No. 2—09—0706
Order filed April 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 06—CF—4585
CLIFFORD L. POWERS,	)	Honorable Fred L. Foreman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: (1) The trial court properly denied defendant's request for an involuntary manslaughter instruction, as the evidence did not support defendant's contention that the fatal shot occurred during a struggle for defendant's gun; (2) the trial court properly allowed testimony regarding defendant's flight, as there was evidence from which the jury could validly infer that defendant knew he was a suspect and consciously avoided the police; (3) defendant was not denied his right to a public trial when the trial court excluded from the courtroom defendant's family members that were named by the State as potential witnesses.

Following a jury trial, defendant, Clifford Powers, was convicted of one count of first degree murder (720 ILCS 5/9—1(a)(1) (West 2004)) and was sentenced to a term of 45 years in prison. Defendant now appeals from his conviction. We affirm.

Bernard Soya was shot to death in a Libertyville parking lot on the night of November 6, 2006. A warrant for defendant's arrest was issued on November 13, and defendant voluntarily surrendered to police on November 16. Defendant was ultimately charged with three counts of first degree murder: intent to kill or do great bodily harm (720 ILCS 5/9—1(a)(1) (West 2004)); strong probability of death (720 ILCS 5/9—1(a)(2) (West 2004)); and strong probability of great bodily harm (720 ILCS 5/9—1(a)(2) (West 2004)). The State subsequently amended all three counts to allege that defendant "personally discharged a firearm that proximately caused the death of Bernard Soya" in order to obtain sentencing in addition to the statutory maximum, as provided by section 5/5—8—1(a)(1)(d)(iii) of Unified Code of Corrections (730 ILCS 5/5—8—1(a)(1)(d)(iii) (West 2004)). Following trial, the jury returned a general guilty verdict form that did not differentiate among the three counts. The trial court denied defendant's motion for a new trial and sentenced defendant to 45 years in prison. This appeal followed.

Defendant first contends that the trial court erred in denying his request to instruct the jury on the charge of involuntary manslaughter (720 ILCS 5/9—3 (West 2004)). A defendant is entitled to jury instructions on his theory of the case if there is at least slight evidence to support that theory. *People v. Davis*, 213 Ill. 2d 459, 478 (2004). "Very slight" evidence supporting a given theory of a case will justify the giving of an instruction. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Where some evidence is presented, it is an abuse of discretion to refuse to instruct the jury. *People v. Gomez*, 402 Ill. App. 3d 945, 957 (2010). However, this entitlement is not without limits; a defendant may not request unlimited instructions based on " 'the merest factual reference of witness' comment.' " *Gomez*, 402 Ill. App. 3d at 958 (quoting *People v. Everette*, 141 Ill. 2d 147, 157 (1991)).

Section 9—3 of the Criminal Code of 1961 defines involuntary manslaughter:

> "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly ***." 720 ILCS 5/9—3(a) (West 2004).

The basic difference between first degree murder and involuntary manslaughter is the mental state that accompanies the conduct that results in the victim's death. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). First degree murder under section 9—(1)(a)(1) requires that the defendant "intends" to kill or do great bodily harm or "knows" that his acts will cause death. 720 ILCS 5/9—1(a)(1) (West 2004). Similarly, section 9—1(a)(2) requires that the defendant "knows" that his acts create a strong probability of death or great bodily harm. 720 ILCS 9—1(a)(2) (West 2004). In contrast, a defendant commits involuntary manslaughter when he "recklessly" performs acts that are likely to cause death or great bodily harm. 720 ILCS 5/9—3(a) (West 2004). A person acts recklessly when:

> "he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4—6 (West 1994).

A defendant acts recklessly when he is aware that his conduct might result in death or great bodily harm, although those results are not substantially certain to occur. *DiVincenzo*, 183 Ill. 2d at 250. In general, reckless conduct involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *DiVincenzo*, 183 Ill. 2d at 250. In general, an involuntary manslaughter instruction is not warranted where the nature of the killing, shown by either multiple

wounds or the victim's defenselessness, shows that the defendant did not act recklessly. *People v. Richardson*, 401 Ill. App. 3d 45, 49 (2010). Whether such an instruction is warranted depends on the facts and circumstances of each case. *Richardson*, 401 Ill. App. 3d at 49.

