination, BJ testified that he had gotten into an argument at school on the morning in question with Eugene Bailey. Because of that argument, he was suspended for a day, and his mother had to pick him up early.

¶ 27 Defendant then testified on his own behalf. Defendant stated that on the day in question, he went to pick up Silvonus with BJ in the car. He knew that there might be trouble that day, but nevertheless stopped his car so that BJ could get out and exchange words with "some Mexican dude" from the Gardens. Then they began getting into a fist fight, so defendant got out of the car. He started swinging at someone that had pinned BJ on the ground. Then someone with a stick hit defendant. Someone then threw a stick at BJ, so defendant picked up the stick. Defendant then hit the victim because it was a reaction. He was scared and did not know what was going on. He was not thinking and was dizzy from when he had gotten hit with the stick. Defendant saw BJ get hit with a brick and ran up to him. He blocked another brick that was thrown at BJ, who was on the ground.

¶ 28 Defendant admitted that after the victim put his arms up to stop his attackers, Silvonus

kicked him down. The victim then tried to lift his head up, but defendant hit him over the head with a board. The victim was unarmed on the ground. Defendant further admitted that after he hit the victim the first time, he hit the victim with the board again.

¶ 29 At the close the evidence, defense counsel requested involuntary manslaughter and second-degree murder instructions, both of which the trial court denied. Defense counsel also requested mob action and aggravated battery as lesser-included offenses, which were both denied. The jury found defendant guilty of felony murder, and the trial court sentenced him to 32 years in prison.

¶ 30 II. ANALYSIS

¶ 31 On appeal, defendant contends that (1) his conviction for felony murder must be vacated because defendant did not have the requisite independent felonious purpose; (2) the trial court failed to instruct the jury about an independent felonious purpose; (3) defense counsel was ineffective for failing to tender instructions informing the jury about an independent felonious purpose; and (4) the trial court failed to ask potential jurors whether they understood and accepted all four *Zehr* principles.

¶ 32 A. Felony Murder

¶ 33 Defendant's first contention on appeal is that his felony murder conviction must be reversed because the predicate mob action was inherent in the murder and not committed with an independent felonious purpose. 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)).

¶ 34 The Criminal Code of 1961 (Code) 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).

¶ 35 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 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 makes no argument that the felony of mob action is not a "forcible felony" within the felony-murder statute.

¶ 36 The felony-murder statute is intended to limit violence caused by the commission of a forcible felony, subjecting an offender to a first-degree murder charge if another person is killed during that felony. *Davison*, 236 Ill. 2d at 239. 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; 720 ILCS 5/9-1(a)(1), (a)(2) (West 2002). Because of this distinction, 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 that view, 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)).

¶ 37 Defendant contends that the acts in this case constituting mob action arise from, and are inherent in, the act of murder itself, and thus cannot serve as the predicate felony. Specifically, defendant contends that the State's only evidence for mob action was that defendant hit the victim over the head with a board, which was the same evidence presented for the murder. Defendant relies on *Morgan* and *Pelt* to support his proposition that the act constituting mob action (hitting the victim in the head with a board), arose from and was inherent in the act of murder itself, and that the felony-murder conviction should be reversed.

¶ 38 In *Morgan*, the 14-year old defendant was indicted on eight counts for killing his grandparents, Lila and Keith Cearlock. Following an argument between the defendant and Keith about the defendant receiving detention in school, Keith administered corporal punishment on the defendant. The defendant then retrieved Keith's gun, intending to use it to kill himself in the bathroom. Instead, the defendant fired the gun at a bottle on the bathtub. The defendant exited the bathroom to find Lila screaming. Keith had threatened to kill defendant in the past, so the defendant feared for his life when he saw how angry Keith had become. The defendant shot Keith as he approached to prevent Keith from reaching him. He then shot Lila in the back as she tried to flee the house. *Morgan*, 197 Ill. 2d at 411-12. The defendant was found guilty of first-

degree felony murder of Lila, and second-degree murder of Keith. The defendant argued on appeal that he could not be found guilty of first-degree felony murder of Lila because the charged felonies (aggravated discharge of a firearm and aggravated battery) were not independent of the killing.

¶ 39 Our supreme court agreed, explaining that it was arguable that the murder gave rise to the predicate felonies, rather than the predicate felonies resulting from the murder. 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.

