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Reply Brief of the Appellant, People of the State of Illinois v. Di Vincenzo, 183 Ill.2d 239, Docket No. 82942 (Supreme Court of Illinois 1998)

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No. 82942

IN THE SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* v. **VINCENT DI VINCENZO** *Defendant-Appellant.*	Appeal from The Appellate Court, Second District, No. 95-1454 Original Appeal from the Circuit Court of DuPage County, No. 93 CF 1106 Honorable Peter J. Dockery, Judge Presiding

REPLY BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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Plaintiff-Appellee,	)	
v	)	Original Appeal from the Circuit Court of DuPage County, No. 93 CF 1106
VINCENT DI VINCENZO	)	Honorable Peter J. Dockery, Judge Presiding
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I. VINCENT DIVINCENZO WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER.

Although the State concedes that Vincent DiVincenzo "did not intend to kill Joseph Novy," (State's Br. at 2), the State argues that there is no possibility that a reasonable jury could ever have found Vince to be guilty of involuntary manslaughter, as opposed to first degree murder. As we have shown in our opening brief, and will show again here, this claim is belied by (1) myriad cases holding that weaponless fights of this sort are quintessential examples of involuntary manslaughter; (2) the legal principles that distinguish involuntary manslaughter from first degree murder; and (3) the history of this very case. These facts, cases, and governing statutes forcefully establish that Vincent DiVincenzo was entitled to have his jury instructed on involuntary manslaughter.

A. Myriad Cases Hold That Weaponless Fights Of This Sort Are Quintessential Examples Of Involuntary Manslaughter.

In our Opening Brief we informed the Court that our extensive research into the past one hundred years of Illinois precedents has uncovered no case "in which a person has been convicted of murder, much less denied an instruction on involuntary manslaughter, after a brief weaponless fight with another able-bodied person of the same general size and strength." Opening Brief at 21. Significantly, the State has offered no case to rebut this assertion.

Instead, the State seeks to rest its argument on the markedly different facts of *People v. Rodgers*, 254 Ill. App. 3d 148, 626 N.E.2d 260 (2d Dist. 1993). In *Rodgers*, the defendant had *threatened to kill* the victim and then entered a home and began to attack the victim while he slept. Initially, the defendant punched the sleeping victim "six to eight times in the side of the head as hard as he could." *Id.* at 150, 626 N.E.2d at 261. After a brief pause, the defendant in *Rodgers* then continued the attack, punching the victim "three to five more times," with each punch "splashing

blood all over." *Ibid.* The defendant continued this beating until the police were summoned. Based on this evidence, the court held that "the brutality of the beating administered by the defendant, *coming after the defendant had repeatedly threatened to kill* [the victim], precludes a finding of recklessness." *Id.* at 153, 626 N.E.2d at 264 (emphasis added). How can the State possibly suggest that the facts of *Rodgers* are analogous to the facts of the case at bar? A person who, after threatening to kill a man, beats that sleeping man to death, continuing to pummel him even though blood is splashing all over the room, cannot be heard to deny that he *knew* there was a strong probability of death or great bodily harm . But this has nothing to do with anything Vincent DiVincenzo--who engaged in a brief fight with another fit young man and walked away after six seconds--is alleged to have done.[1]

Although the State does not offer any cases in which involuntary manslaughter instructions have been denied on facts at all similar to this case, the State disagrees with our description of the cases we have cited regarding the appropriate inferences from weaponless fights. The cases we have cited, however, speak for themselves and could not be clearer in setting forth the general principle that weaponless fights of this sort can most certainly constitute involuntary manslaughter (and are generally not considered sufficient to support a first degree murder conviction). See Opening Br. at 27-30 (citing cases). We have cited at least a dozen cases in support of our showing that Illinois courts, like other courts, have repeatedly held that weaponless fights typically support an inference that the defendant possessed the *mens rea* of first degree murder only when: (a) there is significant

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[1] The State takes issue with the use of the word "fight," because Joe Novy never was able to actually throw a punch State's Br. at 5 n.1. It is clear, though, that this was no "sucker punch" or other form of "ambush." Vince and Joe were arguing verbally when Joe initiated the physical contact by pushing Vince and then cocking his fist to throw the first punch. Only then did Vince react by striking Joe.

disparity in size and strength between the defendant and the victim; or (b) the brutality, duration, and severity of a massive beating shows that the defendant necessarily had intent or knowledge that the natural consequences of his actions were extraordinarily perilous.

Indeed, the Appellate Court for the First District recently reiterated this rule:

> Defendant notes that Illinois recognizes that death is not ordinarily contemplated as a natural consequence of blows from bare fists. *People v. Brackett*, 117 Ill.2d 170, 180, 510 N.E.2d 877, 882 (1987) (and cases cited therein). * * * However, an involuntary manslaughter instruction should not be given if the evidence clearly demonstrates that the crime was murder and there is no evidence which would reduce the crime to involuntary manslaughter. *People v. Ward*, 101 Ill.2d 443, 451, 463 N.E.2d 696, 699 (1984). Factors to be considered when determining whether there was evidence of recklessness which would support the giving of an involuntary manslaughter instruction include: the disparity in size between the defendant and the victim; the brutality and duration of the beating; and the severity of the victim's injuries.

People v. Tainter, 1998 WL 24234, slip op. at 4-5 (1st Dist., Jan. 23, 1998) (reproduced as App. B).[2] It is no surprise, then, that involuntary manslaughter instructions have been consistently tendered in cases of weaponless fights, even those far more severe than the encounter involved here. See Opening Br. at 44 (citing cases).

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[2] Based on these considerations, the court in *Tainter* held that the defendant--a 36-year-old man who stood 5' 9"--was not entitled to an involuntary manslaughter instruction based on his beating of a 56-year old woman who was 5' 2" tall. The court in *Tainter* also relied on the medical expert's testimony that it "took a great deal of force" to inflict the injuries the woman suffered. *Id.* at 5. These factors are obviously not present in the case of Vincent DiVincenzo: there was no size disparity that favored Vince and the prosecution's own medical experts testified that there was no indication of any significant force that led to the fluke occurrence that killed Joe Novy. See Opening Br. at 16.

B. The Legal Principles That Distinguish Involuntary Manslaughter From First Degree Murder Show That The Defendant Was Entitled To An Involuntary Manslaughter Instruction.

In our Opening Brief we explained that the Illinois courts' treatment of weaponless fights fits perfectly within the courts' broader jurisprudence on the difference between the *mens rea* of first degree murder and the *mens rea* of involuntary manslaughter. The State repeatedly accuses us of having misstated some of these principles, but, as will be seen, each of the principles upon which we have relied is well-established in the caselaw. Indeed, it is the State's approach here--an approach that wholly ignores the difference between the *mens rea* of first degree murder and the *mens rea* of involuntary manslaughter--that is unfaithful to governing law.

To begin with, the State argues that there is no support for the proposition that first degree murder and involuntary manslaughter are distinguished in part by the defendant's level of certainty that his acts will cause death or great bodily harm. State's Br. at 3. We are at a loss to understand how the State can deny this key difference between "recklessness" and "knowledge", which appears on the face of the statutes and has been articulated forcefully in the series of cases we discussed on pages 24-26 of our Opening Brief. Perhaps the State feels compelled to deny this difference, because to recognize it is to concede that a jury could easily have concluded that Vince was guilty of involuntary manslaughter. Surely a jury could have found that Vince *recklessly* disregarded the fact that his acts were *"likely"* to cause great bodily harm, but that he was not guilty of first degree murder, because he never *knew* that his acts created a *"strong probability"* of great bodily harm. The legislature intended these words--"likely" and "strong probability"-- to mean something different, and the jury should have been given the chance to decide where Vincent DiVincenzo's conduct fell on this continuum.

Similarly, we are confounded by the State's claim that we are asking the Court to "ignore the law" when we state that Vincent DiVincenzo was entitled to an involuntary manslaughter instruction because it was far from clear that he knew that his acts had a "natural tendency to destroy another's life." State's Br. at 3. This venerable phrase--"natural tendency to destroy another's life"-- is not our invention; it has been invoked by this Court on scores of occasions, including several months ago. See *People v. Howery*, 178 Ill.2d 1, 43, 687 N.E.2d 836, 856 (1997) (the determination of whether a defendant is guilty of first degree murder turns on whether the "defendant voluntarily and willfully committed an act, the natural tendency of which was to destroy another's life"). As we explained in our Opening Brief, this standard gives meaning to the "great bodily harm" language that is used in the first degree murder statute. See Opening Brief at 31-32 (citing official Committee Comments, cases, and treatises for the proposition that the first degree murder statute deals only with acts that are clearly dangerous to life) The State flees from this standard because, once again, it is so clear that this standard does not describe the events of this case. Again, there can be no serious question that a properly instructed jury could easily have found that Vincent DiVincenzo did not possess a murderous state of mind,[3] and was guilty only of involuntary manslaughter.

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[3] The State attacks our use of the phrase "murderous state of mind" and argues that "there is no such legal concept in Illinois * * * and no such state of mind has any relevance to this conviction for first degree murder." State's Br at 12 n.2. Surely, though, the State does not contend that a person can be convicted of first degree murder if he did not possess one of the mental states specified in the statute--*i.e.*, a murderous state of mind

C The History Of This Case Shows That Reasonable Jurors Could Readily Have Concluded That Vincent DiVincenzo Was Guilty Of Involuntary Manslaughter, Not First Degree Murder.

Even the grand jurors--who heard only the prosecution's version of the evidence in this case--initially voted that there was no probable cause to indict for first degree murder, although they thought that some lesser form of homicide charge might be appropriate. The reason for the grand jurors' doubts are obvious Given the evidence of a five or six second weaponless fight, not unlike the fights in which teenage boys are too frequently involved, the jurors could naturally conclude that Vince was guilty of something less than first degree murder because he did not *know* that his acts created a *strong probability* of death or great bodily harm. Depriving the petit jury of the opportunity to consider the lesser offense of involuntary manslaughter usurped the role of that jury and deprived Vincent DiVincenzo of his right to a fair trial.