Bernard Soya was discovered hanging out of the passenger side door of a Kia Sorrento SUV at about 6:30 am on November 6, 2007. His head was on the pavement, while his feet were still inside the vehicle, which was still running. Soya was dead when officers arrived at the scene. Officers recovered 21 ounces of marijuana, a white powdery substance, prescription pills, a digital scale, and over $1500 in cash from the vehicle. They also recovered about $400 from Soya's pants pockets.

Police found three spent .25 caliber shell casings at the scene of the shooting. One was found in the back of the truck parked next to Soya's vehicle, while two others were found on the ground on the passenger side of Soya's vehicle. In addition, officers found a cell phone battery with a bullet lodged in it near the back passenger side of Soya's vehicle; however, no cell phone was found. In addition, no weapons were found.

Dr. Eupil Choi, a pathologist, performed an autopsy on Soya. Choi testified that Soya was shot twice - once in the left hip and once in the head. The shot to the head was fatal; the shot to the hip was not. According to Choi, the bullet entered Soya's head "on the right side *** above and behind the right ear." Choi described the path of the bullet found in Soya's brain as "downward, in other words, from the top to the bottom part of the head." He agreed that the shot would have had to come "straight down or the skull or the head would have to be horizontal to the ground." No powder burns were found on Soya's body. This indicated to Choi that the wounds were not the result of "close-range firing,"or firing of the gun from less than 20 inches from the body.

Stephan Villarreal, a friend of defendant, testified that defendant called him at about 7:30 on November 6, 2006, and asked him to for a ride to pick up some marijuana. Defendant also told him that "he was just going to rob this guy for the marijuana." Villarreal did not take defendant's robbery claim seriously, and agreed to pick him up. After driving around, they waited at a gas station until defendant received a phone call. Defendant told Villarreal to wait in the car and walked away. About 10 minutes later, defendant came running back, looking "scared" and "fidgety" and holding his left hand, which was bleeding. Villarreal saw that defendant had a gun. As they drove away, defendant told Villlarreal that he had shot himself in the hand and had shot "the guy" three times; he specifically said that he had shot "the guy" in the stomach and the head. Defendant thought that "he might have killed him." They drove to defendant's mother's house, where Villarreal saw defendant's left hand; he saw blood, but he did not see the actual injury or from where the blood was coming. Villarreal then drove to his girlfriend's place of employment. He never noticed any blood in the car that he drove that night. On cross-examination, Villarreal agreed with defense counsel that he told the police that defendant told him that "this person tried to grab his gun and caused it to go off."

Michelle Gerstung testified that she lived with defendant on November 6, 2006. On that date, defendant received a telephone call from "Steve," and Michelle overheard that "they were going to get weed from Bernard or whoever." She also heard defendant say that "they were going to rip the weed guy off."

That evening Michelle allowed defendant to drive her car to his mother's house, and Steve was to pick up defendant there. She tried to call defendant on his cell phone at one point during the evening, but he did not answer. When defendant returned that night, he did not say anything to her but immediately took a shower. When he came back out, his hand was wrapped up. When she asked

what happened, defendant replied that "the ripoff went bad." Defendant said that "there was a struggle and that he had a gun." When Michelle asked how the "ripoff" went bad, defendant "said that he had a gun and that other guy grabbed it and it went off." She agreed with the prosecutor when asked if defendant told her that, when he pulled out a gun, the other guy grabbed it. Defendant told her that he shot the other guy; he did not say how many times he shot him, but she remembered that defendant told her that he shot the other guy in the hip "and that's how he got a wound on his hand."

Michelle was shown the written statement that she gave to the police. The following colloquy then took place:

"Q. Do you remember what [defendant] told you when he got back to your apartment about what happened when he got into the passenger's seat of that car with the pot dealer?

