No. 2—09—1135
Order filed June 14, 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—2255
FRANCISCO MEZA,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: The trial court erred in denying defendant's request for a jury instruction on involuntary manslaughter, so defendant was entitled to a new trial.

Following a jury trial, defendant, Francisco Meza, was convicted of the first-degree murder (720 ILCS 5/9—1(a)(2) (West 2006)) of his roommate, Felipe Rosas. Defendant was sentenced to 24 years' imprisonment. On appeal, defendant argues that the trial court erred in refusing his request for a jury instruction on the lesser-included offense of involuntary manslaughter. We agree, and we therefore reverse and remand for a new trial.

I. BACKGROUND

Defendant was charged by indictment with first-degree murder on June 21, 2006. The indictment alleged that on March 22, 2006, defendant struck Felipe Rosas in the head, knowing that such act created a strong probability of great bodily harm to Rosas, and thereby caused Rosas' death. Prior to trial, defendant moved to suppress statements he made while in police custody. Defendant argued that during the interrogation, which was done in Spanish and recorded on video, Detective Andrew Ulloa told him that he did not have the right to an attorney. At the hearing, the parties introduced various written translations of the interrogation. The trial court denied the motion to suppress.

At defendant's jury trial, Ruben Rodriguez testified as follows. He owned a building in Waukegan containing three apartments. On March 22, 2006, he lived in the top apartment, and defendant and Rosas rented the basement apartment. That morning, defendant came to Rodriguez's apartment before going to work. Defendant asked him to check on Rosas, saying that Rosas was ill from eating chicken. Rodriguez immediately went to check on Rosas and found him lying down in defendant's bed. Rodriguez asked him what was wrong and if he needed to go to the hospital. Rosas' eyes were open, but he did not answer. Rodriguez could see that Rosas was breathing, and he thought Rosas was drunk because Rosas drank frequently, and Rodriguez had seen him in that state before. Rodriguez returned about one hour later and went to check on Rosas. He found him on the kitchen floor of the first floor apartment. Rosas was cold to the touch, and Rodriguez called an ambulance. Rodriguez did not recall telling an officer that Rosas had pointed to his stomach when Rodriguez previously asked if he was okay. Rodriguez had heard defendant and Rosas arguing earlier that same morning and "a noise like if somebody knocked on the wall." Some days prior, Rodriguez had seen a group of six or seven men, who were trying to steal Rosas' bike, kicking Rosas

while he was on the ground outside. Rodriguez yelled and the men ran away. At that time, Rosas got up and said he was okay.

Paramedics testified that when they arrived at Rodriguez's building, they found Rosas laying on the floor in a room off of the kitchen. He was unconscious and unresponsive and had a large hematoma or lump on the back of his head. There were no other signs of injury. Rosas' vital signs were consistent with a person suffering from a head injury. There was a small amount of blood on the back of his head.

Officers called to the scene found no signs of a struggle in any of the apartments. They collected a pair of nunchucks found in a basement bedroom. The parties stipulated that DNA from the nunchucks matched Rosas, and that there was no blood or hair on the nunchucks.

Rosas' brother testified that he visited Rosas in the hospital every day for two weeks. Rosas never regained consciousness. The family decided to terminate life support, and Rosas died.

Cook County chief medical examiner Nancy Jones was accepted as an expert in pathology and provided the following testimony. She performed an autopsy on Rosas on April 8, 2006. Rosas was 5'7" and weighed between 127 and 129 pounds. He had a skull fracture of about 2½ inches on the left side of his head, closer to the front. He also had bruising behind his left ear. She could not quantify how much force would be necessary to cause the skull fracture because it varies from person to person, but fracturing a human skull requires "a fair amount" of force. Jones opined that Rosas died from cranio-cerebral injuries resulting from blunt head trauma. A person who suffers an injury like Rosas would be able to walk and talk for anywhere from one hour to one day or more. Rosas' injuries were not consistent with him dying from a fall. There was also no indication of food

poisoning or defensive wounds. Jones opined that a pool cue shown to her could have caused Rosas' death.

