2013 IL App (2d) 110940-U
No. 2-11-0940
Order filed April 29, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-4698
DAVID RAMIREZ-LUCAS,	)	Honorable Gary V. Pumilia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in failing to give instruction on reckless conduct as lesser-included offense to charge of aggravated discharge of a firearm, as defendant never tendered such an instruction, and the evidence did not support giving such an instruction; and (2) two of defendant's four convictions for felony murder would be vacated under the one-act, one-crime doctrine.

¶ 2 On May 13, 2010, a jury convicted the defendant, David Ramirez-Lucas, of (among other things) first degree felony murder in connection with the deaths of two men at a Rockford bar. The convictions stemmed from a series of events in which the defendant was told to leave the bar and then returned with a gun and shot several people. The defendant appeals his convictions, arguing that (1) the trial court erred in refusing to instruct the jury on reckless conduct as a lesser-included

offense of aggravated discharge of a firearm (one of the predicate felonies upon which felony murder convictions were based); (2) one of the other felony murder convictions cannot stand because the predicate felony occurred after the defendant killed the victim; and (3) the defendant was incorrectly sentenced on all four murder convictions although there were only two deaths, and thus two of the convictions should be vacated. We affirm the convictions relating to the aggravated discharge of a firearm, and modify the judgment to reflect a single felony murder conviction for each death.

¶ 3 I. BACKGROUND

¶ 4 The evidence at trial included the following testimony relevant to the issues raised in this appeal. On the evening of December 8, 2007, the defendant went to the El Tenampa bar on South Main Street in Rockford. El Tenampa was celebrating its fifth anniversary in business, and had a band playing in addition to various special events such as a raffle and giveaways of promotional items. The defendant arrived between 7:30 and 8 p.m. and sat at a table near the restrooms. The bar itself was U-shaped, with the back door to the parking lot at one end (the southwest end) of the U. The area where the defendant was sitting was all the way around the bar at the far side of the U (the northwest corner of the room). The defendant drank at least ten beers, ordering three or four "buckets" of beer (buckets filled with ice and bottles of beer). The bar was crowded, primarily with

family and friends of the bar owner, Jesus Medrano, Sr.[1] Witnesses estimated that there were between 40 and 60 people there.

¶ 5 Sometime between 11 p.m. and midnight, the defendant went to the restroom. There he encountered Jesus Medrano, Jr., and the two got into an altercation when (according to Medrano, Jr., and his friend Hugo Garza) the defendant made a comment about urinating in the bathroom sink. Garza joined in and began fighting with the defendant, hitting him seven or eight times. A few minutes later, Medrano, Sr., broke up the fight and told the defendant he had to leave. At that point the defendant's nose was bloody, as was his shirt. Garza's shirt also had blood on the sleeve, and he changed it later while still at the bar. Various witnesses testified that the defendant left El Tenampa peacefully (accompanied to the door by Medrano, Sr.), although the defendant testified that he was angry.

¶ 6 A friend gave the defendant a ride to his home, which was about 10 minutes away. The defendant did not have his keys, so he used a hidden key to enter his home. (The defendant originally testified that when he got home he looked for his keys and at that point realized he did not have them. However, the defendant later testified that he realized as he was being ejected from El Tenampa that he did not have his keys or cell phone and that he asked Medrano, Sr., to get those items for him, but Medrano, Sr., merely repeated that the defendant had to leave.) At his home, the defendant went to

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[1] Both the bar owner and his son were named Jesus Medrano, although they had different middle names. They were not technically "Sr." and "Jr.," but they were referred to that way throughout the trial for ease of reference. We likewise refer herein to the bar owner as Medrano, Sr., and his son as Medrano, Jr.

the bathroom, washed his face, and changed his clothes. He then decided to go back to El Tenampa to get his phone and keys. He took with him a fully-loaded .45-caliber semi-automatic handgun. The same friend who had given him a ride home gave him a ride back to El Tenampa.

¶ 7 The Shooting of Leonardo Medrano

¶ 8 The defendant arrived at El Tenampa about 30 to 45 minutes after he had been ejected, and reentered by the back door (the door most commonly used by patrons). Immediately inside the back door was a short hallway with two side doors leading to the inside of the bar where drinks were served and the inside of the kitchen. Beyond that was the main room of El Tenampa. The defendant testified that he had his gun in the pocket of his jacket with the handle sticking out a little bit. He walked into the main room and around the bar toward the area where he had been sitting earlier. According to the defendant, when he was a short distance away from the table where he had been sitting, he saw that his keys and phone were not on the table and turned around to leave. Without warning he was then grabbed from behind. He took his gun out of his pocket and fired a shot into the floor. He fired into the floor because he did not want to hurt the man who had grabbed him.