¶ 40 Two years after *Morgan*, our supreme court revisited the issue of what constituted a proper predicate forcible felony for a felony murder charge. In *Pelt*, the defendant threw his infant son against a bedroom dresser, which resulted in 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 then conduct which killed the infant." *Pelt*, 207 Ill. 2d at 442.

¶ 41 Defendant contends that just as in *Morgan* and *Pelt*, that the predicate felony of mob action did not involve conduct with a felonious purpose other than the conduct which killed the victim. Defendant's argument is that his acts of striking the victim with a board constituted his only participation in the mob action, and that those same acts constituted the killing of the victim. Defendant maintains that up until he struck the victim with the board, he was acting in defense of himself and his brother. We disagree.

¶ 42 The evidence at trial demonstrates otherwise. The same evidence was not used to prove both the predicate felony of mob action and the murder. Rather, the evidence showed that several people, including defendant, knew that there was going to be a fight after school on the day in question, because of what had transpired between defendant's brother and Eugene Bailey earlier that day. Nevertheless, defendant (with his brother) drove to Fenger after school and picked up Silvonus. Defendant then stopped the car to allow his brother to get out and have words with Little Carl. Defendant himself then got out of the car, and a fight ensued. Defendant was shown in a slowed-down version of the video hitting a young man in a white shirt. Defendant is then shown in the middle of the street with his brother, facing a young man holding a board. The young man then throws the board, which defendant retrieves. Defendant is then seen with the board while the others run away from him. He then takes a running start and hits the victim over the head with the board.

¶ 43 While defendant claims that all of his actions leading up to hitting the victim with a board were in defense of his brother, the evidence shows otherwise. Based on the video footage and

defendant's own testimony in both the interview room and on the stand, defendant acted with other individuals to use force or violence to disturb the public peace by engaging in a fight with other people on the afternoon in question, which completed the predicate felony of mob action before defendant even hit the victim with a board. The jury was under no obligation to believe defendant's testimony regarding self-defense or defense of others. See *People v. Ortiz*, 196 Ill. Ed 236, 267 (2001) ("a fact finder need not accept the defendant's version of events as among competing versions"). We find the supreme court cases of *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*, to be instructive.

¶ 44 In *Davis*, the defendant's felony-murder charge was predicated on the forcible felony of mob action, just as it is in this case. 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. However at trial, the defendant denied ever hitting the victim, and claimed to have only swung at the victim twice. It was undisputed that the other individuals inflicted many of the victim's injuries. *Davis*, 213 Ill. 2d at 474.

¶ 45 Based on the evidence presented at trial, our supreme 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 mob action charge and the murder charge. Our supreme 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." The *Davis* 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. *Davis*, 213 Ill. 2d at 474.

¶ 46 In *Davison*, the evidence showed that a few hours before the murder occurred, the victim fought with one of the defendant's co-offenders over stolen money. It was undisputed that sometime after the fight the defendant and his co-offenders searched for the victim and, after locating him, pursued him on foot and by car. The defendant admitted that he threw a bat at the victim during the pursuit. The defendant also engaged in some sort of physical interaction with the victim when he first caught up to the victim, 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. This evidence was found to support 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. Consequently, our supreme court concluded that the defendant acted with the felonious purpose to commit mob action. *Davison*, 236 Ill. 2d at 242-43.

¶ 47 Like the evidence in *Davis* and *Davison*, the evidence here showed that defendant went to Fenger with his brother after school on the day in question knowing there would likely be a fight. Defendant willingly stopped his car to allow his brother to exchange words, and eventually begin a physical altercation with Little Carl. Defendant then exited his car and is seen on video hitting another young man, then picking up a board and threatening a group of young men with it, and

eventually hitting the victim twice over the head with it. We do not agree with defendant that his involvement in the mob action occurred the moment he struck the victim with the board, and not before. It is clear to us from the evidence that defendant was acting with others to use force or violence to disturb the public peace, and thus acted with the felonious purpose to commit mob action.