A. He said that he got in there and he was going to like [*sic*] pretend to get weed, and then he got out and was acting like he was going to pay for the, you know, the weed, and he stuck the gun, pointed it towards that guy, and I guess the guy grabbed it and that's - and the guy pulled the trigger because they were fighting over it.

Q. Okay. And so [defendant] told you that the other guy grabbed the gun and tried to take the gun away from him?

A. Yeah.

Q. What did he say happened after that?

A. That he shot him.

Q. Did he say he shot him in the cell phone?

A. Yeah.

Q. And after that, what did he say about the cell phone, anything more?

A. He shot him in like the back area, too.

Q. That [defendant] shot him in the back area?

A. Yeah.

Q. Okay. So how many times did he tell you that he shot him?

A. About two or three times.

Q. And what did he say [he] thought happened to the guy when he left?

A. Thought he was dead because he wasn't moving."

After reviewing her statement again during cross-examination, Michelle remembered saying that defendant "really regretted the guy being shot and told me that the gun went off because the guy grabbed it." Defendant also told her that "the rip [*sic*] went bad and the guy grabbed the gun and that's why he got shot in the hand."

On redirect examination, the following colloquy took place:

"Q. [Defendant] did tell you that he jumped in the passenger's seat, correct?

A. Yes.

Q. And he did tell you that at some point, he got out, walked around to the driver's seat, right?

A. Yes.

Q. And that's when he told you that he pulled out his gun and pointed it at the guy and told him to give him his bud, correct?

A. Yes.

Q. And that's when [defendant] told you that the guy grabbed the gun?

A. Yes.

Q. And that it went off twice; one of them hit the cell phone; one of them hit him in the hip, right?

A. Yes.

* * *

Q. Did he tell you that he shot him a third time?

A. Yeah, in the back area."

Defendant argues that testimony of Villarreal and Gerstung regarding a struggle between defendant and Soya was sufficient evidence of recklessness to warrant the giving of the involuntary manslaughter instruction. We disagree. There was no evidence that the firing of the fatal shot was a reckless, as opposed to an intentional or knowing, act.

We first note that multiple shots were fired, and Soya was struck three times - in the cell phone, in the left hip, and in the right side of the back of the head. There was no evidence that Soya possessed any weapon. In general, an involuntary manslaughter instruction is not warranted where the nature of the killing, shown by either multiple wounds or the victim's defenselessness, shows that the defendant did not act recklessly. *Richardson*, 401 Ill. App. 3d at 49.

Most importantly, while both Villarreal and Gerstung testified that defendant told them that Soya grabbed the gun, which caused the gun to go off, neither testified that defendant said that Soya was shot in the head during the struggle for the gun. Villarreal agreed that defendant told him that Soya "tried to grab his gun and caused it to go off." He also testified that defendant told him that he had shot himself in the hand and had shot the guy three times, including in the stomach and the head. However, Villarreal never testified that defendant told him that Soya was shot at all, let alone receiving the fatal shot to the back of the head, during a struggle for the gun.

Similarly, Gerstung's testimony regarding the shooting, unclear and sometimes contradictory, never implicated a struggle for the gun as the cause of the fatal head shot. Gerstung said that defendant told her that, when he pulled out his gun, the "other guy grabbed it and it went off." Defendant shot Soya in the hip "and that's how he [defendant] got a wound on his hand." Gerstung also agreed that defendant told her that, when Soya grabbed the gun, it went off twice; one shot hit the cell phone, the other hit Soya in the hip. Defendant then told her that he shot Soya a third time, "in the back area."

Assuming, *arguendo*, that defendant and Soya did struggle over the gun, defendant never established that the fatal bullet was fired unintentionally during such a struggle. Defendant's attempt to connect the testimony regarding a struggle and the evidence of the fatal shot is nothing but unsupported speculation. Defendant, had he testified, could have clarified the issue; however, he did not do so, and it is not the State's burden to clarify and remove a defendant's contention from speculation.