¶ 9 Various witnesses had differing accounts of the events immediately after the defendant reentered the bar. Nicole Beard, a waitress at El Tenampa, testified that she was in front of a closet near the back door when the defendant came in. He walked past her, and then he bumped into someone else and his coat flew open. At that point, people started screaming in Spanish. (Beard did not understand Spanish.) The defendant kept walking toward the crowd, and the crowd came toward him. The defendant then raised his hand above the crowd. He was holding a gun and started shooting in the air toward the crowd. Beard heard two to four shots as she left.

¶ 10 Medrano, Sr., testified that he did not notice that the gunman had come into the bar until someone yelled "He has a gun!" The man was standing near the dartboard (near the restrooms) when Medrano, Sr., heard the first shot. After that first shot, the man began walking back around the bar toward the exit. Leonardo Medrano (one of the owner's sons) came up to the man and tried to take his gun away. Leonardo fell back and the man shot him in the leg. Leonardo's sister Nidya Angeles covered Leonardo with her body, and the man kicked at Leonardo's face. Medrano, Sr., hit the bar's "panic button" to call the police.

¶ 11 Nidya Angeles testified that she, Leonardo, and some others were at a table between the pool table and the restrooms. She saw the defendant escorted out. Later, she heard someone yell, "he has a gun!" The defendant was near the dartboard then. She saw the defendant pointing the gun, then shooting. Her brother Leonardo was near her and the defendant pointed the gun at him. She pulled Leonardo backward and he fell. Nidya then covered him with her body. Nidya did not recall the defendant shooting Leonardo. However, as she and Leonardo were lying on the floor she "felt kicking."

¶ 12 Leonardo testified that he had followed his father as the defendant was escorted out after the restroom fight. When the defendant returned about 30 minutes later, Leonardo saw him. He approached the defendant and asked "what are you doing?" because the defendant had a gun in his hand. Leonardo described the defendant as holding the gun with a bent elbow, the gun pointed upward at a 45-degree angle. As the defendant walked around the bar toward the dartboard, he straightened his arm and began sweeping the gun back and forth in a panning motion. Leonard tried to grab the gun from the defendant, but the defendant pulled away and shot once. The shot was toward Leonardo but missed him. Leonardo tried again to grab the gun. The defendant pushed him

and then shot him in the leg as he fell backward. Leonardo's sister Nidya jumped on top of him and covered him, screaming at the defendant to leave him alone. The defendant then kicked Leonardo in the mouth.

¶ 13 Antonio Ramirez testified that he was at El Tenampa with his brother Christiano. He was sitting near the front door and the pool table, near the east end of the room. He saw the defendant escorted out after the restroom fight. About half an hour later, he saw a man run in, screaming "where is he, where is he?" and scanning the bar. (This is contrary to the testimony of most of the witnesses, who stated that the gunman did not say anything while he was moving through the bar.) Christiano pointed the man out to Antonio. Antonio saw the man holding the gun straight out in front of him and sweeping it back and forth toward people in a horizontal panning motion. Antonio saw Leonardo approach the man and try to calm him down. The man got mad and pushed Leonardo, who fell backward. The man then shot toward Leonardo. Antonio and Christiano heard a second shot, and people began screaming and running.

¶ 14 The Confrontation with Christiano Ramirez

¶ 15 Antonio and Christiano turned to go, but were blocked by other people. The gunman began approaching them. Christiano, who was holding a bottle of beer, stepped in front of Antonio. Christiano testified that the gunman approached until the gun was within a foot of his chest. Both Christiano and Antonio testified that the gunman pointed the gun at them. The gunman said something to Christiano in Spanish that he did not understand; according to Antonio, the man wanted Christiano to drop the bottle. The defendant testified that, as he was heading for the door, there was a man in front of him holding a beer bottle. The defendant was afraid that the man would hit him with the bottle, and so the defendant told him to drop the bottle. On cross-examination, the defendant

agreed that Christiano had not threatened him before the defendant pointed his gun at Christiano and told him to drop the bottle. Antonio testified that the man then "let out a shot toward us." Antonio confirmed that he told police that night that the man "shot the gun at our feet" and that he felt "the bullet hit near the floor." Christiano did not recall the defendant firing. In his statement to police later that night, he said that the defendant fired a shot into the floor between his legs, but this was based on seeing a bullet hole in the floor when he showed the police where the confrontation occurred. The defendant confirmed that he fired a shot during the confrontation with the Ramirez brothers, "so that he [Christiano] would drop the bottle." However, he stated that he fired at the floor, not at the man with the bottle.

¶ 16 The Shooting of Mora

¶ 17 The defendant testified that he continued toward the back door, but another man (Tomas Mora) approached him and hit him twice on the back with a bar stool. Most of the other patrons who testified at the trial agreed that Mora had lifted a bar stool and swung it down toward the defendant. Medrano, Sr., who was inside the bar (in the area from which he would serve alcohol) at the time, stated that Mora missed his step as he was doing this and fell. The defendant shot Mora in the chest. Mora fell on the floor near the dance floor. The defendant conceded that, at the time Mora attacked him, he had already fired two shots.