To draw attention away from the critical inquiry into whether Vince *knew* that his acts created a *strong probability* of death or great bodily harm, the State places considerable emphasis on its claim that "Vince made a deliberate decision to pursue Joseph Novy and to beat him." State's Br. at 9 This claim is of no relevance to the issue in this case: whether Vince necessarily knew that he was imperiling Joe Novy's life when he fought with him. The prosecution repeatedly conceded (at trial and on appeal) that Vince *never intended* to cause death or great bodily harm. The talk about a grudge, then, adds nothing of relevance to assessing whether a jury could have found that Vince was reckless about the potential disastrous consequences of the fight.

In arguing about Vince's "grudge," the State contends that "it is important to make a distinction between the fist fights that occur, as the defendant notes, each day in schoolyards or as the result of heated interaction, and the unprovoked, premeditated beating that occurred in this case."

State's Br. at 7. The State apparently believes that this argument supports the trial court's denial of an involuntary manslaughter instruction, but it actually proves just the opposite. The State's concession that involuntary manslaughter instructions are appropriate when weaponless fights occur "in schoolyards or as the result of heated interaction" powerfully supports Vince's right to the instruction. The defense presented testimony (by the defendant and by Dan Frasca) that the fight in this case was precisely the kind of event that the State now concedes can constitute involuntary manslaughter--it resulted from a heated interaction during which Vince and Joe were arguing and during which Joe initiated physical contact Even if there were any evidence to support the State's claim that this was a "premeditated" beating, it was up to the jury to decide whether this was true and, if so, what effect it had on whether Vince was guilty of involuntary manslaughter or first degree murder. Thus, the State's own description of the governing inquiry demonstrates the absolute necessity of instructing the jury on involuntary manslaughter.

Indeed, the State again (inadvertently) demonstrates that Vince was entitled to an involuntary manslaughter instruction when it relies upon Janet Berens's testimony in arguing against Vince's right to the instruction. To defend its claim that "this was not reckless behavior," the State writes that "Janet Berens, a neighbor who observed the beating, testified that she observed the defendant kick Joe Novy three times after he fell to the ground." State's Br. at 9. Surely the State knows, however, that it may not rely upon *disputed* facts to defeat the defendant's entitlement to an instruction on a lesser included offense See Opening Br at 32-34 (discussing rule that court must look to evidence in the light *most favorable to the defense* in determining whether there is *any* evidence supporting an instruction on a lesser included offense). The defense vehemently denied that Vince kicked Joe Novy, and both Vince and Dan Frasca testified that this never happened. Obviously, the defendant's

entitlement to an involuntary manslaughter instruction must be judged by the defense's version of the facts, not by the prosecution's The fact that the State feels compelled to rely (improperly) on disputed evidence about alleged kicks to defend the refusal of the instruction speaks volumes about its inability to defend this result under the accepted legal principles.

II. VINCENT DIVINCENZO'S CONVICTION SHOULD BE REDUCED TO INVOLUNTARY MANSLAUGHTER.

The crux of the State's response to our argument that the Court should reduce this conviction to involuntary manslaughter is as follows:

> 'Simple common sense,' the defendant claims, 'tells us that most fights of this sort do not end up leading to serious injury, much less death.' Defendant's Br. at p. 46. 'Simple common sense,' however, is not the law.

State's Br. at 10. This is a remarkable claim. The Illinois courts' decisions over the past century have been predicated on the recognition--as a matter of common sense and experience--that a defendant is not generally on notice that a brief weaponless fight creates a strong probability of causing death or great bodily harm as envisioned by the first degree murder statute. The State is asking the Court to ignore this body of accumulated experience and to deem Vincent DiVincenzo guilty of first degree murder without regard to the impossibility of his knowing that this fight would be the one-in-a-thousand that creates a life-threatening danger.

Whether Vincent DiVincenzo can be found guilty of first degree murder depends on his mental state before and during those six seconds in which he fought with Joe Novy. The fact that, unbeknownst to Vince, Joe ended up dying as a result of a fluke injury that no one could have predicted has no impact on whether Vince had the *mens rea* to be found guilty of first degree murder. Tellingly, the lone case that the State cites in discussing whether the mens rea of first degree murder

was proved here is a case dealing with felony murder--the one part of the first degree murder statute where intent or knowledge of the strong probability of death or great bodily harm is of no significance. See State's Br. at 11 (citing *People v. Graham*, 132 Ill. App. 3d 673, 477 N.E.2d 1342 (1985)).

Ultimately, the only way the State can assert that Vince DiVincenzo knew that his acts created a strong probability of great bodily harm is to argue that Vince was on special notice of the dangers of fistfights because he had once been in a fistfight in which another boy's nose was broken. State's Br. at 11-12. If this prior incident has any relevance to this case, though, it points in exactly the opposite direction. Knowing that a punch can break a nose is a far cry from knowing that a punch can endanger someone's life, and this prior incident hardly put Vince on notice that fighting was a life-threatening enterprise. Rather, like so many other teenagers who are exposed to fighting in sports and elsewhere, Vince never imagined that anything more than relatively minor injuries were likely to occur. Vincent did something very wrong when he fought that day, just as anyone who fights does something very wrong, but he did not commit first degree murder.

We respectfully ask, pursuant to Supreme Court Rule 615(b), that this Court reduce the conviction to involuntary manslaughter and let this young man serve his time in prison and then make a life for himself.[4] One life was tragically destroyed as an unintended result of the fight on May 27, 1993. Although no one can bring Joe Novy back, it is within this Court's power to ensure that yet another life not be needlessly destroyed.

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[4] In the event that the Court agrees to reduce the conviction to involuntary manslaughter, the defendant hereby withdraws his claim for dismissal of the indictment as set forth in Issue III of his Brief.

III. THE GRAND JURY INDICTMENT SHOULD HAVE BEEN DISMISSED IN LIGHT OF THE PROSECUTION'S CONDUCT IN THE GRAND JURY.

This case squarely presents the question of whether there are any limits on prosecutors' efforts to overpower a grand jury, particularly one which already completed its vote on the indictment at issue. The three areas of misconduct involved here, especially when viewed cumulatively, show that the prosecutors abused the grand jury in this case and that Vincent DiVincenzo suffered substantial prejudice as a result.

A. The Prosecution Violated The Independence And Integrity Of The Grand Jury By Unduly Pressuring The Grand Jurors To Reconsider Their Completed Vote Of A No Bill.

Nowhere in the State's Brief does the State ever take issue with our claim that it is entirely unacceptable for a prosecutor to implore a grand jury to reconsider its return of a no bill. Rather, the State argues that this is not what happened in this case because (1) the grand jurors never actually signed a no bill form after they voted the no bill and announced that vote to the prosecutor, and (2) the grand jury told the prosecutor that, notwithstanding its completed vote of a no bill on the first degree murder indictment, it was willing to consider lesser charges. The State makes this claim no less than seven times in the course of its Brief. See State's Br. at 18, 19, 19, 20, 20, 21, 26. If the State's position on this issue is wrong--and we will show that it is--then it follows that Vince DiVincenzo is entitled to dismissal of the indictment.

The following transcript of the grand jury's colloquy after its vote of the no bill on first degree murder demonstrates beyond any question that the grand jury had finished its vote on the first degree murder indictment and never expressed any desire or willingness to reconsider its vote on the first degree murder indictment:

(The Jury deliberated upon their verdict, afterwhich the following further proceedings were had herein:)

THE FOREMAN: *We voted a no bill on this.*

MS. CRESWELL: We are going to start up a little later this afternoon.

A JUROR: Let me ask you a question.

Can you come back with a lesser charge or can you bring this back to another grand jury?

MS. CRESWELL. We can bring it to another grand jury, if there is additional evidence, but --

A JUROR: Can you come back with a lesser charge?

MS. CRESWELL: The function of the Grand Jury is to decide, you know, what charge, if any, is appropriate. If you are of the opinion that a lesser charge is appropriate, then you can return a True Bill on a lesser charge.

THE FOREMAN: That is what a lot of us were wrestling with.

MS. CRESWELL: Okay. *Are you telling me that you found a No Bill on First Degree Murder but that you want to deliberate as to other possible charges?*

A JUROR: *Absolutely.*

MS. CRESWELL: *Okay, I can return this afternoon with the documents for a No Bill on First Degree Murder, and I can bring you at that time the law with respect to lesser offenses and you can continue deliberating on those.*

Is that what you want to do?

The record has to be absolutely clear that you are not finished deliberating on the case. Is that what you are telling me?

A JUROR: *As far as First Degree Murder, but a lesser charge, no.*

MS. CRESWELL That is what I will do, then. And there is one more indictment.

A JUROR: Ma'am, in the future, can we always change like thus, so if you were to come in again, say with a charge like that in some other case, can

we say a No Bill for that but a True Bill for a lesser charge? Is that acceptable for us to do that?

MS. CRESWELL: Absolutely.

THE JUROR: We didn't realize that was possible.

Supp C. 10-12 (emphases added).