Jose Gonzalez testified that he was defendant's boss and friend. He was also a friend of Rosas. On March 22, 2006, he picked up defendant for work as usual at about 7:15 or 7:20 a.m. Gonzalez brought him back at the end of the day and learned that Rosas had been taken to the hospital. Defendant continued to work as normal in the following weeks, and he did not seem nervous or preoccupied. In May 2006, defendant showed Gonzalez a card that a detective had left for him. He asked Gonzalez to help him call the detective because Gonzalez could translate and had a cell phone. Gonzalez arranged an appointment with the detective and drove defendant to the police station.

Detective Andrew Ulloa testified as follows. In May 2006, he was assigned to the investigation regarding Rosas' death. Defendant had not yet been interviewed in connection with the case, and Ulloa arranged a meeting with him on May 31, 2006. At that point, defendant was not a suspect. Defendant came to the police station with his boss, and Ulloa took him to an interview room, where they spoke in Spanish. Ulloa did not have any difficulty understanding defendant during the interview, and defendant never indicated he had trouble understanding Ulloa.

The first part of the interview lasted about half an hour. Defendant said that he had returned home from work and found Rosas cooking and drinking beer. Rosas offered him some chicken, and defendant saw that it was raw. Defendant told Rosas it needed to be cooked more, but Rosas said it was fine and ate the raw chicken. Defendant cooked his piece more. The next morning, defendant found Rosas on the floor having a seizure. Defendant offered help, but Rosas got up and said that

he was feeling better, and he went to lay down. When defendant returned from work, he spoke to Gonzalez and found out that Rosas had been taken to the hospital.

Ulloa asked if defendant could write out his account, and defendant started sweating profusely and making "suspicious" comments, like talking about how good a person he was. Ulloa asked if defendant had spoken to anyone else on the day in question, and defendant denied doing so. Defendant then said that Rosas had recently gotten jumped and had a soft spot on his head, and defendant rubbed the back left side of his head to demonstrate. At that point, Ulloa had not told him the cause of Rosas' death or that he had been struck on the left side of his head. Defendant said that he recalled an additional incident from that morning. When he woke up, he saw that Rosas had been drinking and was using nunchucks. Rosas said they should see who could work the nunchucks better. Defendant started using them, and he accidentally struck Rosas in the head when he got in the way. At that point, Ulloa left the room to discuss the suspicious comments with his supervisor, and he was told to videotape the rest of the interview because defendant was now a murder suspect.

Ulloa advised defendant of his *Miranda* rights by reading them from a preprinted form in Spanish. Defendant indicated that he understood each right, and he signed the waiver form. Ulloa asked him to explain what he had said before, and defendant again related the story of the raw chicken and nunchucks. Ulloa asked if he had spoken with anyone else that morning, and defendant said no. Ulloa said that he knew that defendant had spoken to Rodriguez, but defendant denied doing so. Ulloa showed defendant a statement from a police report stating that Rodriguez had reported speaking to defendant that morning. Defendant became very quiet. Ulloa questioned whether there had been an altercation that had led to defendant striking Rosas with the nunchucks.

Defendant denied it. Ulloa said that the investigation showed signs that an altercation had taken place, and defendant again denied it. Ulloa added that he had spoken to Rosas prior to his death. Defendant then said that they had an argument, and Rosas started insulting him. Defendant became angry, picked up a stick, and struck Rosas on the head with it.

Defendant gave the following account, according to Ulloa's translation of the interview:

"Well, I got up, then he started to say bad words, fuck you motherfucker, what the fuck, fucking asshole, you aren't worth a damn. Then I got mad, and grabbed a stick and I gave him a blow.

* * *

*** But it was not a hit, like to say I'm going to kill him. It was just a blow to calm him down, so that he wouldn't be giving me so much damn trouble. So that he would calm down."