¶ 18 After the defendant shot Mora, Medrano, Sr., stated that he began to shout "bad words" at the defendant. The defendant came toward Medrano, Sr., pointing his gun at him, and Medrano, Sr., dropped to the floor.

¶ 19 The Shooting of Ibarra

¶ 20 José Ibarra testified that he had arrived at El Tenampa at about midnight, as the defendant was being ejected. Ibarra was near the pool table 30 to 45 minutes later when he saw the defendant come back with a gun. As the defendant began shooting, Ibarra moved around the pool table. Ibarra saw the defendant shoot his cousin, Mora. Ibarra went to help Mora. Ibarra then saw the gunman going toward Ibarra's sister. Ibarra hit the gunman with a pool cue and tried to grab his gun hand. As they were struggling, the defendant shot Ibarra in the abdomen. Ibarra testified that he spent two weeks in the hospital as a result. As to this shooting, the defendant testified that after he shot Mora someone hit him with a stick and people jumped on him and he shot again, but he did not see where that shot went.

¶ 21 Events in the Kitchen

¶ 22 Leonardo Medrano testified that after the defendant shot him in the leg and kicked him, he got up in time to see the defendant shoot Mora. Leonardo hid behind the bar, but then saw the defendant aim a gun at his father. Leonardo came out from behind the bar and approached the defendant, grabbing him around the chest and trying to pin his arms downward. Leonardo's cousin Heriberto Mendez (Ibarra's nephew) came to help, and they wrestled the defendant into the kitchen. The lights were off in the kitchen. The defendant testified that he was trying to leave El Tenampa but people were hitting him and he was thrown into a dark room. Medrano, Sr., also came out from behind the bar to assist Leonardo and Mendez at this point.

¶ 23 The four men scuffled in the dark kitchen. Medrano, Sr., testified that although the men were standing at first, they fell and continued fighting on the ground. They were yelling at the defendant to drop the gun, but he would not, so they fought with him to try to get the gun away from him. The defendant fired the gun "a lot of times." At some point, Mendez was shot in the head and died.

Leonardo was shot in the foot. Medrano, Sr., was shot through the shoulder; the bullet also grazed his neck and chin. Medrano, Sr., Leonardo, and the defendant all agreed that the gun remained in the defendant's hand throughout the fighting. The defendant testified that he did not intend to shoot anyone or pull the trigger on purpose while he was in the kitchen. Agreeing with a question from his attorney, the defendant stated that the gun might have gone off when people in the kitchen pulled on the gun while his finger was on the trigger. Medrano, Sr., stated that no one could get the gun away from the defendant until all of the bullets were gone. Leonardo testified that he eventually bit the defendant on the hand to make him let go of the gun. The defendant testified that, because he was afraid, he held onto the gun tightly until he lost consciousness from the blows being showered on him.

¶ 24 The Aftermath

¶ 25 When the police arrived (in response to several calls to 9-1-1), they found a small crowd in the kitchen, beating the defendant, who was unconscious. The defendant, Leonardo, Ibarra, Mora, and Medrano, Sr., were all taken to the hospital. The defendant had cuts on his face and scalp and his nose was broken. Leonardo had been shot twice, once in the left shin and once in his left foot. Ibarra had been shot through the abdomen. Mora, who had been shot in the chest, was pronounced dead at the hospital. Medrano, Sr., was shot through the shoulder. Mendez's body was taken directly to the coroner's office.

¶ 26 Police crime scene investigators found eight spent .45-caliber shell casings in El Tenampa: four in the main room, and four in the kitchen. The .45-caliber handgun recovered from the scene had a magazine that could hold eight bullets, but it was empty. A second, fully loaded magazine for .45-caliber bullets was also found at the scene, but no evidence linked it to the defendant.

¶ 27 The defendant was arrested and indicted on 16 charges. He was charged with the knowing first degree murder of Mora and Mendez. He was also charged with five counts of first degree felony murder for each victim. In addition to these 12 murder charges, the defendant was charged with aggravated battery to Leonardo, Ibarra, and Medrano, Sr., and aggravated discharge of a firearm toward Christiano. The charges were numbered as follows:

Count I	Knowing first degree murder of Mora
Count II	First degree felony murder of Mora, based on burglary
Count III	First degree felony murder of Mendez, based on burglary
Count IV	Knowing first degree murder of Mendez
Count V	First degree felony murder of Mora, based on aggravated battery (Medrano, Sr.)
Count VI	First degree felony murder of Mendez, based on aggravated battery (Medrano, Sr.)
Count VII	First degree felony murder of Mendez, based on aggravated battery (Leonardo)
Count VIII	First degree felony murder of Mora, based on aggravated battery (Leonardo)
Count IX	First degree felony murder of Mendez, based on aggravated battery (Ibarra)
Count X	First degree felony murder of Mora, based on aggravated battery (Ibarra)
Count XI	First degree felony murder of Mendez, based on aggravated discharge of firearm (Christiano)
Count XII	First degree felony murder of Mora, based on aggravated discharge of firearm (Christiano)
Count XIII	Aggravated battery (Medrano, Sr.)