¶ 48 Moreover, defendant's conduct constituting the mob action was neither inherent in, nor arose from, the murder itself. Instead, the evidence established that the victim died from blunt force trauma caused by several co-offenders kicking, punching, and stomping on the victim's head, rather than any particular wounds inflicted by defendant alone. See *Davison*, 236 Ill. 2d at 243; *Davis*, 213 Ill. 2d at 475; *People v. Viser*, 62 Ill. 2d 568 (1975) (all three cases allowing felony murder charges predicated on felonies involving the defendants' participation in fatal group attacks on the victims when there was no clear evidence the defendants caused the fatal injuries). This is not a case, like *Morgan* and *Pelt*, where the State was trying to avoid its burden of proving an intentional or knowing murder. Rather, the predicate felony "involved conduct with a felonious purpose apart from the killing itself." *Davison*, 236 Ill. 2d at 244.

¶ 49 B. Jury Instructions

¶ 50 Defendant's next argument on appeal is that the trial court committed plain error because it did not instruct the jury that the predicate forcible felony of the felony-murder charge, mob action, must have a felonious purpose independent of that for the murder. The State responds that this issue has been forfeited, and we agree.

¶ 51 Defense counsel argued in a posttrial motion that the court "erred in giving instructions

on behalf of the State over the defendant's objection," however he never asked for the instruction of a "felonious purpose." Accordingly, defendant has forfeited this argument for appellate review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (error must be both objected to and included in posttrial motion in order to be preserved). Defendant concedes that he failed to object at trial, yet urges us to review the issue as plain error. The plain-error rule requires there first be a "clear or obvious error." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). If there was error, then we must determine whether such unpreserved error can be considered. It can only be considered if: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Piatkowski*, 225 Ill. 2d at 565. Defendant argues both prongs of the plain error test apply here. However, as noted, there first must be a clear and obvious error. We find none.

¶ 52 Defendant argues that the existence of an independent felonious purpose was a question of fact, and therefore he was entitled to a jury's determination of that question, beyond a reasonable doubt. Defendant contends that because the trial court did not submit instructions on an independent felonious purpose, the jury did not make a determination that he was guilty beyond a reasonable doubt of every element of the crime of felony murder, and thus defendant's conviction was improper.

¶ 53 Defendant failed to tender an alternative mob action jury instruction (and notably has not pointed to any existing instruction that should have been given), but rather argues that the trial

court should have *sua sponte* given an instruction regarding the independent felonious purpose of mob action. We do not agree.

¶ 54 "It is the burden of the party who desires a specific instruction to present it to the court and request that it be given to the jury." *People v. Turner*, 128 Ill. 2d 540, 562 (1989). "Generally, the only situations where a fair trial requires the court to *sua sponte* offer an instruction include 'seeing that the jury is instructed on the elements of the crime charged, on the presumption of innocence and on the question of burden of proof.' " *Id*. (quoting *People v. Parks*, 65 Ill. 2d 132, 137 (1976)). Here, we cannot say that the trial committed error in failing to tender an additional jury instruction because none of the above circumstances are present in this case.

¶ 55 Felony murder occurs, as defined by the Code, when a person kills an individual without lawful justification, and in performing the acts which case the death, he is attempting or committing a forcible felony other than second-degree murder. 720 ILCS 5/901(a)(3) (2010). As stated previously, a mob action is a forcible felony. The relevant jury instruction given on this issue was Illinois Pattern Jury Instruction (IPI) Criminal No. 7.02X, which read:

> "To sustain the charge of first degree murder, the state must prove that when the defendant performed the acts which caused the death of [the victim], the defendant was committing the offense of mob action. Accordingly, you may find the defendant guilty of first degree murder only if you also find the defendant guilty of mob action."

¶ 56 Mob action is defined in the Code 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 (West 2010). The instruction given on mob action was IPI Criminal No. 19.03, which states:

> "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."

¶ 57 Accordingly, the jury was properly instructed on the elements of the crime charged, and thus we cannot say that the trial court committed error by not *sua sponte* submitting giving instructions on an independent felonious purpose. Because the trial court did not commit a clear or obvious error here, there can be no plain error, and defendant's argument on appeal is therefore forfeited.

¶ 58 C. Ineffective Assistance of Counsel

¶ 59 Defendant's next argument on appeal is that defense counsel was ineffective for not requesting an independent felonious purpose instruction. However, since we find that the jury was properly instructed on the elements of the crime charged, we cannot say that defense counsel committed error in failing to request a jury instruction on independent felonious purpose. (Cf. *People v. Torres*, 228 Ill. 2d 382, 398 (2008) (defendant could not have negotiated a lesser sentence given that the sentence he received was the minimum possible under the sentencing scheme).