Defendant agreed to write a statement, which Ulloa translated as follows:

"I arrived on Tuesday in the afternoon. He was drinking and cooking chicken. He invited me to two pieces. I grabbed them, but the chicken was raw. I cooked it again. We ate and we went to sleep.

The next morning he got up to drink. Then he started to insult me telling me *** fuck your mother, bitch, prick. I got mad and I gave him a strike, but it wasn't with intentions to kill him because if I wanted to kill him I would have given him more strikes.

And that is what happened, everything."

Ulloa asked where the stick was, and defendant said that it was in his bedroom. He gave Ulloa permission to retrieve the stick. Ulloa and an evidence technician went to defendant's

apartment and found the bottom half of a pool cue in the indicated location. At the station, defendant was shown a picture of the pool cue and identified it as the stick he used to hit Rosas. Defendant said that he used his left hand and hit Rosas with the bottom part of the stick on the left side of the head. On cross-examination, Ulloa agreed that he employed interviewing techniques when talking to defendant, such as developing a rapport and creating themes that Rosas had died from a combination of things, that there was a fight, and that his death was an accident. Ulloa also agreed that he lied to defendant during the interview, such as his statement that he had talked to Rosas. Ulloa was also the first to mention the nunchucks found in the apartment and suggest that there was a fight.

Waukegan police officer Anthony Paulsen testified that on March 22, 2006, he spoke to Rodriguez. Rodriguez said that when he had asked Rosas what was wrong that morning, Rosas pointed to his stomach but did not say anything.

An interpreter hired by the defense testified that in the videotaped interview, Ulloa told defendant that he did not have a right to consult a lawyer, in that he said "no tiene" which means "you don't." The interpreter testified that the phrase "lo tiene" would be grammatically incorrect. In rebuttal, Ulloa testified that he told defendant that he had a right to an attorney by saying "lo tiene"; Ulloa used "lo" as an extraneous word.

At the close of evidence, the trial court refused defendant's request for a jury instruction on involuntary manslaughter. The jury found defendant guilty of first-degree murder. The trial court sentenced defendant to 24 years' imprisonment. Following the denial of defendant's motion to reconsider the sentence, defendant timely appealed.

II. ANALYSIS

Defendant's sole argument on appeal is that the trial court erred in refusing to instruct the jury on involuntary manslaughter, because there was at least some evidence at trial to support a finding that he recklessly caused Rosas' death when he struck Rosas with a pool cue a single time after being verbally abused and only to calm Rosas down. The State maintains that defendant has forfeited this argument because while he raised it in a posttrial motion, at trial he argued that the instruction was warranted because the evidence showed that he accidentally struck Rosas in the head with nunchucks, and he did not argue recklessness with the pool cue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review, the defendant must object at trial and raise the issue in a written posttrial motion). Defendant argues that he did address the issue during trial because in response to the State's argument that the evidence showed that he struck Rosas with the pool cue, defense counsel stated that the question was whether defendant was acting recklessly when the incident occurred.

"An issue raised by a litigant on appeal does not have to be identical to the objection raised at trial, and we will not find that a claim has been forfeited when it is clear that the trial court had the opportunity to review the same essential claim." *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009). Here, the above-mentioned exchange shows that the defense alluded to the issue of recklessness with the pool cue during trial, and the record also shows that the trial court addressed the subject of involuntary manslaughter in regards to both the nunchucks and the pool cue. Accordingly, we agree with defendant that he did not forfeit his argument on appeal.

Involuntary manslaughter is a lesser-included offense of first-degree murder. *People v. Robinson*, 232 Ill. 2d 98, 105 (2008). If the record contains even slight evidence that would reduce a crime to a lesser-included offense, the trial court should give the jury an instruction on the lesser-

included offense. *People v. Washington*, 375 Ill. App. 3d 243, 257 (2007). The failure of the trial court to give the lesser included offense instruction in such a situation constitutes an abuse of discretion. See *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). However, an instruction on a lesser included offense is not necessary where the evidence rationally precludes the instruction. *People v. Greer*, 336 Ill. App. 3d 965, 976 (2003).