Further, the physical evidence of Soya's corpse does not support such a finding. No powder burns were found on Soya's body, which indicated to the pathologist that the shots were not the result of "close-range firing,"or firing of the gun from less than 20 inches from the body. The location of the fatal head wound, the right side of the head above and behind the right ear with a downward trajectory indicating that Soya was facing the ground, argues against the suggestion that the shot was fired while Soya struggled for possession of the gun.

Defendant argues that caselaw holds that "pointing a gun at someone is a reckless act that may support a conviction for involuntary manslaughter." However, this assertion is too broad; to be found guilty of involuntary manslaughter, a defendant must be shown to have performed reckless acts that *cause the death* of the decedent. See 720 ILCS 5/9-3(a) (West 2004)); *People v. Hoard*,

249 Ill. App. 3d 21, 29 (1993). The cause of Bernard Soya's death was the bullet fired into his head from above and behind his right ear; it was not the brandishing of a gun in an attempt to commit an armed robbery. To hold otherwise would require us to conclude that the commission of an attempt armed robbery was itself a reckless act. Clearly, such is not the case.

Defendant cites a series of cases in support of his assertion; however, an examination of the facts in each case shows that each is distinguishable. In *People v. Austin*, 207 Ill. App. 3d 896 (1990), there was evidence that the defendant and a bus driver were approximately 12 inches apart struggling over defendant's gun, and "[t]he gun went off during the scuffle. Defendant testified that the bus driver tried to grab the gun, she jerked it away, and it went off." *Austin*, 207 Ill. App. 3d at 899. The appellate court held that the defendant was entitled to an instruction on involuntary manslaughter. However, the evidence showed that it was the fatal shot that was fired during the scuffle. Similarly, in *People v. McCarroll*, the court found that such an instruction was warranted where the evidence showed that the decedent was struck by the fatal bullet as he and the defendant struggled over defendant's gun. *People v. McCarroll*, 168 Ill. App. 3d 1020, 1025 (1988). Again, in *People v. Falkner*, "[w]hile defendant was brandishing the revolver he was grabbed by one or more patrons of the bar and a struggle ensued during which the deceased, George Bell, who held defendant's gun arm, was shot and killed." *People v. Falkner*, 61 Ill. App. 3d 84, 86 (1978).[1]

[1]*Falkner* is further distinguishable as it involved this court's reduction of the defendant's conviction of felony murder to the lesser-included offense of involuntary manslaughter because the court found that "the necessary armed robbery element of the felony murder charge was not proved beyond a reasonable doubt." *Falkner*, 61 Ill. App. 3d at 90.

In each of these cases, there was evidence that the fatal shots were fired during struggles over a gun. Here, such evidence that the fatal shot was fired during a struggle is missing. There was no evidence supporting a theory of involuntary manslaughter to justify the giving of an instruction, and the trial court's refusal to give the instruction was not an abuse of discretion.

Defendant next contends that the trial court erred in admitting evidence of his flight to avoid apprehension. We first note that defendant sought to exclude evidence of flight via a motion *in limine* prior to trial but did not object when the evidence was offered at trial. Normally, a motion *in limine* is insufficient to preserve an error for review. *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 963 (2006). Further, the State argues that defendant has forfeited this issue because he failed to include it in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant did not address his failures in his initial brief, addressing them only in his reply brief and arguing, *inter alia*, that we should review this issue as plain error. In general, the absence of a plain-error argument by a defendant will lead a reviewing court to "honor" the defendant's procedural default. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2011). However, a plain-error argument raised in a reply brief is sufficient to allow us to review an issue for plain error. *Ramsey*, 239 Ill. 2d at 412. In conducting a plain-error review, we must first determine whether a clear or obvious error has occurred. *Ramsey*, 239 Ill. 2d at 412.

Evidence is relevant if it tends to prove a fact that is in controversy or render a matter that is in issue more or less probable. *People v. Nelson*, 235 Ill. 2d 386, 432 (2009). A trial court, in its discretion, may exclude evidence, even when it is relevant, if its prejudicial effect substantially outweighs its probative value. *People v. Walker*, 211 Ill. 2d 317, 337 (2004). Evidence of flight following the commission of a crime, when considered in connection with all other evidence in a case, is a circumstance that the jury may consider as tending to prove guilt. *People v. Lewis*, 165 Ill.