In light of this transcript, it is no more than a play on words for the State to claim, as it repeatedly does, that the grand jury "wished to continue deliberating." State's Br. at 26. The grand jury's willingness to deliberate further had nothing to do with the first degree murder indictment. Rather, with regard to first degree murder, the grand jury had informed the prosecutor in no uncertain terms that it had voted to return a no bill and had no desire to deliberate on those charges any further.[5]

The State's claim that the grand jury was not finished with the first degree murder issue must turn, therefore, on the lack of the foreman's signature indicating a no bill. The State cites to a statute, 705 ILCS 305/17, that lists as one of the duties of a grand jury foreman the duty to write the words "not a true bill"on a bill of indictment and to sign his name when the grand jury has not found the bill to be supported by sufficient evidence. According to the State, because the grand jury foreman had not written the words "no bill"on the first degree murder indictment and signed his name, the grand jury was not finished deliberating on the first degree murder charge and it was permissible

[5] In seeking to distinguish the various cases we have cited on this issue, the State argues that these cases all deal with situations in which the grand jury had completed its vote and did not wish to deliberate further. See State's Br. at 20-21. This is, of course, precisely what happened in this case as well--the grand jury had completed its vote on first degree murder and did not want to deliberate further on the first degree murder charge.

therefore for the prosecutors to implore the grand jury to reconsider its vote not to indict on first degree murder.

The State's claims about the foreman's technical duties are of no bearing on whether the prosecutors invaded the independence and autonomy of the grand jury. That inquiry turns on realities, not technicalities, and the reality is that the grand jury repeatedly told the prosecutors that they had finished their vote and wished to deliberate no further on first degree murder.

Even if the statute the State cites on this point were relevant to the inquiry, though, the State's contention that a grand jury cannot be said to have concluded its vote until the foreman signs his name does not comport with the governing law. To begin with, this Court has held on several occasions that nothing turns on the absence of the foreman's signature--even when the grand jury is returning a true bill. See *People v. Benitez*, 169 Ill.2d 245, 252, 661 N.E.2d 344, 348 (1996) ("We agree with the State that the mere absence of signatures is not fatal to an otherwise valid indictment."); *People v. Hangsleben*, 43 Ill.2d 236, 237, 252 N.E.2d 545, 546 (1969) ("the signature of the foreman of the grand jury was required only as a matter of direction to the clerk and for the information of the court") (citing *People ex rel. Merrill v. Hazard*, 361 Ill. 60, 62, 196 N.E. 827, 828 (1935)). Moreover, as we discussed in our Opening Brief, a separate statute, 725 ILCS 5/112-4(e), provides that a written "no bill" is entirely optional. See Opening Br. at 53.

As we have explained, though, even if the law did require the foreman's signature on a no bill, it would be ludicrous to rely on that law to contradict the grand jury's explicit direction that it was finished deliberating on the request for a first degree murder indictment. The reason that the foreman never wrote the words "not a true bill" and never signed his name is that the prosecutor told the foreman that she "would return [after lunch] with the documents for a No Bill on first degree

murder." Supp C11. At no time did the prosecutor ever inform the foreman that he could write the words "not a true bill" and sign his name on the proposed bill that the prosecutor had initially presented to the grand jury. Nor did the prosecutor comply with her promise to return after lunch with the "documents for a No Bill of first degree murder." It is perverse for the State to rely on the lack of a signature to justify the prosecutor's behavior, when it was the prosecutor's own behavior that kept the foreman from signing the no bill that the grand jury had voted. The grand jury could not have been clearer about its final determination on the first degree murder charge.

Once it is recognized that this grand jury had, in fact, completed its deliberations and its vote on the first degree murder charge, then the State's efforts to defend this indictment fall by the wayside. The prosecution's violation of the grand jury's autonomy by pressuring it to change its vote obviously prejudiced Vince DiVincenzo in the most glaring way: he was forced to stand trial for a crime upon which the grand jury had already voted not to indict. See Opening Br. at 62-63.

B. The Prosecution Misstated The Governing Law And Misled The Grand Jury.

In our Opening Brief we set forth an extensive series of quotations showing the many times that Mr. Kinsella's remarks to the grand jury distorted or ignored the element of "knowledge" in the first degree murder statute. Opening Br at 55-58. We pointed out that although the element of knowledge was properly described on several occasions, the accurate descriptions were far overshadowed by the misdescriptions of the law, including at least six statements to the effect that:

- Vince could be charged with first degree murder based on what he "should have known" (Supp. C.17);
- Vince could be charged with first degree murder even if he did not intend to kill so long as his "acts created a strong probability of death or great bodily harm" (Supp. C.19), and

- The "knowledge" requirement in the first degree murder is satisfied so long as "you perform acts, you know what acts you were performing." (Supp. C.23)

We also showed the instances in which the prosecutors had led the jury to believe that involuntary manslaughter has no relevance to this case because the intentional act of throwing a punch is incompatible with the definition of recklessness. Opening Br. at 58. All of these statements were made as part of a speech in which, as the Appellate Court stated, "Kinsella commented on his belief that first degree murder was the appropriate charge." App. 30.

The State admits that the prosecutors said these things about first degree murder, and even admits that these passages do not accurately describe the elements of first degree murder. See State's Br. at 23 (admitting that the "word 'knowledge' may be omitted from the portions of the record quoted by the defendant"). Nonetheless, the State argues that because the prosecutors did describe the knowledge component accurately at times, the repeated omission of the knowledge requirement at other times did not prejudice the defendant. The Court will have to decide this issue by reading the grand jury transcript itself (For the Court's convenience, we have appended to this Reply Brief the transcript of the grand jury's colloquy with the prosecutors. See App. A). It is critical to point out, however, that we are not simply attacking selective omissions, we are attacking significant misstatements of what "knowledge" means and what involuntary manslaughter is about. Mentioning "knowledge" a few times does no good when the grand jury has been improperly told that "knowledge" simply means that Vince knew he was throwing a punch.

The distortion of the concept of involuntary manslaughter is equally troubling. By telling the grand jury that involuntary manslaughter applies to "*accidents*" and that this case involved an *intentional* punch, the prosecutors all but guaranteed that the grand jury would reject the involuntary

manslaughter option and indict Vince of first degree murder (especially since the concept of "knowledge" had been defined as "knowing what act you were performing"). See Supp. C. 9, 35. Indeed, the prosecutor's description of involuntary manslaughter in this case was very similar to the argument that the court condemned in *People v. Gutirrez*, 205 Ill. App. 3d 231, 564 N.E.2d 850 (1st Dist. 1990), where the prosecutor told the jury that recklessness is limited to accidents. The Appellate Court had this to say about that contention:

> Of greatest concern to this court are the prosecutor's remarks relating to "recklessness" and "accident." Taken as a whole, they reflect a *calculated and persistent attempt to mislead the jury and to confuse their understanding of the legal theory underlying involuntary manslaughter*. This line of argument had the greatest potential for prejudicing the defense and for denying the accused a fair trial because involuntary manslaughter was the only theory upon which the jury could have reduced the defendant's conduct to a lesser offense. As legal concepts, recklessness and accident are not synonymous. Recklessness requires a conscious awareness of a substantial risk of harm and a disregard of that risk. While an accident may result from negligence, mere negligence is not recklessness. * * * Yet, as the State admits in its brief to this court, the words "reckless" and "accidental," as generally understood by the layperson, have almost interchangeable definitions. Based on the testimony and the physical evidence, there was no possibility that the jurors could have characterized defendant's pulling of the trigger as "accidental." Thus, *an argument calculated to present the concept of "recklessness" as equivalent to "accident," thereby indirectly suggesting that the jury could logically eliminate both from serious consideration, had great potential for severe prejudice.*

Id. at 264, 564 N.E.2d at 872 (emphases added).

It was these sorts of misstatements--about both first degree murder and involuntary manslaughter--that apparently led the grand jury to tell the prosecutor that it was returning the indictment "based on the clarification that you have brought forth." Supp. C. 36. The grand jury transcripts show that far from "clarifying" any confusion that had been generated by the morning sessions, Mr. Kinsella's exhortations to the grand jury served to muddle the law and led the jury to misunderstand the elements of first degree murder and involuntary manslaughter.

C. The Prosecutors Took Advantage Of A Blatant Breach Of Grand Jury Secrecy.

The State never even tries to defend the prosecutors' behavior in willingly obtaining information that the prosecutors knew was coming straight from an illegal breach of grand jury secrecy. Instead, the State argues that the defendant has not sufficiently proven that he was prejudiced by the violation--that this ill-gotten information had any impact on the prosecutors' ultimate behavior in the grand jury.

In making this argument the State ignores the fact that the defendant was *denied* his right to an evidentiary hearing at which he expected to prove that the illegal breach impacted on the prosecutors' presentation of the case. In our Opening Brief we explained that the lower courts misunderstood this Court's decisions when they denied the defendant his right to an evidentiary hearing Opening Br at 60-61 (discussing *People v. Linzy*, 78 Ill. 2d 106, 398 N.E.2d 1 (1979), and *People ex rel. Sears v. Romiti*, 50 Ill. 2d 51, 277 N.E.2d 705 (1971)). The State has not even responded to this point. It is plain, though, that the State cannot reasonably defend the Catch-22 of (a) faulting the defendant for not showing that he was prejudiced by the breach while (b) at the same time arguing that the defendant was not entitled to an opportunity to demonstrate that he was prejudiced by the breach At the very least, the defendant is entitled to an evidentiary hearing on the impact of the breach.

Ultimately, though, a remand for such a hearing should prove unnecessary because the other independent grounds--especially when combined with the conceded facts of the breach of secrecy--compel dismissal of the indictment in this case This Court's supervisory power over grand juries requires the Court to step in and dismiss an indictment when necessary to "prevent perversion of the

Grand Jury's process." *In re May 1991 Will County Grand Jury*, 152 Ill.2d 381, 393, 604 N.E.2d 929, 935 (1992). There is no other way to characterize what happened in this case.

CONCLUSION

WHEREFORE, for the reasons stated in Argument II, this Honorable Court should reverse the first degree murder conviction on the grounds that the evidence was insufficient and the Court should either reduce the offense to involuntary manslaughter or remand for a trial on involuntary manslaughter.