¶ 60 D. *Zehr* Principles

¶ 61 Defendant's final argument on appeal is that the trial court failed to ask the potential jurors whether they accepted all four of the *Zehr* principles, in violation of Supreme Court Rule 431(b). Initially, the State contends that defendant has forfeited this issue by failing to make an objection and did not raise this issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176 (1988) . Defendant concedes his forfeiture in his opening brief on appeal, but argues that the issue should nevertheless be reviewed pursuant to the first prong of the plain error analysis, which allows us to review an unpreserved error where the evidence is closely balanced. *People v. Davis*, 405 Ill. App. 3d 585, 590 (2010). The first step in a plain error analysis requires us to determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 62 As amended in 2007, Supreme Court Rule 431(b) codified our supreme court's ruling in *People v. Zehr*, 103 Ill. 2d 472 (1984), and now requires a trial court to instruct a jury about the following four principles espoused in *Zehr*: (1) that the defendant is presumed innocent of the charges against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's decision not to testify cannot be held against him or her. Rule 431(b) stipulates that a court must "ask each potential juror, individually or in a group, whether that juror understands and accepts those four principles." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 63 Here, defendant does not dispute that the court conveyed all the requisite principles to the jury, but instead argues that the trial court failed to explicitly ask whether the jury both understood and accepted all of the *Zehr* principles. Specifically, defendant contends that the trial

court improperly asked, "[d]oes everybody understand that?" after it described the four *Zehr* principles, and asked if any of the jurors "[took] issue" with defendant's right to a presumption of innocence.

¶ 64 In support of his claim, defendant relies primarily on *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, our supreme court held that the trial court erred because it failed to admonish prospective jurors of all four *Zehr* principles and neglected to ask them if they "accepted" those principles as required by Rule 431(b). *Thompson*, 238 Ill. 2d at 605-06. Specifically, the *Thompson* court held that the method of inquiry "must provide each juror an opportunity to respond to specific questions concerning the [Rule 431(b)] principles." *Id.* The court went on to say that the committee comments to the rule emphasized that "trial courts may not simply give a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." *Id.*

¶ 65 Rule 431(b), therefore, mandates a specific question and response process. The questioning may be performed either individually or in a group, but the rules requires an opportunity for a response from each prospective juror on his or her understanding and acceptance of those principles. *Thompson*, 238 Ill. 2d at 607. The *Thompson* court nevertheless found that the court's violation of Rule 431(b) did not "automatically result in a biased jury" or render the defendant's trial fundamentally unfair or unreliable in determining guilt or innocence, and thus found that there was no plain error. *Thompson*, 238 Ill. 2d at 610-11.

¶ 66 We have addressed this exact issue in the wake of *Thompson*, and repeatedly upheld instructions that do not mirror verbatim the language of Rule 431(b). In *People v. Digby*, 405 Ill.

App. 3d 544 (2010), the trial court asked potential jurors whether they "had a problem" with the presumption of the defendant's innocence, whether they "disagreed" with the State's burden of proof, and whether they would hold defendant's failure to testify against him. *Digby*, 405 Ill. App. 3d at 548. Finding no error, this court held that although the trial court "did not use the precise language of Rule 431(b), the words it did use were appropriate and clearly indicated to the prospective jurors that the court was asking them whether they understood and accepted the principles enumerated in the rule." *Digby*, 405 Ill. App. 3d at 548. The court further noted that Rule 431(b) "does not set out principles in the form of questions to be asked *in haec verba*, and does not provide 'magic words' or 'catechism' to ensure the court's compliance." *Id*.

¶ 67 Here, we find that the language used by the trial court, asking prospective jurors if they understood the four *Zehr* principles, as well as if they took issue with defendant's presumption of innocence, is sufficient to indicate that the court was asking them whether they understood and accepted those principles. Consequently, we find no error with respect to the court's Rule 431(b) admonitions to the jury. However, even if such statements were in error, they would nevertheless fail to rise to plain error, because the evidence in this case was not closely balanced.

¶ 68 III. CONCLUSION

¶ 69 For the foregoing reasons, we affirm the judgement of the circuit court of Cook County.

¶ 70 Affirmed.