A person commits first-degree murder, as charged in this case, if he kills an individual without lawful justification, and in performing the acts which cause the death, he knows that the acts created a strong probability of great bodily harm. 720 ILCS 5/9—1(a)(2) (West 2006). A person commits involuntary manslaughter if he unintentionally kills someone without lawful justification, the acts that caused the death were likely to cause death or great bodily harm, and the defendant performed those acts recklessly. 720 ILCS 5/9—3(a) (West 2006). Thus, the main difference between the two offenses is the mental state for the conduct resulting in the victim's death; first-degree murder requires a mental state of knowledge whereas involuntary manslaughter requires a less culpable mental state of recklessness. *People v. Jones*, 404 Ill. App. 3d 734, 742 (2010). A person has knowledge where he is consciously aware that his conduct is practically certain to cause a particular result. 720 ILCS 5/4—5(b) (West 2006). A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow *** 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 2006). In other words, a person acts recklessly when he is aware that his acts might result in death or great bodily harm, although the result is not substantially certain to occur. *DiVincenzo*, 183 Ill. 2d at 250. Reckless conduct involves

a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *Id.*

Whether an involuntary manslaughter instruction should be given depends on each case's particular facts and circumstances. *Id.* at 251. Non-exclusive factors considered in determining whether a defendant acted recklessly include a disparity in size and strength between the defendant and the victim; the brutality and duration of the beating and the severity of the injuries; and whether the defendant used his hands or a weapon like a gun or knife. *Id.* The nature of the killing, such as multiple injuries to the victim or the victim's defenselessness, may show that the defendant did not act recklessly, thereby precluding an involuntary manslaughter instruction. *Id.*

As a general rule, death is not considered a natural consequence of blows from bare fists. *People v. Taylor*, 212 Ill. App. 3d 351, 356 (1991). In contrast, " 'the intentional use of a deadly weapon is accompanied by a presumption the actor knows his acts create a strong probability of death or great bodily harm because a person intends the natural and probable consequences of his acts.' " *Jones*, 404 Ill. App. 3d at 745, quoting *People v. Gresham*, 78 Ill. App. 3d 1003, 1007 (1979); see also *People v. Rodriguez*, 275 Ill. App. 3d 274, 284 (1995) (the use of a deadly weapon creates a strong inference that the defendant intended to cause the victim's death). For example, if a defendant intentionally shoots a gun in the direction of the victim, the conduct is not considered reckless, even if the defendant asserts that he did not intend to kill anyone. *People v. Jefferson*, 260 Ill. App. 3d 895, 912 (1994). Still, in determining whether a defendant's actions were reckless or intentional, a court must examine the manner in which the defendant used the weapon. *People v. Sims*, 247 Ill. App. 3d 670, 678 (1993). A defendant is not entitled to an involuntary manslaughter

instruction based on a mental state that is known only to him and is unsupported by the facts. *People v. Jackson*, 372 Ill. App. 3d 605, 614 (2007).

Here, defendant does not dispute that his act of striking Rosas on the head caused Rosas' death, but he challenges the mental state accompanying that act. Defendant argues that the facts and circumstances of this case provide at least slight evidence that he acted recklessly so as to warrant an involuntary manslaughter instruction. Defendant points to evidence that Rosas was drunk the morning in question and started berating defendant before he left for work. Defendant grabbed a pool cue and hit him a single time, not intending to kill him but doing so because he was mad and wanted to calm Rosas down. Correspondingly, the autopsy showed a single skull fracture. The coroner testified that it requires "a fair amount" of force to fracture a human skull but could not quantify the amount of force required to fracture Rosas' skull. Defendant points to evidence in the record that he and Rosas were of similar height and weight. He also points to evidence that Rosas was alive when he left for work and was able to move around the apartment before his death, and that defendant asked his landlord to check on Rosas before leaving that morning. Defendant further maintains that he did not exhibit any consciousness of guilt because he never attempted to flee or change his daily routine. Defendant argues that, based on the evidence, the jury should have been given the option to decide whether he knew that his conduct created a strong probability of great bodily harm, or whether he simply disregarded the risks posed by his conduct.