As a less preferred alternative to the relief set forth in Argument II, this Court should, for the reasons stated in Argument I, reverse the conviction and remand for a trial at which the jury is given an involuntary manslaughter instruction.

As a less preferred alternative to the relief set forth in Argument II, this Court should, for the reasons stated in Argument III, dismiss the indictment against Vincent DiVincenzo.

Respectfully submitted,

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FEBRUARY 4, 1998

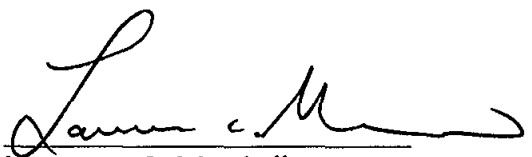
No. 82942

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from The Appellate Court, Second District, No. 95-1454
Plaintiff-Appellee,	)	
v.	)	Original Appeal from the Circuit Court of DuPage County, No. 93 CF 1106
VINCENT DI VINCENZO	)	Honorable Peter J. Dockery, Judge Presiding
Defendant-Appellant.	)	

PROOF OF SERVICE

Please take notice that I have filed twenty copies of the attached Reply Brief of the Appellant with the Clerk of the Court specified above. I have also served three copies upon James Ryan, Attorney General of Illinois, 100 West Randolph Street, Chicago, Illinois, 60601, by depositing same in the United States Mail, first class postage prepaid, on this 4th day of February, 1998.



Lawrence C. Marshall

APPENDIX

APPENDIX A

Grand Jury Colloquy

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

BEFORE THE GRAND JURY OF DU PAGE COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff;

-vs-

VINCENT DI VINCENZO, JR.,

Defendant.

ORIGINAL

No. 93 CF 1106-01

REPORT OF PROCEEDINGS had before the Grand Jury of DuPage County, on Wednesday, the 16th day of June, A.D. 1993.

PRESENT:

MR. JAMES E. RYAN, State's Attorney of DuPage County, by:
MS. KATHRYN CRESWELL,
Assistant State's Attorney,

appeared on behalf of The People of the State of Illinois.

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(The following proceedings were had herein, not previously transcribed, taken prior to the testimony of Witness Falcone:)

MS. CRESWELL: Good morning.

For the record, I'm Kathryn Creswell, Assistant State's Attorney.

This morning, as promised, you are going to hear evidence regarding an incident that occurred on May the 27th of 1993 between Joseph Novy and Vincent DiVincenzo, Jr.

At the conclusion of today's proceedings, I am going to ask the Grand Jury to consider returning a one count indictment against Vincent DiVincenzo, Jr., for First Degree Murder, and the proposed indictment alleges that on May 27th of 1993, at and within DuPage County, Illinois, Vincent DiVincenzo, Jr., committed the offense of First Degree Murder in that the said defendant, without lawful

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justification, struck Joseph Novy in the head and kicked Joseph Novy, knowing that such acts created a strong probability of great bodily harm to Joseph Novy, thereby causing the death of Joseph Novy, in violation of 720ILCS5/9-1(a)(2).

First Degree Murder, like many other offenses, can be charged a number of different ways. There is a number of different ways to word it. What we are proposing is just one of many ways, and I want to read that section to you.

9-1(a)(2) says as follows:

"A person who kills an individual without lawful justification commits First Degree Murder if, in performing the acts which caused the death, he knows that such acts create a strong probability of death or great bodily harm to that individual or another."

I want to point out that there is nothing in that provision that talks about intent. If it is charged under this section, we are not required to prove that

he intended to kill him or that he was premeditated.

Let me read it to you again.

"A person who kills an individual without lawful justification commits First Degree Murder if, in performing the acts which caused the death, he knows that such acts create a strong probability of death or great bodily harm to that individual or another."

And the proposed indictment alleges that Vincent DiVincenzo, Jr., without lawful justification, struck Joseph Novy in the head and kicked Joseph Novy, knowing that such acts created a strong probability of great bodily harm to Joseph Novy, thereby causing the death of Joseph Novy.

The Grand Jury has the right to question and subpoena any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain or examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney. --

I have two witnesses I want to present, and then a police officer and tape recording -- actually two tape recordings to play during the testimony of the officer.

Does anyone have any questions about the indictment as it is worded, or about the offense of First Degree Murder?

(No response.)

MS. CRESWELL: Okay, I will get the first witness.

* * * * *

(The following proceedings were had herein, not previously transcribed, taken preceeding the testimony of Witness Wall:)

A JUROR: You are charging the accused here with the strongest degree of homicide that you can, short of a specific intent crime; is that correct?

MS. CRESWELL: As I indicated earlier, First Degree Murder can be charged a number

of different ways.

For example, another way you could charge it, it says, in 9-1(a)(1), "A person who kills an individual without lawful justification commits First Degree Murder if, in performing the acts which caused the death, he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another."

There is a number of different ways to word an indictment because there is a number of different ways the Legislature has determined constitutes First Degree Murder.

The way it has been drafted right now is, under 9-1(a)(2), that he knew that his acts created a strong probability of great bodily harm. It does not include the element of intent.

THE JUROR: I am aware of that, but you could have charged him with just plain Homicide where he didn't know that the death would occur, but obviously did.

MS. CRESWELL: Well, the way the

indictment is worded, it is not that he knew that death would occur.

THE JUROR: I'm not asking you the way the indictment has been written. I'm asking you, he could have been charged with something less than the indictment is charging him with. Is this not correct? He is being charged with Homicide.

MS. CRESWELL: Well, there is no such offense as Homicide. Under the statute, First Degree --

A JUROR: He could have been charged with Second Degree, I think is what he is trying to say.

MS. CRESWELL: Well, Second Degree Murder, and then there is Involuntary Manslaughter, and do you want me to read those portions of the law?

A JUROR: No. I am having a lot of difficulty with the charges. I don't know about the rest of them, but I am having a lot of difficulty.

A JUROR: What is Involuntary Manslaughter?

MS. CRESWELL: Involuntary Manslaughter says: "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts, whether lawful or unlawful which caused the death are such as is likely to cause great bodily harm to an individual, and he performs them recklessly, except in cases in which the cause of death consists of the driving of a motor vehicle, in which case the person commits reckless homicide."

A reckless act implies it was an accident.

And what we are talking about here is a punch, a deliberate punch. The punch itself was an intentional act, and that is why the section is worded such that he performs an act which does cause the death and he knows that his act creates a strong probability of great bodily harm.

A JUROR: I have a lot of problems with this.

A JUROR: But still, my thing is, would it be Aggravated Assault and Battery?

A JUROR: Well, we should excuse the State's Attorney.

MS. CRESWELL: And just so you know, we can start a little bit later this afternoon.

(The Jury deliberated upon their verdict, afterwhich the following further proceedings were had herein:)

THE FOREMAN: We voted a no bill on this.

MS. CRESWELL: We are going to start up a little later this afternoon.

A JUROR: Let me ask you a question.

Can you come back with a lesser charge or can you bring this back to another Grand Jury?

MS. CRESWELL: We can bring it to another Grand Jury, if there is additional evidence, but --

A JUROR: Can you come back with a lesser charge?

MS. CRESWELL: The function of the Grand

Jury is to decide, you know, what charge, if any, is appropriate. If you are of the opinion that a lesser charge is appropriate, then you can return a True Bill on a lesser charge.

THE FOREMAN: That is what a lot of us were wrestling with.

MS. CRESWELL: Okay. Are you telling me that you found a No Bill on First Degree Murder but that you want to deliberate as to other possible charges?

A JUROR: Absolutely.

MS. CRESWELL: Okay, I can return this afternoon with the documents for a No Bill on First Degree Murder, and I can bring you at that time the law with respect to lesser offenses and you can continue deliberating on those.

Is that what you want to do?

The record has to be absolutely clear that you are not finished deliberating on the case. Is that what you are telling me?

A JUROR: As far as First Degree Murder,

but a lesser charge, no.

MS. CRESWELL: That is what I will do, then. And there is one more indictment.

A JUROR: Ma'am, in the future, can we always change like this, so if you were to come in again, say, with a charge like that in some other case, can we say a No Bill for that but a True Bill for a lesser charge? Is that acceptable for us to do that?

MS. CRESWELL: Absolutely.

THE JUROR: We didn't realize that was possible.

(The Grand Jury heard other matters on the calendar, recessed for lunch, heard other matters on the calendar, after which the following further proceedings were had herein, not previously transcribed, Assistant State's Attorney John Kinsella present:)

MR. KINSELLA: Good afternoon.

I came up here to speak to you for a while.

My understanding is this morning there was evidence in a case presented to you, and my concern, and what I would like to address right now with you is whether you all have a clear understanding of what the law is. Okay? Because it is our obligation, as the State's Attorneys, to

advise you as to the law. I can't tell you what the facts are. I can make reasonable inferences. I think the facts have been established, but ultimately, the facts are up to you, but the law is what concerns me.

If it is the impression -- well, first of all, let me say this

I would suggest to you that if there is -- excuse me for turning my back -- if there is information that you are relying upon which was not presented in testimony by any of the witnesses, I would suggest that you point that out. If anybody has a problem with being objective in this case, you should point that out.

I'm not going to say that you will be automatically excluded, but it is important that any extraneous considerations are being made known.

The oath you took requires you to not indict someone or fail to indict someone, based upon any fear or favor.

I would suggest to you that includes attitudes of sympathy and leniency, and it

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is up to the State's Attorney handling the case, once probable cause is determined, to exercise leniency that we feel is appropriate, and the Court in sentencing, to exercise leniency.

I would suggest to you that it is improper for you to decide that there is no probable cause in light of the facts simply because there is a feeling of sympathy towards the accused, and his age or his background or his good character, or for that matter, on the opposite side of the coin, bad character. Those are not proper considerations.