Count XIV Aggravated battery (Leonardo)

Count XV Aggravated battery (Ibarra)

Count XVI Aggravated discharge of a firearm (Christiano)

The defendant's jury trial on these charges began on May 3, 2010, and lasted nine days.

¶ 28 Questions from the Jury

¶ 29 During its deliberations, the jury sent out a number of notes, one of which is relevant to this appeal. That note contained two questions. The first question asked "Who was shot first – Jose or Thomas [*sic*]?" (This question presumably referred to José Ibarra and Tomas Mora.) The second question on the note asked "Does the felony (*i.e.*, aggr. discharge of firearm) have to take place prior to the killing for murder (1st degree) to be applicable[?]" The parties debated the proper answer to the second question, with the State arguing that a predicate felony need not occur before the killing so long as they both occurred during "the same criminal episode," and the defendant arguing the opposite and also arguing that the jury should be told merely to continue deliberating on the evidence presented and the instructions already given. The trial court's comments reflect that it ultimately decided to answer this question by inserting "Type B" after the phrase "murder (1st degree)" and then telling the jury that the answer to its question was "no." This verbal description of the trial court's response is the only response in the record; the record does not contain any written copy of the trial court's answer to the question.

¶ 30 The Verdicts

¶ 31 On May 13, 2010, the jury returned its verdicts. As to the charges of knowing (Type A) murder, the jury found the defendant guilty of second degree murder as to Mora and involuntary manslaughter as to Mendez. The jury also found the defendant guilty of the first degree felony

murder (Type B murder) of both Mora and Mendez, based on two predicate felonies that the jury found the defendant had committed: (1) aggravated battery toward Ibarra, and (2) aggravated discharge of a firearm toward Christiano. The jury also returned a guilty verdict on the misdemeanor charge of reckless conduct toward Medrano, Sr. The jury returned verdicts of not guilty on all of the remaining charges, including the charge of aggravated battery toward Leonardo. Finally, the jury found that the State proved that the defendant personally fired the shot that killed Mora, but did not prove that the defendant personally fired the shot that killed Mendez.

¶ 32 The defendant filed a motion for a new trial, which the trial court denied on August 23, 2010. The trial court then discussed the appropriate sentences for the defendant. There was no dispute that, because the defendant had been convicted of killing two people, a sentence of natural life was required. However, the trial court raised the question of how it should structure the judgments and sentences. After hearing argument, the trial court stated that it would enter only one conviction for felony murder for each victim: "The Defendant is convicted of the offense of felony murder with regard to the death of Thomas [*sic*] Mora" and "convicted of felony murder with regard to the death of Herberto [*sic*] Mendez." The trial court merged the convictions on the predicate felonies (aggravated battery toward Ibarra and aggravated discharge of a firearm toward Christiano) into the felony murder convictions. The court refused to enter any judgment on the conviction for the second degree murder of Mora or the involuntary manslaughter of Mendez, commenting that these charges were "not merged, but the judgment and conviction must be on the most serious offense." The written judgment order sentenced the defendant to natural life in prison for the "felony murder of Tomas Mora" (with a notation that this conviction pertained to counts X and XII), and imposed the same sentence for the "felony murder of Heriberto Mendez" (with a notation referring to counts IX

and XI), to run concurrently. Finally, the trial court sentenced the defendant to a term of 364 days in jail for reckless conduct, a sentence that had already been completed due to credit for time served.

¶ 33 II. ANALYSIS

¶ 34 On appeal, the defendant attacks the validity of his convictions on the predicate felonies as well as his felony murder convictions. The predicate felonies were (1) the aggravated discharge of a firearm toward Christiano, and (2) the aggravated battery to Ibarra. As to the first, the defendant argues that the trial court erred in not instructing the jury on the lesser included offense of reckless conduct. If the trial court had not erred in this manner, the defendant contends, he might have been found guilty only of the misdemeanor reckless conduct, and thus would not have been convicted of either the aggravated discharge itself (count XVI) or the felony murder charges based on that offense (counts XI and XII). As to the second felony, the aggravated battery to Ibarra, the defendant argues that it cannot serve as the predicate felony for the felony murder charge for Mora's death (count X), because the aggravated battery to Ibarra occurred after the defendant shot Mora and the defendant did not have the intent to harm Ibarra at the time he shot Mora. Finally, the defendant argues in the alternative that some of his convictions must be vacated under the one-act, one-crime rule.