2d 305, 349 (1995). The inference of guilt that may be drawn from flight depends on the suspect's knowledge that the offense has been committed and that he is or may be suspected. *Lewis*, 165 Ill. 2d at 349. While evidence that a defendant was aware that he is a suspect is essential to prove flight, actual knowledge of his possible arrest is not necessary to make such evidence admissible where there is evidence from which such a fact may be inferred. *Lewis*, 165 Ill. 2d at 350.

Here, defendant objects to the testimony of five police officers regarding conversations they had with various family members of defendant in the days following the shooting. None of the officers was asked about the contents of the conversations, but each was asked if he was able to locate defendant based on the interviews. Each responded that he was not able to locate him. Defendant also complains of the following portion of the State's closing argument:

> "Evidence of his guilt. The flight. Consciousness of his guilt. He ran from the scene; he went to his house, apartment; took that shower; asked his girlfriend [Gerstung]: Let's get out of town. The police are looking for him from the 6th, and you heard evidence that he turned himself in on the 16th. Ten days later.
>
> Now, between that time, what have the police done? They talked to his mother; they talked to his father; they talked to his little sister; they talked to his older sister; they talked to his brother in Joliet. For ten days: Where are you, Mr. Powers? Where are you?"

Defendant argues that there was no evidence from which the jury could validly infer that defendant knew he was a suspect and consciously avoided the police. We disagree. In his brief, defendant never addresses the testimony of Gerstung and Villarreal, to both of whom he admitted that he shot and probably killed Soya. He never addresses Gerstung's testimony, referenced in the closing argument, that he asked her to go with him when he spoke to her on the night of the murder:

> "He wanted me to go with him. I don't know where, but he wanted me to go with

him somewhere, and I told him no, because I have family here and I don't want to lose my family."

Defendant also fails to address the testimony of Luke Shaw, who testified that defendant called him to buy marijuana, and Matthew Kaiser, whom Shaw then called in order to set up the drug buy between defendant and Soya. Defendant's involvement in a drug deal with Soya on the night of the murder was known by at least four people; the fact that he shot and killed Soya was known to two people. He asked Gerstung to leave with him, an offer that Gerstung evidently thought was for the long term, as she refused because she did not want to lose her family in the area. From this evidence, the jury could validly infer that defendant knew he was a suspect in Soya's murder and consciously avoided the police. Thus, testimony that police officers could not find defendant after talking to his family members was relevant, and its probative value, while not the strongest, outweighs any prejudicial effect. We find no error here.

In a related, but properly preserved, issue, defendant contends that he was denied his right to a public trial. Defendant's family members who had been interviewed by the police were named by the State as potential witnesses and were barred from attending the trial under a motion to exclude witnesses. None of the family members was ultimately called to testify.

It is within the sound discretion of the trial court to grant motions to exclude witnesses from the courtroom, and we will not disturb the exercise of that discretion unless the trial court clearly abuses it or prejudice to the defendant is shown. *People v. Taylor*, 244 Ill. App. 3d 460, 467 (1993). While acknowledging this established law, defendant argues that this court should apply the "overriding interest" test for closing a trial proceeding that the *Taylor* court applied. However, the *Taylor* court did not apply this test in regards to family members who were excluded as potential witnesses; this test was applied to the exclusion of other family members who were not potential

witnesses. See *Taylor*, 244 Ill. App. 3d at 467. This court looked at the exclusion of witness family members:

> "not as an action by the State which is directed at defendant's sixth amendment right to a public trial, but rather as an act of the parties to exercise a long-standing trial right in criminal cases to request the exclusion of witnesses from the courtroom as part of the usual trial process." *Taylor*, 244 Ill. App. 3d at 467.

We agree that the exclusion of witnesses from the courtroom is a part of the usual trial process, and we decline to apply the inapplicable "overriding interest" test to the exclusion of defendant's family members from the courtroom. We can find no abuse of the trial court's discretion in its exclusion of all witnesses, whether family members or not, from the courtroom, and we find no error here.

For these reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.