Your decision is whether there is probable cause to believe that a crime was committed and that this person committed it.

From what I understand, it is not a question so much in this case as the "who," but what crime.

As I told you when I selected you, that that quite often is the most difficult case, is to decide not cases of who did it, but what did they do?

Now, as to the question of the law, the charge that I believe was presented to you for your consideration does not require the defendant have an intent to kill. That is a different subsection of the Murder Statute.

Someone that points a gun from the top of a tower or points a high powered rifle at somebody's head and pulls a trigger, I suggest to you those facts establish an intent to kill, and there is a section in the statute for a crime which alleges that the act was done with an intent to kill.

The section we are dealing with here is whether the act was done knowing that it created a strong probability or death or great bodily harm.

The law defines Great Bodily Harm. This is in the context of the Aggravated Battery, "Not necessarily susceptible to precise legal definition, but physical beating may qualify as conduct that could cause great bodily harm," and the question

is not what the victim did or did not do to treat the injuries inflicted in this particular case, but what injuries did, in fact, the victim receive.

As I understand it, the evidence established that there was a broken jaw on this individual, and injuries sufficient to rupture -- what was the precise --

MS. CRESWELL: Sub-arachnoid hemorrhage, was the testimony.

MR. KINSELLA: Those are the injuries.

The question is whether the conduct of the defendant, whether there is probable cause to believe that the conduct of the defendant was done, knowing that his acts created a strong probability of great bodily harm.

You can look and consider what the consequences were. Okay? Because quite often the way a beating is done is not measured by amounts of pressure per square inch administered through the fist to the face. You look quite often at the results to determine what this person knew or should

have known would be the probable consequences. And you have a situation where the results are a broken bone in the face and the injury that Ms. Creswell just described.

Now, the question is whether there is probable cause to believe that the acts which the evidence established resulted in those injuries, are acts which were done knowing that such acts created a strong probability of death or great bodily harm.

The law is clear. Beating with fists and kicking, if that's what the facts are, can result in and constitute Murder.

Just so you are aware of that.

There is cases prior to this case where murder convictions have been sustained where the facts and evidence involved beating and kicking. It does not require the use of a deadly weapon.

"To sustain a murder conviction -- " Now, again, we are talking -- and these cases deal with sustaining proof beyond a reasonable doubt, not a question of probable cause.

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"To sustain a murder conviction, defendant, on the grounds that he knew that his acts constituted a strong probability of great bodily harm, there must be evidence from which the tryer of fact could infer the defendant knew, at a minimum, that his acts created a strong probability of great bodily harm to another individual; that the defendant acted and that act resulted in the death of another."

Okay, the Murder Statute contains, I believe, basically three sub-sections to it. One of them I alluded to, which is the pointing of the gun and intent to kill. That is one of the types of Murder that there can be.

The other type is basically that you know that your acts will cause the death of someone. And then there is the version we are dealing with here, whether the acts created a strong probability of death or great bodily harm. Okay. Does anyone at this point have any question what the law is? And I would suggest, if it hasn't

already been done, that you read the Murder Statute.

THE FOREMAN: Well, there were questions. I think a couple of people indicated, what is the difference between First Degree and Second Degree?

MR. KINSELLA: Let me make it clear. There is a legal difference. The law is different. It is not a question of degree of conduct. It is First Degree or Second Degree Murder under the law. You don't examine the facts and the conduct of the defendant and say while the elements may not fit First Degree Murder, we believe it would be more appropriate, in light of this individual's circumstances, that he be charged with a lesser crime. Under the Second Degree Murder, the facts have to establish that the defendant acted in an unreasonable belief of self-defense -- maybe you should read it, Kathy. I don't want to paraphrase what Second Degree Murder is. It is not a matter of leniency in saying it is more appropriate to be less than more.

There are different laws and different legal issues.

Would you read it?

MS. CRESWELL: Let me read Second Degree Murder.

"A person commits the offense of Second Degree Murder when he commits the offense of First Degree Murder," and you know what the definition of First Degree is, "and either of the following mitigating factors are present: one, at the time of the killing, he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed, or, at the time of the killing he believes the circumstances to be such that if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable."

In other words, he believes it is

self-defense but his belief is unreasonable, and then it tells you that serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

MR. KINSELLA: Let me give you the usual example.

A man comes home, walks in the bedroom and a guy is in bed with his wife, and he pulls out a gun that he happens to have on his person and kills him, or, that the victim's conduct was such that the person believed he had some right to self-defense. But that belief is unreasonable. Those are the two examples of Second Degree Murder.

Yes, sir.

A JUROR: What about like if there is an accidental murder? Is that still First Degree Murder, then?

MR. KINSELLA: The third version of criminal culpability for causing somebody's death is Involuntary Manslaughter. That is where the defendant's conduct was reckless. Involuntary Manslaughter contains within in,

as by way of example to you, reckless homicide, vehicular homicide. The drunk driver driving down the road runs into somebody. That is contained by way of analogy in recklessness and involuntary manslaughter.

Now, if you found that the defendant's conduct was not such that it created a strong probability of death or great bodily harm but that his conduct was reckless, and we can define -- read what reckless is. It should be in the definitions.

MS. CRESWELL: I did read you the Involuntary.

MR. KINSELLA: Find Recklessness.

These are differing states of mind. There are some exceptions, but for the most part, we are talking about felony offenses that require a mental state, mens rea, intent, knowledge or recklessness. Intent means you perform an act intending a certain result. Knowledge is that you perform acts, you know what acts you were performing. You

may not necessarily intend the result of those acts, but recklessness is --

MS. CRESWELL: It is not in the definition section.

MR. KINSELLA: Not in the Murder Statute. Can I see your book?

This is from the old Section 4-6.

"A person is reckless or acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statutes defining the offense. If such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation, an act performed recklessly is performed wantonly," and a generally used analogy for recklessness is firing a gun into a moving train or shooting a gun at a moving train. You may not intend that bullet to pass through somebody sitting in the boxcar, but if, in fact, you shot at a moving train, you are consciously disregarding a substantial and unjustifiable

risk that those circumstances may exist or that result may follow.

Okay? Even though you didn't intend to kill anybody, but act recklessly, if you do that and somebody dies, you would be guilty of involuntary manslaughter. That is by way of example.

The confusion that concerned me is on the intent to kill. If it was your belief that the evidence must establish probable cause with a belief and intent to kill, that belief is incorrect.

Are there any other questions or concerns as far as those definitions? Does anyone have -- yes, sir.

A JUROR: I am having a hard time with this. You know, I get into a fist fight with somebody. I don't mean to kill somebody but if I hit him and a guy falls and whacks his head and gets a hemorrhage or something like that, that is what I am having my problem with in this thing.

MR. KINSELLA: We are not dealing with a hypothetical set of facts.

THE JUROR: I know that.

MR. KINSELLA: We are dealing with specific facts, and you're decision is not whether it is a good thing to indict this person or a bad thing or a fair thing. You are not here to consider favor or fear. You are here to decide probable cause, and I am suggesting to you that the law is very clear that if somebody strikes someone, whether it be with their fist or their hand, and we note that the consequences and the results are as indicated, that suqqests with what force or velocity it was used and that that conduct does not fit within the self-defense sections we talked about in Second Degree Murder or provocation sections. If it doesn't fit within those, and that force creates a strong probability of great bodily harm and that person dies as a result of those injuries, that that constitutes First Degree Murder.

Now, your scenario would depend on, if this was an unprovocated attack in which you attacked someone, striking them and

kicking them, and those facts are sufficient to create a strong probability, in this case, probable cause, to believe that that creates a strong probable cause of great bodily harm to that person and that person dies as a result, yes, that is First Degree Murder.

Whether that is the right thing or wrong thing is not what you should be concerned with. You are concerned with whether there is probable cause to believe that these facts fit that law.

Okay? It is not up to you to decide equity and leniency. Okay? The tryer of fact may do that. The Judge may do that. The prosecutor may do that. You are here to decide probable cause.

Yes, sir.

A JUROR: I understand where you are coming from and the laws and guidelines, but then you keep saying that you want to push the Murder One issue. I mean, what we got out of it and what we deliberated on, we got nothing out of a Murder One case, and I'm

sorry, that's what I felt at the time.

MR. KINSELLA: Well, what I am suggesting is that -- take a step back and separate from your consideration a motions and leniency, and remember what your job is, to believe that these facts satisfy the elements of that crime. All right? It is not a question of whether he was a good kid or a bad kid or whether he just got out of the penitentiary, whether he had been a choir boy in the seminary his whole life. The question is whether he performed acts which created a strong probability of great bodily harm and that person died as a result of those acts.

Furthermore, there is a question to believe -- that is probable cause -- to believe that, and if there is confusion, I want to be sure it is decided appropriately, and if it was decided inappropriately, now is the time to correct it. If all of those proper considerations were made and that is the result, so be it. And I am not here to push anything. I am here to make sure

everybody follows the law. Okay?

Any other questions?

Kathy, is there anything else?

We brought some cases in here to discuss with you. I don't expect you to make all of you criminal lawyers in the next five minutes. I brought them with me. I will even leave them here, although there is two types of cases here dealing with the definition of great bodily harm and what that term means, because, keep in mind, there is a statute that maybe you dealt with already, Aggravated Battery. Okay? It is aggravated because the person knowingly performs acts which result in great bodily harm. Okay?

As the case says, there is not precise definition of what that means.

Let me suggest to you that breaking of bones and causing internal hemorrhaging has been, many, many times, found to be great bodily harm. Okay? The law doesn't say precisely -- the law can't say if you break two bones, that is great bodily harm,

or if the cut is longer than three inches, it is great bodily harm. There is no precise definition like that. But the definition of great bodily harm is generally derived from the Aggravated Battery statute which you dealt with. Remember, Aggravated Battery can be based upon the status of the person to whom a simple battery is administered or the results of that battery, such as an aggravated battery, great bodily harm.