¶ 35 A. Aggravated Discharge and Reckless Conduct

¶ 36 The defendant contends that he wanted the jury to be instructed on reckless conduct as a lesser included offense of aggravated discharge of a firearm, and that the trial court erred by refusing to so instruct the jury. However, this contention is forfeited, because the defendant never tendered a jury instruction regarding reckless conduct toward Christiano.

¶ 37 The defendant argues that the record shows that he wanted the jury instructed on reckless conduct as a lesser included offense of aggravated discharge, because defense counsel asked for such

an instruction during the portion of the jury instruction conference when the parties and the trial court were reviewing the issues instruction for aggravated discharge. The defendant asserts that the trial court "refused" to give a reckless conduct instruction in connection with this charge. The record does not support this contention.

¶ 38 The record shows that, on the seventh day of trial (May 11, 2010), the parties finished presenting their witnesses and the jury was dismissed until the following day. After going over the exhibits to be admitted, the trial court and the parties began discussing the jury instructions. However, neither the State nor the defense had yet tendered jury instructions to the court. Accordingly, the discussion proceeded in the abstract.

¶ 39 The defense began by saying that it would be asking for instructions on self-defense and second degree murder (based on an unreasonable belief in the necessity of self-defense) with respect to count I, the knowing murder charge (referred to as "Type A" murder) relating to Mora's death. The defense would ask for those same instructions plus involuntary manslaughter with respect to count IV, the Type A murder charge relating to Mendez's death. The State objected. The trial court ruled that it would allow the requested instructions with respect to count I, and the defense stated that it would prepare such instructions and tender them the next day. As to count IV, the trial court stated that it would not give the requested instruction on involuntary manslaughter, because the evidence did not support a finding that the defendant fired the gun recklessly in the kitchen, only that either (a) he fired knowingly or (b) the gun went off accidentally as people were pulling on it while the defendant was holding it. The trial court stated that it was also leaning toward denying the self-defense and second degree murder instructions with respect to the knowing murder of Mendez.

However, the defense could prepare these instructions and the trial court would give its final ruling the next day.

¶ 40 After listening to arguments raised by the parties on various other issues relating to the instructions for the charges on counts I through VII, including whether self-defense instructions could be given with respect to the charges of felony murder (referred to as "Type B" murder), the trial court commented that it would not issue final rulings on the instructions that evening. Instead, it would reconsider the issues raised once the instructions were actually before the court the next day: "Right now, folks, I just want you to know the way I'm looking at things, seeing as we really aren't ready for an instruction conference." Also, if there was case law the parties wished to submit on certain issues, the trial court would consider it and would revisit any of its preliminary rulings. The parties should submit the jury instructions they wanted to be given and the court would make its final rulings in the morning. At no point on this day did anyone raise the issue of reckless conduct as a lesser alternative to aggravated discharge of a firearm.

¶ 41 The next morning (May 12, 2010), the defense submitted several cases to support its arguments that: (a) accidentally discharging a gun would support giving an instruction on involuntary manslaughter; and (b) reckless conduct was a lesser included offense of aggravated battery, and an instruction on reckless conduct could be given when a shooting occurred during a fight over a gun. After reviewing them, the trial court reconsidered its earlier statements and permitted the jury to be instructed on involuntary manslaughter in connection with the Type A murder charge relating to Mendez.

¶ 42 The trial court then began going through the parties' proposed instructions. The issue of reckless conduct as a lesser included offense of aggravated discharge of a firearm first arose when the

parties were reviewing the State's proposed instruction no. 18, an "issues" instruction which stated the propositions that the State was required to prove regarding the charge of aggravated discharge of a firearm toward Christiano:

> "To sustain the charge of aggravated discharge of a firearm, the State must prove the following propositions:
>
> First proposition: That the defendant knowingly discharged a firearm; and
>
> Second proposition: That the defendant discharged the firearm in the direction of Christiano Ramirez.
>
> Third proposition: That the defendant was not justified in using the force which he used.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

This proposed instruction was based on Illinois Pattern Jury Instructions (Criminal) (IPI) 18.12 (4th ed. 2000).

¶ 43 The defense asked that the phrase "without lawful justification" be added, so as to permit the jury to consider the question of whether the defendant acted in self-defense with respect to his conduct on this charge. The trial court granted this request over the State's objection. The defense also indicated that it would like the jurors to be instructed that they could instead find the defendant guilty of reckless conduct as a lesser included offense. The trial court indicated that it was open to

this but that it did not believe that language to that effect could be inserted into the format of this particular IPI instruction:

> "I'm just saying putting reckless conduct in *** this instruction, I don't know how we'd do that or what the—how that reads."

The defense did not tender its own proposed version of this instruction.

¶ 44 The defendant did tender other proposed instructions relating to reckless conduct, including the following instructions:

-- A definition of reckless conduct (based on IPI (Criminal) 11.37), stating that "a person commits the offense of reckless conduct when he recklessly performs any act which causes bodily harm to another person."