Defendant cites *People v. Whiters*, 146 Ill. 2d 437 (1992). There, the defendant was arguing with the victim, who was her boyfriend, and the victim ripped the phone from the wall and threatened the defendant. The defendant then grabbed a kitchen knife and held it at her waist, pointed at the victim. When he moved towards her, she stabbed him in the abdomen. The defendant

immediately screamed that she did not mean to hurt him and called an ambulance. *Id.* at 440-41. The appellate court held that the defendant was entitled to an instruction on involuntary manslaughter, and our supreme court affirmed, stating that the "appellate court correctly held that a determination of whether any of the above-mentioned conduct constituted recklessness was a question of fact for the jury and that the jury should have been instructed on involuntary manslaughter." *Id.* at 441.

The State argues that the evidence did not warrant an involuntary manslaughter instruction because Rosas was unarmed and had only verbally insulted defendant when defendant escalated the altercation and struck him with a pool cue in anger. The State argues that the use of a deadly weapon negated any lack in disparity in size between defendant and Rosas. The State contends that defendant's striking Rosas in anger indicated that his mental state was not reckless, but knowing. It cites *Rodriguez*, where the court stated that "the fact that the defendant admittedly struck the victim out of anger *** further negates a finding of recklessness because '[a] person who is driven by his bad temper to injure or kill another acts knowingly or intentionally, not recklessly.' " *Rodriguez*, 275 Ill. App. 3d at 285, quoting *People v. Summers*, 202 Ill. App. 3d 1, 11 (1990).

The State maintains that this case is analogous to *People v. Whitt*, 140 Ill. App. 3d 42 (1986). There, the defendant asked his friend to leave a residence several times, to no avail. The defendant then took a baseball bat and hit the friend in the head purportedly to get his attention and because the defendant did not know what else to do. After the first hit, the defendant thought the friend may come after him, so he struck him again. The evidence showed that either blow had enough force to have caused the friend's subsequent death. The defendant claimed that he was not trying to hurt or kill his friend and argued that the jury should have been instructed on involuntary manslaughter. *Id.*

at 47-49. This court held that defendant's mere claim that he did not intend to hurt or kill his friend was not a sufficient basis to require such an instruction. We stated that the circumstances in which the bat was used made it a deadly weapon capable of killing someone, and the defendant's conduct indicated intentional actions, rather than reckless conduct, to strike the blows which caused the friend's death. We stated that where a defendant's willful act has the natural tendency to cause death or great bodily harm, an involuntary manslaughter instruction was not warranted. Accordingly, we held that the trial court did not err by refusing to give the jury an involuntary manslaughter instruction. *Id.* at 49.

The State argues that defendant voluntarily and wilfully hit Rosas with a pool cue, and that his actions were deliberate and intentional rather than reckless. The State points to defendant's statement that if he had wanted to kill Rosas, he would have struck him in the head multiple times, as evidence of his mental state. The State argues that he also displayed a consciousness of guilt because he began to sweat profusely while being questioned by Detective Ulloa and made suspicious comments. The State maintains that *Whiters* is distinguishable because there was evidence of physical aggression by the victim in that he ripped the phone out of the wall, whereas here there was no physical aggression by Rosas. The State argues that defendant also did not call for help immediately as did the defendant in *Whiters*, and defendant told his landlord only that Rosas was sick from eating bad chicken. The State claims that the evidence highlighted by defendant would not have permitted the jury to rationally find him guilty of involuntary manslaughter, so the trial court did not err in refusing to provide the jury with such an instruction.