Now, with the Murder Statute, we are dealing with, in a sense, great bodily harm. Aggravated Battery resulting in death, that the death was proximity caused by those injuries. Okay? So, if someone took a bat and hit you over the head and you got it stitched up, I would suggest to you that someone hitting you like that would constitute great bodily harm. If you survived, great. The guy is charged with Aggravated Battery. If you died from those injuries, that would constitute Murder.

Now, that is a different analogy

because you have a weapon, but if somebody strikes you and you receive 20 stitches by him beating you up, I would suggest to you that constitutes great bodily harm. If you die as a result of somebody performing such acts, creating a strong probability of great bodily harm, that would be murder.

Kathy, do you have anything?

What I would ask you to do right now is -- and if I am correct and this is your decision and you have followed the proper considerations of the law and one of probable cause, we are not here to prove the defendant guilty beyond a reasonable doubt, and you are not here to determine whether the proof is sufficient to support a conviction beyond a reasonable doubt, but if you followed the law as I tried to clarify it to you, and that is the result, so be it. But I would ask you to reconsider, at this point, the vote on the First Degree Murder. If that is the result, or you want something else considered, remember what the options are. She read to you the Second Degree

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Murder. If you see there is facts in there that would suggest that he was acting in reasonable belief of self-defense or based upon some provocation, fine. I don't know what those facts are, so, that only leaves us with involuntary manslaughter, and you would be finding that the defendant's conduct in striking with his fist or kicking, if that is what you find happened, I don't know if those are the facts or not, but I believe there is some evidence of that, you would have to say that that was reckless on the part of the defendant, that his conduct was reckless. Okay?

A JUROR: Where are these definitions of strong probability and reckless found that we can look at?

MS. CRESWELL: Strong probability is not defined. Recklessness is defined at 4-6, and if you want to look at intent for intentional act, that is found at 4-4.

MR. KINSELLA: This section, Article 4, Criminal Act and Mental State, defines Voluntary Act, Mental State, Intent,

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Knowledge, Recklessness and Negligence.

Okay? Generally, one of those mental states is required as an element of every crime. You usually don't have a picture of an internal workings of the defendant's brain at the time the act was committed, so, you can't use that kind of analysis. You generally look at the conduct and circumstances to determine or interpret what that person's state of mind was.

My example, if somebody points a high powered rifle at somebody's head, puts a bullet through their head, you don't know what was going on in their mind, but that act and those results would clearly prove an intent to kill. Okay?

In this case, you have acts which resulted in what, a broken jaw and the internal injury. Okay? You can look to those acts to determine whether that person knew his conduct created a strong probability of great bodily harm. Did you believe that he has to know that he is going to kill somebody? That is incorrect.

A JUROR: I have a question. Do you have the transcripts of the tape that we listened to?

MS. CRESWELL: I have two transcripts. They have not been corrected, so, if you want to look at the transcripts, I can bring the tape back up, if you want to listen to the tape.

A JUROR: I just wanted to refresh my memory.

MR. KINSELLA: Just to follow up on that question that you had before, if you have a mutual combat situation, those facts are different. If two people start swinging at each other in a bar, as quite typically happens, that is a different set of facts, and you would want to know more about what happened.

A JUROR: Well, I know one didn't attempt to defend himself, obviously.

MR. KINSELLA: Because if he died and there is probable cause to believe that he did not perform acts likely to cause death or great bodily harm and it doesn't fit

within either of the two mitigating circumstances of First and Second Degree -- keep in mind, Second Degree is murder plus the existence of mitigating circumstances. That is what Second Degree is. Okay? It is not a different -- I mean, it is different in that sense, but it is not standing on its own. It is murder plus the mitigating circumstances, so, if it isn't either of those things, the only other option is that his conduct was reckless. Okay? And generally speaking, when somebody makes a fist, throws it at somebody's face and hits them, that is usually not a reckless act, but if he is doing that intending to hit somebody and has knowledge that that is going to cause some injury, all right, now, you might look at the results of this to determine that it is probable that injury could be great bodily harm, and if the result is broken bones in the face, that is the circumstances you should consider.

Okay?

Anything else?

I will let you deliberate. If you, during your deliberations, have questions, let us know. We are here to answer the questions about the law.

And I will leave these here.

(The Grand Jury deliberated, afterwhich the following further proceedings were had herein:)

THE FOREMAN: Based on the clarification that you have brought forth, we have changed our decision originally and we will go with the First Degree Murder charge, True Bill.

MR. KINSELLA: Thank you. If there are any more questions, and when time permits, I will, if you want, come back and we can discuss this more. Maybe not this case specifically, but we will discuss the law and the theory.

I appreciate the opportunity to clarify things, and thank you.

MS. CRESWELL: Thank you.

(The Grand Jury attended to other matters on the calendar, afterwhich the following further proceedings were had herein, outside the hearing and presence of the Grand Jury:)

MS. CRESWELL: Would you swear in the witness?

(The oath was thereupon duly administered to the witness by the reporter.)

MS. CRESWELL: If the record could just reflect that it is June the 16th at approximately 4:35 p.m. and the Grand Jury has just concluded for the day.

J O H N F. T A N N A H I L L,
called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

By: Ms. Creswell

Q Sir, would you state your name and spell your last name for the court reporter?

A John F. Tannahill, T-a-n-n-a-h-i-l-l.

Q And what is your business or occupation?

A Police officer, Village of Westmont.

Q Officer Tannahill, did you have occasion to be present here in the Grand Jury room and present testimony today for some indictments?

A Yes, I did.

Q Or at least for one indictment; is that right?

A That is correct.

Q And were you present for the morning session or the afternoon session?

A I had arrived at approximately

quarter to one this afternoon.

Q And were you told then that the Grand Jury wasn't going to resume until approximately 2:00 p.m.?

A That is correct.

Q From the time that you arrived until approximately 2:00 p.m. when the Grand Jury reconvened, where were you waiting?

A I was waiting out in the foyer, outside the Grand Jury room.

Q Were the doors locked to get into the Grand Jury room?

A Not into the waiting area, no.

Q So, you were in the waiting area right outside here; is that correct?

A That is correct.

Q Not out in the hallway?

A Not out in the hallway.

Q And as you were in the waiting area, were there Grand Jurors present?

A Yes, they were.

Q Were they wearing badges which identified themselves as Grand Jurors?

A Yes, they did.

Q Other than yourself, did you see any other police officers in uniform?

A Yes, I did.

Q Approximately how many were present?

A There was one more from Lisle P.D.

Q Do you know his name?

A No, I don't, but he did have a Grand Jury hearing this afternoon also.

Q All right. While you were in the waiting room and members of the Grand Jury were present, did one of the Grand Jurors speak to you?

A Yes, he did.

Q Can you just give me a general description of that Grand Juror's appearance?

A Yes, he had light salt and pepper hair, male white, approximately, I would say, late 30's, early 40's. I don't remember what he was wearing, but he was about five, eight, five, nine, maybe 140, 150 pounds.

Q Where were you when you first heard that Grand Juror say anything?

A I was sitting in a chair in the waiting area.

Q Where was he?

A He was at the window facing south.

Q And that window, have you looked into that window?

A Yes, I have.

Q That window looks down into the library of the State's Attorney's office; is that correct?

A That is correct.

Q And when he was at that window, did you hear what he said?

A Yes, I did.

Q What did he say?

A He related that there were a group of people down there brainstorming, I believe his terminology was, over a case that they had heard earlier that morning.

Q Do you recall any more specific words that he used at that time?

A "They are down there trying to work up a different charge on what we had already heard."

Q And did you then have a conversation with him?

A Yes, I did.

Q And what did you say to him and what did he say to you?

A He approached the coffee area where I was sitting next to, and at that point we got into a conversation about Texas and a few other places, and he mentioned a case that they had heard earlier, reference to a homicide.

Q What did he say about the case?

A He related that they were over-brainstorming about a homicide case to get another charge because they had got a No Bill on a First Degree Murder.

Q And what did you say and what did he say?

A At that point I said "A No Bill on a First Degree Murder?" And at that time he said "Yes, the State fails to prove that the subject had intent to kill the other subject."

Q Do you recall any more conversation

with him?

A Yes, we discussed it further. He related to me that the facts of the case did not hold up to the charge; that he would consider a Manslaughter charge a better charge and they would approve that over First Degree Homicide.

Q And did he say why he thought Manslaughter was a better charge?

A Because he felt that the intent of the person who had killed the other subject, the intent was not there, the kid did not intend to kill him. He intended to get into a fight with him, such as a bar fight in Texas where you would step outside and have a fight and settle the problem.

Q And after that conversation, were you still in the waiting room when myself and John Kinsella returned to the Grand Jury waiting room?

A Yes, I was.

Q And did you then have occasion to relate that information to myself and Mr. Kinsella?

A Yes, I did.

MS. CRESWELL: I don't have any more questions.

Thank you.

All right, Officer Tannahill, you just indicated that he did relate further conversation regarding the facts; is that correct?

A That is correct.

Q And what other information did the Grand Juror say to you?

A He related to me that the facts of the case were, it was two kids fighting and the one kid had died and there was no weapons involved, and he feels it was just a fist fight and it wasn't the intent of the subject to kill the other one, just to beat him up.

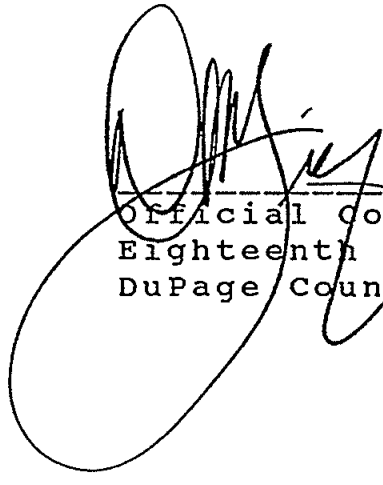
Q Did he have any further conversation about the facts?