-- An "issues" instruction listing the elements of reckless conduct (based on IPI (Criminal) 11.38), but only as to the defendant's conduct toward Medrano, Sr.:

> "To sustain the charge of reckless conduct, the State must prove the following proposition:
>
> That the defendant recklessly performed an act which caused bodily harm to Jesus Medrano [*sic*].
>
> If you find from your consideration of all the evidence that this proposition has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that this proposition has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

-- Verdict forms allowing the jury to find the defendant either guilty or not guilty of reckless conduct toward Leonardo, Christiano, Ibarra, and Medrano, Sr.

¶ 45 The defense initially indicated that it would like to have the jury instructed on reckless conduct as a lesser included offense of all of the predicate felonies charged:

> "Your Honor, I'd ask leave to tender to you the definition and issues instruction for the reckless conduct as they pertain to each count. I'd also tender to you both a marked and clean copy of the guilty and not guilty verdict forms for each of those charges.
>
> Tender to you 11.37 and 11.38, regarding the offense of reckless conduct. I will only be submitting one definition and issues of reckless conduct, because it does apply to various counts.
>
> So I give to you the master copy of the definition and issues on reckless conduct. They will then be differentiated by the—the verdict forms."

However, the trial court became frustrated because the instructions provided by the defense were not numbered but should have been. The trial court also asked for the verdict forms on involuntary manslaughter, which were missing. The trial court then told the defense to get everything organized and ready while the court took a short break.

¶ 46 When the court returned, the parties discussed instructing the jury on reckless conduct, but only as to particular charges. Specifically, the defense asked that the jury be instructed on reckless conduct in connection with the shooting of Mora, and the trial court denied this request. The defense then tendered the reckless conduct issues instruction relating to the defendant's conduct toward Medrano, Sr. The defendant had been charged with aggravated battery to Medrano, Sr., and the trial court asked why the jury should be instructed on reckless conduct. The defense explained that the defendant's act of keeping his finger on the trigger of his gun in the kitchen could be seen as a reckless act that led to the shooting of Medrano, Sr.

¶ 47 The trial court then asked if the defense had any other instructions to tender. The defense said it did not. The trial court stated that it would give the tendered instructions (with the reckless conduct issues instruction relating only to the defendant's conduct toward Medrano, Sr.) over the State's objection, and again asked if there was anything else. The defense then stated that it was tendering "the verdict forms for reckless conduct to Jesus Medrano, Sr." (The record of the jury instruction conference does not reflect that the defense actually sought to submit to the court the other verdict forms relating to reckless conduct toward Christiano, Leonardo, or Ibarra.) The instructions that were ultimately given to the jury regarding reckless conduct therefore included only the following: the definition of that term, the issues instruction quoted herein relating to the charge of reckless conduct toward Medrano, Sr., and verdict forms for guilty and not guilty verdicts on the charge of reckless conduct toward Medrano, Sr.

¶ 48 After reviewing this sequence of events, we find that the trial court did not refuse to instruct the jury on reckless conduct as a lesser alternative to aggravated discharge of a firearm. As to the trial court's comments that it did not see how it could insert an instruction on reckless conduct into the middle of the IPI issues instruction on aggravated discharge, that was not a "refusal" to consider the possibility of reckless conduct as a lesser included offense to aggravated discharge. Nor was there any indication in the record that the defendant disagreed with the court's comments in this regard, or felt unable to simply tender a separate instruction on reckless conduct with respect to this charge. Tellingly, the defendant did not attempt to tender any version of the above issues instruction on aggravated discharge that contained language relating to reckless conduct. And the defendant *did* tender a separate instruction on reckless conduct when he wanted the jury to consider that offense as an alternative to the charge of aggravated battery toward a different victim (Medrano, Sr.). In light

of this record, we cannot agree with the characterization that the trial court "refused" to give a jury instruction on reckless conduct toward Christiano. Rather, the record supports the conclusion that the defendant simply failed to tender such an instruction.

¶ 49 The defendant points to the fact that he prepared verdict forms for reckless conduct toward all four of the victims in the predicate offenses (Christiano, Leonardo, Ibarra and Medrano, Sr.). However, it is axiomatic that a jury should not be given verdict forms for offenses on which it has not received any substantive instructions. Here, the defendant never submitted any proposed substantive instructions on the offense of reckless conduct toward Christiano. (Nor did the defense actually ask the trial court to include the verdict forms for reckless conduct toward Christiano among the documents to be given to the jury.) At most, the presence in the record of these verdict forms shows that the defense considered submitting a substantive instruction on reckless conduct toward Christiano, but the verdict forms are no substitute for actually preparing and tendering such an instruction.