We agree with defendant that the jury should have received an instruction on involuntary manslaughter. Although there is no question for purposes of this appeal that defendant deliberately

hit Rosas with the pool cue, "a defendant may act recklessly where he commits deliberate acts but disregards the risks of his conduct." *DiVincenzo*, 183 Ill. 2d at 252. The use of a weapon, which creates an inference of knowledge (see *Jones*, 404 Ill. App. 3d at 745), is still not outcome determinative, as the defendant in *Whiters* used a knife but was found to deserve an involuntary manslaughter instruction. *Rodriguez* and *Summers*, cited by the State for the proposition that a person who is driven by anger to injure or kill another acts knowingly or intentionally rather than recklessly, are distinguishable because they both involved the beatings of very young children. The proposition is relevant to situations where there is strong evidence of intent to kill or injure, as those beatings showed.

The central question in determining whether an involuntary manslaughter instruction is warranted is whether the defendant's mental state in doing the acts that lead to the victim's death was knowing or reckless. *Jones*, 404 Ill. App. 3d at 742. Here, the evidence showed that defendant hit Rosas in the head a single time with a pool cue because Rosas was verbally insulting him, and defendant became angry and wanted to "calm him down." *Cf. People v. Tainter*, 304 Ill. App. 3d 847, 851 (1999) (citing evidence that the beating was a result of a jealous rage as evidence of recklessness). The coroner testified that Rosas died from a single blow to the head and could say only that the blow required "a fair amount" of force. She also testified that a person suffering from such an injury could walk and talk for anywhere from an hour to one day or more, and the evidence showed that Rosas was alive when defendant left for work and was able to move from their basement apartment to the first floor. *Cf. Tainter*, 304 Ill. App. 3d 851 (citing evidence that the victim was able to get up, walk home, and remain ambulatory for several days as a factor supporting an involuntary manslaughter instruction). It is also undisputed that before leaving for work, defendant

asked his landlord to check on Rosas, which is some evidence that defendant did not intend to cause great bodily harm to Rosas when he hit him. Under these facts and circumstances, a reasonable jury could conclude that in hitting Rosas in the head with a pool cue with "a fair amount" of force a single time as a result of an argument, defendant was consciously disregarding a substantial and unjustifiable risk that was a gross deviation from the standard of care of a reasonable person, but that death or great bodily harm was not *substantially certain* to occur as a result. Accordingly, the trial court abused its discretion in refusing defendant's instruction on involuntary manslaughter.

In arriving at our conclusion, we find *Whitt* distinguishable. There the victim was not being belligerent towards the defendant, and the defendant hit him with a baseball bat, which is a heftier piece of wood than a pool cue, and did so not once, but twice. Also, the defendant in *Whitt* struck each blow with "a significant force" (*Whitt*, 140 Ill. App. 3d at 47) as opposed to the "fair amount" of force here. The defendant's testimony in *Whitt* that he did not intend to hurt his friend stands in contrast to his actions and is therefore the type of hidden mental state that will not support an involuntary manslaughter instruction (see *Jackson*, 372 Ill. App. 3d at 614), whereas in this case defendant's alleged lack of intent to harm Rosas is supported by evidence of a single blow and defendant's request to have the landlord check on him. Defendant's situation is more akin to *Whiters*, where the conduct took place between individuals with close relationships and during emotional arguments, and the defendants sought some sort of help for the victims afterwards.

We recognize that there is sufficient evidence in this case for a jury to conclude that defendant acted knowingly in that he was consciously aware that hitting Rosas with a pool cue was practically certain to cause great bodily harm to Rosas, thereby supporting a first-degree murder

conviction. However, because there is also at least slight evidence that defendant acted recklessly, the jury should have had the option to find him guilty of the lesser-included offense of involuntary manslaughter. See *DiVincenzo*, 183 Ill. 2d at 252 (determining a defendant's mental state, which can be inferred from the circumstantial evidence, is a "task [that] is particularly suited to the jury"). Accordingly, we reverse and remand for a new trial.

III. CONCLUSION

For the foregoing reasons, we reverse the judgment of the Lake County circuit court and remand for a new trial.

Reversed and remanded.