A Just basically that he felt that First Degree Murder was not a good charge.

Q Approximately how long did your conversation with him last?

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

I, DONALD M. LIEF, do hereby certify that I reported in shorthand the proceedings had before the Grand Jury in the above-entitled cause, and that the foregoing proceedings, consisting of Pages 1 to 44, inclusive, is a true, correct and complete transcript of my shorthand notes so taken at the time and place hereinabove set forth.



Official Court Reporter
Eighteenth Judicial Circuit of Illinois
DuPage County.

APPENDIX B

People v. Tainter, 1-95-5395
(1st Dist., Jan. 23, 1998)

Slip Copy
(Cite as: 1998 WL 24234 (Ill.App. 1 Dist.))

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Patrick TAINTER, Defendant-Appellant.

No. 1-95-3935.

Appellate Court of Illinois,
First District.

Jan. 23, 1998.

Appeal from the Circuit Court of Cook County The Honorable Deborah M. Dooling, Judge Presiding.

For APPELLANT, Rita Fry, Public Defender of Cook County (Emily Eisner, Assistant Public Defender, of counsel).

For APPELLEE, Richard A. Devine, State's Attorney, County of Cook (Renee Goldfarb, Linda Woloshin and Judy L. DeAngelis, Assistant State's Attorneys, of counsel).

Presiding Justice CAMPBELL delivered the opinion of the court:

*1 Following a jury trial in the circuit court of Cook County, defendant Patrick Tainter was found guilty of the murder of Yvonne Johnson. The trial court found defendant eligible for an extended term sentence and sentenced him to 75 years in the Illinois Department of Corrections. Defendant now appeals.

The record on appeal indicates the following facts. Before trial, defendant filed motions in limine to bar certain evidence. One motion sought to bar testimony regarding acts of violence toward Johnson committed by defendant within the six years prior to the murder. Another motion sought to bar reference to a possible weapon mentioned in hospital records. The trial court denied both motions.

At trial, William Ramirez testified that on April 14, 1994, Johnson, who was the aunt of Ramirez's "common law" wife, was staying at Ramirez's apartment. At approximately 9 p.m., Ramirez saw Johnson and defendant laying on the living room couch; defendant and Johnson had been dating for 13 years. Ramirez asked defendant or the couple to leave. Defendant and Johnson left at 1:30 a.m. Ramirez testified that Johnson returned at 1:45 a.m., bleeding from the mouth and nose. Johnson went to the bathroom, washed up, and slept on the couch.

On the morning of April 15, 1994, Ramirez saw that Johnson's face and lips were swollen. When Johnson spoke, the words did not sound "right," as though her tongue was swollen. Ramirez asked Johnson what happened. After speaking to Johnson, Ramirez suggested that she go to the hospital, but she declined. Ramirez did not see Johnson eat or drink that day; he tried to feed her, but she could not chew. Johnson stayed in bed the entire day, which Ramirez testified was unusual for her.

On April 16, 1994, Johnson remained in bed. Ramirez again tried to feed Johnson, but was unsuccessful. Johnson's right cheek was getting darker; her lips continued to swell. Ramirez had a neighbor, Georgianna Starr, watch Johnson while he went to the grocery store. Starr testified that Johnson's face and jaw were swollen, with a dark bruise on the right side. Although her speech was slurred, Johnson told Starr how she was injured. Both Ramirez and Starr suggested that Johnson go to the hospital, but Johnson declined.

On April 17, 1994, Ramirez saw that Johnson's face was still black and swollen. Johnson could barely walk. The first time that Johnson went to the bathroom that day, she limped and appeared weak. The second time that Johnson went to the bathroom, Ramirez helped her due to her weakness. While she sat on the toilet, Johnson slumped forward and had passed blood. Johnson asked Ramirez to telephone for an ambulance. The paramedics arrived approximately 15 minutes later. Johnson was carried out of the bathroom by paramedics and Georgianna Starr. Johnson's eyes were rolling; she was unable to speak to anyone. Johnson was ultimately taken to Illinois Masonic Hospital.

Dr. Abraham Jacob testified that he treated Johnson when she was brought into the emergency room at approximately 11 a.m. on April 17, 1994. Dr. Jacob testified that Johnson was in a "shockey state," with multiple contusions to her right shoulder, left breast, right knee and the right side of her face. Johnson's face was swollen. Dr. Jacob noticed that Johnson was

mottled "all over, blotchy, reddish, like blush." According to Dr. Jacob, x-rays revealed that Johnson had a fractured mandible and older fractures of the ribs. Johnson had a cut and scrape of the knee. Rectal bleeding was also noted.

*2 In addition, Johnson was "markedly jaundiced," which Dr. Jacob stated was caused by liver failure. Based on information from Johnson's family, Dr. Jacob was aware that Johnson was being treated for cirrhosis of the liver. Dr. Jacob was also aware that Johnson was being treated for a possible stomach ulcer, high blood pressure and a prior infection. Dr. Jacob testified that he had received information from Johnson's family "or whomever was with her" and the paramedics that Johnson had been assaulted with a blunt object three days earlier. Dr. Jacob testified that there were "two different versions;" one involved a crow bar, one involved a two by four. Johnson was admitted to the intensive care unit, with complete respiratory support.

In the early morning hours of April 18, 1994, Johnson was in a coma. Johnson was unable to produce urine, despite being given diuretics and intravenous fluids. Dr. Jacob testified that Johnson died between 5:30 and 6 that morning.

Dr. Joseph Cogan, an Assistant Forensic Medical Examiner with the Cook County Medical Examiner's Office, testified that on April 19, 1994, he performed an autopsy on Johnson. Dr. Cogan testified that Johnson was approximately 5'2" tall, weighing 191 pounds. Dr. Cogan catalogued Johnson's injuries, including swelling and hemorrhaging of the scalp and shoulders, injuries to the back of the head, hemorrhaging on both sides of the head, discoloration of the right side of her face and her right ear, and contusions of the left breast area. There was also bruising of the chest, right breast and upper abdomen. Dr. Cogan stated that trauma to the body--various blows to the body--causes hemorrhage underneath the skin.

Dr. Cogan also testified regarding the fractured mandible. Dr. Cogan stated that it was very hard to break an adult jaw in the manner Johnson's jaw was broken. Dr. Cogan testified that it would take "a considerable amount of force."

Dr. Cogan opined that Johnson died as a consequence of multiple injuries from a beating. The fracture of Johnson's jaw produced a disruption in the barrier between the mouth and the inside of her body, allowing bacteria to spread through her head, neck and shoulders. Ultimately, Johnson's organs shut down due to the bacteria spreading through her body.

Dr. Cogan testified that the hemorrhaging in this case was consistent with "a punch, a kick, a blow with some object, a lot of different things * * *." Dr. Cogan testified that defendant may have used a two by four to inflict some of the blows against Johnson. Dt. Cogan testified that the hospital records mentioned the possibility that a crow bar or a two by four was used in the beating, and that he later learned of the possibility of a fist or foot. Dr. Cogan also testified that a two by four could cause a fracture of the kind involved in this case, but that he would not list a crow bar as a likely weapon.

The parties stipulated that Chicago Police Detective T. O'Connor would testify that he was assigned to investigate the homicide of Johnson on April 18, 1994. During the course of investigation, he left a business card with defendant's sister. On the evening of April 18, 1994, defendant telephoned Detective O'Connor and agreed to speak with Detective O'Connor regarding the homicide. Defendant met Detective O'Connor and then agreed to accompany him to the police station. Defendant was interviewed by Detective O'Connor and Assistant State's Attorney (ASA) Bigane. Defendant was arrested at 2 p.m. on April 19.

*3 ASA Virginia Bigane testified that she interviewed defendant at 3 p.m. on April 19, 1994. Following Miranda warnings, defendant stated that he had been Johnson's boyfriend for 12 years. On April 14, 1994, defendant and Johnson had been drinking alcohol in Chase Park, then went to Ramirez's apartment. Ramirez ordered defendant out of his apartment. Defendant asked Johnson to leave with him. Ramirez continued to order defendant to leave; defendant kept asking Johnson to go with him until she agreed.

After leaving the apartment, defendant and Johnson went to an outside alley area. Johnson suggested to the defendant that they go to Rudy's house because she had a key to the house. Defendant told ASA Bigane that the fact that Johnson had another man's house key made him mad and jealous. Defendant told ASA Bigane that he punched Johnson in the face, which caused Johnson to spin around. Johnson attempted to grab onto a dumpster to regain her balance. Defendant told ASA Bigane that he then gave

Johnson a "round-house" kick to her back side, swinging his leg around his body to gain momentum.

Defendant told ASA Bigane that when Johnson attempted to get up, defendant again punched Johnson in the jaw. Johnson fell to the ground. Defendant then kicked Johnson in the body numerous times, particularly the back and ribs, while Johnson was on the ground, yelling for help and for defendant to stop.

Defendant told ASA Bigane that he then got Johnson's purse and threw it at Johnson, saying "Here's your damn bag." Defendant left Johnson on the ground. Defendant returned to Chase Park, where he fell asleep. ASA Bigane testified that defendant was cooperative, but declined to have his statement transcribed by a court reporter or to sign a handwritten statement.