¶ 50 It is well established that "[t]he party who desires a specific instruction bears the burden of tendering it to the court," (*People v. Franklin*, 135 Ill. 2d 78, 103 (1990)), and that "[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it" (Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994)). A trial court must ensure that, regardless of whether suitable instructions are tendered, the jury in a criminal trial is properly instructed on certain matters—the elements of the offense, the burden of proof, and the presumption of innocence. *Franklin*, 135 Ill. 2d at 103; *People v. Williams*, 181 Ill. 2d 297, 319 (1998). However, the instruction at issue here does not relate to any of these matters. Thus, the trial court was under no obligation to instruct the jury on reckless conduct *sua sponte*.

¶ 51 The decision whether to give a jury instruction on a lesser included offense is within the sound discretion of the trial court, and we will not reverse absent an abuse of that discretion. *People v. Calderon*, 369 Ill. App. 3d 221, 235 (2006). Here, the trial court did not abuse its discretion by failing to give an instruction on reckless conduct toward Christiano that was never tendered by the defense.

¶ 52 Moreover, even if the defendant had tendered such an instruction, any refusal by the trial court to give it would not have been error. Determining whether a lesser included offense is applicable in a case involves two inquiries. *People v. Echols*, 382 Ill. App. 3d 309, 313 (2008). The first is whether the particular offense is indeed a lesser included offense of the charged offense. Under the charging instrument approach, a court examines whether the factual description of the charged offense "describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *People v. Kolton*, 219 Ill. 2d 353, 367 (2006)). This inquiry presents a question of law. *Id*. at 361. The second inquiry is whether the evidence presented at trial would rationally support a conviction on the lesser included offense. *Echols*, 382 Ill. App. 3d at 314. A court should give an instruction on a lesser included offense if there is some evidence that "would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit him or her of the greater offense." *People v. Williams*, 293 Ill. App. 3d 276, 281 (1997). The question of whether the evidence is sufficient to support giving a jury instruction is reviewed *de novo*. *People v. Washington*, 2012 IL 110283, ¶ 19.

¶ 53 Here, the parties agree that the first prong of this test is met, in that the charged offense also describes the conduct that would constitute the lesser offense. However, the State argues that the second prong is not met, because the evidence at trial did not support instructing the jury on the lesser offense of reckless conduct.

¶ 54 In order for a jury to find the defendant guilty of reckless conduct but acquit him of aggravated discharge of a firearm, the jury would have to conclude that the defendant did not *knowingly* (1) fire his gun (2) toward Christiano, but that he did do these things *recklessly*—that is, consciously disregarding a substantial risk of harm. However, the evidence is undisputed that the defendant intentionally (knowingly) fired his gun during his encounter with Christiano; he testified that he deliberately fired because he wanted Christiano to drop the beer bottle. Thus, instructing the jury on the lesser offense of reckless conduct would be warranted only if there was evidence that would permit the jury rationally to find that the defendant fired *in Christiano's direction* recklessly, rather than knowingly.

¶ 55 The evidence here does not support such a finding. It was undisputed that the bar was crowded when the defendant began shooting, and the defendant testified that he was aware of the likelihood that shooting at someone would cause injury. All three of the people involved in this encounter testified that the defendant approached the Ramirez brothers and that he pointed his gun at them. Christiano testified that the gun was less than a foot from his chest. Antonio testified that the defendant shot the gun "at our feet" and that his feet felt the impact of the shot in the floor. The defendant testified that he deliberately shot at the floor. However, there was no evidence that the defendant shot either directly downward toward his own feet, or toward the floor behind him. Nor was there any evidence that the defendant lost control of the gun or that his intended shot went wild. Rather, the only evidence is that the defendant knowingly shot into the floor between himself and Christiano. This meets the ordinary definition of "in the direction of," and satisfies the requirement that the defendant knowingly shot in the direction of Christiano. This case is thus distinguishable from *Williams*, in which the evidence was that the defendant fired into the air to frighten the victim,

but there was no evidence that the defendant actually fired "in the direction of" the victim. *Williams*, 293 Ill. App. 3d at 282. We further note that the statute does not require that the defendant have shot directly at any particular part of the victim. See *People v. Kasp*, 352 Ill. App. 3d 180, 187-88 (2004) (the *mens rea* for aggravated discharge of a firearm is "the offender's awareness of the presence of an individual in the direction" in which he is firing). On this evidence, a jury could not rationally find that the defendant shot toward Christiano recklessly rather than knowingly.

¶ 56 In arguing against this conclusion, the defendant cites three cases, but all are distinguishable. The first two cases, *People v. Smith*, 402 Ill. App. 3d 538, 545-46 (2010), and *People v. Upton*, 230 Ill. App. 3d 365, 375-76 (1992), are distinguishable because they involved charges that required the State to prove that the defendant intended a certain result when he acted. In *Smith*, the defendant (who was attempting to evade arrest) drove his car at a police officer, who was injured diving out of the way. The defendant was charged with attempted murder, among other things, and was convicted. The reviewing court reversed, holding that the jury should have been instructed on the lesser included offense of reckless conduct, because the jury rationally could have found that the defendant was merely trying to escape and did not intend to kill the police officer. *Smith*, 402 Ill. App. 3d at 545-46. Similarly, in *Upton*, the defendant was convicted of attempted murder after he shot toward a truck that was towing his car away and injured the truck driver. As in *Smith*, the reviewing court in *Upton* held that an instruction on the lesser offense of reckless conduct should have been given, because the evidence could support a finding that the defendant lacked the specific intent to kill the truck driver. *Upton*, 230 Ill. App. 3d at 375-76. Both of these cases are distinguishable from our case, however, because in both *Smith* and *Upton*, the crime charged—attempted murder—required the State to prove that the defendant intended to accomplish a particular result (to kill the victim). See *Smith*, 402 Ill.

App. 3d at 547. Here, by contrast, the State was required to prove only that the defendant knowingly fired his gun in the direction of another person, not that he intended to cause a particular result. See *People v. Folks*, 273 Ill. App. 3d 126, 134 (1995) (holding that the lack of a required intent to accomplish a particular result did not render the offense of aggravated discharge of a firearm unconstitutional and noting that "every one of the circumstances covered [by the statute] involves the firing of a firearm under circumstances which are extremely dangerous"). The third case cited by the defendant, *People v. Roberts*, 265 Ill. App. 3d 400 (1994), is likewise distinguishable in that it involved a struggle over a gun, and thus a jury rationally could conclude that the gun went off accidentally or that the defendant was not in control of it at the time of the shot. No such circumstances were present here. To the contrary, the evidence demonstrates that the defendant was in full control of his gun during the entire encounter with Christiano.

¶ 57 For all of these reasons, we find no error in the absence of any instruction on the lesser offense of reckless conduct toward Christiano, and affirm the defendant's convictions for the aggravated discharge of a firearm toward Christiano (count XVI) as well as the felony murders of Mora and Mendez based on that offense (counts XI and XII).

¶ 58 B. The Conviction on Count X

¶ 59 The second issue raised by the defendant on appeal relates to his felony murder conviction for killing Mora "while committing" the offense of aggravated battery to Ibarra (count X). The defendant argues that this conviction is legally invalid because his confrontation with Ibarra did not begin until after he had shot Mora. Thus, he argues, he was not "attempting or committing" the aggravated battery to Ibarra within the meaning of section 9-1(a)(3) of the Code (720 ILCS 5/9-1(a)(3) (West 2006)) at the time he shot Mora, and the battery to Ibarra therefore could not serve as the predicate

felony for this felony murder charge. The defendant contends that, for the same reason, the trial court erred in instructing the jury (in response to their questions) that they could find the defendant guilty of felony murder even if the predicate felony took place after the killing. Lastly, the defendant makes the related argument that count X was not proven beyond a reasonable doubt because there was no evidence that, at the time the defendant shot Mora, he had any intent to harm Ibarra or in fact was in the process of committing the battery against Ibarra.

¶ 60 We need not reach the merits of this issue, because of the third issue raised by defendant: the extra convictions reflected in the judgment. The State concedes that two of the defendant's four felony murder convictions must be vacated under one-act, one-crime principles, as the defendant killed two people, not four. For the felony murder convictions based on the death of Mora, we vacate count X, leaving the conviction on count XII. Thus, regardless of whether we agree with the defendant's arguments on the second issue, our disposition on the third issue would be the same. The appellate court should not engage in analysis of issues that are unnecessary to its resolution of the appeal. *People v. White*, 2011 IL 109689, ¶ 153. We therefore do not reach the merits of the defendant's second issue.

¶ 61 C. One-Act, One-Crime

¶ 62 As mentioned, the defendant's final argument on appeal is that he was convicted of killing two persons but the judgment order improperly refers to convictions on four counts of first degree murder. He argues that, under one-act, one-crime principles, the maximum number of convictions upon which he can be sentenced is two. See *People v. Smith*, 233 Ill. 2d 1, 20 (2009). The State concedes that the judgment should be modified to reflect only one conviction for the first degree murder of each

victim. See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) (reviewing court need not remand and may make necessary corrections to the judgment).

¶ 63 With respect to Mora's death, we vacate the defendant's conviction on count X and modify the judgment to reflect only the conviction on count XII (felony murder based on the aggravated discharge of a firearm to Christiano). As to the death of Mendez, we hereby vacate the defendant's conviction on count IX and modify the judgment to reflect a single conviction (on count XI) for the first degree murder of Mendez.

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, we vacate two of the defendant's convictions, including his conviction on count X. We direct the circuit court clerk to modify the judgment to reflect only one conviction of first degree felony murder of Tomas Mora (count XII) and one conviction of first degree felony murder of Heriberto Mendez (count XI). In all other respects, we affirm the judgment of the circuit court of Winnebago County.

¶ 66 Vacated in part and affirmed in part; judgment modified.