Witnesses also testified regarding prior violent acts by the defendant. In each instance, the trial court instructed the jury that the evidence was being admitted on the issue of defendant's intent, motive or absence of an innocent state of mind and should be considered only for that limited purpose. Johnson's daughter, Kelly Weise; testified that in the summer of 1989, she saw defendant "back-hand" Johnson "so hard it almost knocked her off her seat * * *." Ramirez testified that five months before Johnson died, he saw defendant slap Johnson's face so hard that blood came out of her mouth. Ramirez testified that defendant and Johnson had been arguing about whether to go out that day. Georgianna Starr testified that two months before Johnson died, she saw defendant push Johnson onto a couch during an argument. Starr also testified that six years earlier, she had seen defendant punch Johnson in the eye during an argument.

Following closing argument and jury instructions, the jury found defendant guilty of murder. The trial court denied defendant's post-trial motion. During sentencing, Johnson's family presented victim impact statements. The State also introduced evidence of prior felony convictions for concealment of a homicidal death, robbery and burglary. The trial court, finding that defendant's actions were brutal and savage, sentenced defendant to an extended term of 75 years in prison. Defendant now appeals.

*4 Initially, defendant contends that he was denied a fair trial because the trial court refused to instruct the jury on the lesser offense of involuntary manslaughter. The basic difference between involuntary manslaughter and murder is the mental state accompanying the conduct causing the homicide. People v. Foster, 119 Ill.2d 69, 87, 518 N.E.2d 82, 89 (1987). A person commits first-degree murder when he "kills an individual without lawful justification * * * [and] either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or he knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 5/9-1(a)(1), (a)(2) (West 1996). A person commits involuntary manslaughter when he "kills an individual without lawful justification * * * 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 1996).

In a murder trial, it is error to refuse an instruction on involuntary manslaughter if there is any evidence in the record which, if believed, would reduce the crime to the lesser offense. People v. Rodgers, 254 Ill.App.3d 148, 152, 626 N.E.2d 260, 263 (1993). Defendant notes that Illinois recognizes that death is not ordinarily contemplated as a natural consequence of blows from bare fists. People v. Brackett, 117 Ill.2d 170, 180, 510 N.E.2d 877, 882 (1987)(and cases cited therein). Defendant also argues that the evidence that he had been drinking prior to the killing is evidence of recklessness. People v. Bembroy, 4 Ill.App.3d 522, 526, 281 N.E.2d 389, 393 (1972).

Accordingly, defendant relies on cases such as People v. Taylor, 212 Ill.App.3d 351, 570 N.E.2d 1180 (1991). In Taylor, the evidence indicated:

> "that both defendant and the victim were intoxicated, the victim more so than the defendant. Defendant punched [the victim] in the face one time, causing him to fall to the ground. From the medical examiner's testimony, it appear [ed] that this fall, in which [the victim] hit his head on the concrete, rather than the blow, caused the injuries which resulted in death. Defendant then proceeded to kick and hit [the victim] as he lay on the ground. The evidence [was] conflicting as to whether defendant was punching or slapping [the victim] as he lay on the ground. Defendant testified that he was hitting [the victim] in an attempt to awaken or arouse him. Defendant also tried unsuccessfully to pick [the victim] up several times. Defendant testified that he was attempting to place [the victim] in his car to

rest, or to arouse [the victim]. [The victim]'s head hit the concrete when defendant dropped him. However, there [was] no evidence that defendant dropped [the victim] with the intent to kill or harm him." Taylor, 212 Ill.App.3d at 356-57, 570 N.E.2d at 1183.

*5 This court concluded that this evidence was sufficient to justify instructing the jury on the offense of involuntary manslaughter. Taylor, 212 Ill.App.3d at 357, 570 N.E.2d at 1183.

However, an involuntary manslaughter instruction should not be given if the evidence clearly demonstrates that the crime was murder and there is no evidence which would reduce the crime to involuntary manslaughter. People v. Ward, 101 Ill.2d 443, 451, 463 N.E.2d 696, 699 (1984). Factors to be considered when determining whether there was evidence of recklessness which would support the giving of an involuntary manslaughter instruction include: the disparity in size between the defendant and the victim; the brutality and duration of the beating; and the severity of the victim's injuries. Rodgers, 254 Ill.App.3d at 153, 626 N.E.2d at 263. An involuntary manslaughter instruction is not warranted where the nature of the killing, shown by either multiple wounds or the victim's defenselessness, reveals the inapplicability of the theory. People v. Trotter, 178 Ill.App.3d 292, 298, 533 N.E.2d 89, 92 (1988).

In this case, there was a disparity in size between the defendant and the victim, although this is not a case where an adult has killed a child as in the Ward line of cases. The record shows that at the time of the killing, defendant was 36 years old, 5' 9" tall, weighing 170 pounds. Johnson was 56 years old (though appearing younger), approximately 5' 2" tall, weighing 191 pounds.

The record also discloses both the duration and brutality of the beating and Johnson's relative defenselessness. After punching Johnson in the face with sufficient force that Johnson to spun around, defendant delivered a "round- house" kick that sent Johnson to the ground. When Johnson attempted to get up, defendant punched Johnson in the jaw. Defendant continued to punch and kick Johnson numerous times while she was on the ground, causing multiple injuries. The record contains no evidence that defendant was able to defend herself.

The medical testimony shows that defendant's jawbone was broken and that it takes a great deal of force to cause such a fracture. Indeed, while defendant's statement refers to kicking Johnson in the back and ribs, the medical testimony also contains evidence of multiple instances of trauma to Johnson's head and bruising of Johnson's chest and upper abdomen.

Unlike Taylor, there was no conflicting evidence regarding the nature of the blows struck after Johnson was on the ground. Instead, the case is more similar to Rodgers, in which this court held that the involuntary manslaughter instruction was not warranted where the victim died of bleeding over the surface of the brain, due to blunt force injury, after defendant repeatedly punched the victim in the face.

Furthermore, the State introduced evidence to show defendant's intent and the absence of accident. Defendant contends that the trial court committed reversible error by permitting this testimony. Evidence of prior acts of misconduct is admissible if relevant for some purpose other than to show a propensity for crime, and if the probative value of the evidence outweighs its prejudicial effect. People v. Burgess, 176 Ill.2d 289, 307, 680 N.E.2d 357, 365 (1997). For example, the State may seek to present evidence of prior acts of abuse committed by the defendant against the victim, to show the presence of intent and the absence of accident. Burgess, 176 Ill.2d at 308, 680 N.E.2d at 366. In such cases, only general similarities between the different acts are necessary. Burgess, 176 Ill.2d at 308, 680 N.E.2d at 366. A trial judge's decision allowing the introduction of evidence of this nature will be upheld unless the ruling represents an abuse of discretion. Burgess, 176 Ill.2d at 307, 680 N.E.2d at 365.

*6 The record in this case shows that the trial court considered the purposes for which the evidence was offered, as well as the probative nature and prejudicial impact of the evidence, before ruling that the evidence would be admissible. In this case, as the appeal demonstrates, the defendant's mental state was very much at issue. The prior acts of abuse by defendant were relevant to show intent and the absence of mistake. Indeed, such prior incidents could be highly probative on the question of defendant's awareness of the effects of a given amount of physical force on Johnson.

The record also shows that during voir dire, the trial court asked whether evidence of prior acts of violence

committed by the defendant against the victim would affect their ability to decide the case. The trial court also instructed the jury each time such testimony was elicited that the evidence was being admitted on the issue of defendant's intent, motive or absence of an innocent state of mind and should be considered only for that limited purpose.

Given this record, we cannot conclude that the trial court abused its discretion in admitting the testimony regarding defendants prior abuse of Johnson. [FN1] This evidence was consistent with the intent that can be inferred from the medical testimony regarding the force necessary to produce the severity of the injuries here and from defendant's own statement admitting that he continued to kick and punch Johnson numerous times after he knocked her to the ground. The record contains evidence that defendant had been drinking several hours before the beating, but no evidence that he was intoxicated at the time of the beating.

In sum, the record clearly shows the crime of murder and contains no evidence that defendant did not know that his beating of Johnson created a strong probability of death or great bodily harm to Johnson. Accordingly, the trial court did not err in refusing to give the involuntary manslaughter instruction.

II

Defendant next contends that the trial court committed reversible error by admitting "anonymous multiple hearsay that speculated on the existence of a weapon." Specifically, defendant objects to the testimony of Dr. Jacob and Dr. Cogan regarding information that Johnson could have been assaulted with a crow bar or a two by four. Hospital records have a high degree of reliability. Wilson v. Clark, 84 Ill.2d 186, 194, 417 N.E.2d 1322, 1326 (1981). Expert witnesses may consider not only medical records commonly relied upon by members of their profession in forming their opinions, but they also may testify as to the contents of these records. People v. Pasch, 152 Ill.2d 133, 176, 604 N.E.2d 294, 311 (1992). A medical examiner may testify, based on medical reports and from the examiner's own observations of the evidence, which weapons might have been used in a crime. See People v. Kidd, 175 Ill.2d 1, 34-35, 675 N.E.2d 910, 926-27 (1996).

In this case, Dr. Jacob testified regarding the possibility of a weapon in response to a question asking how Dr. Jacob knew the proper course of treatment, since Johnson was unable to speak. The record shows that the testimony was elicited as part of the basis for Dr. Jacob's opinions. The transcript also shows that Dr. Cogan was accepted as an expert in the field of forensic pathology, a field Dr. Cogan described as including:

> *7 "examining deceased individuals, determining cause of death, performing autopsies * * *, testifying in [c]ourt in regard to * * * autopsy findings, [and] assisting police or other people to understand the medical findings and origins of trauma and causes of death."

Thus, Dr. Cogan was qualified to render the opinion that Johnson's death was caused by multiple injuries from a beating and to explain what sorts of objects, such as a fist, a foot, a two by four or a crow bar are consistent with the blunt trauma at issue in this case, particularly where the objects discussed are those mentioned in the hospital records.

Defendant relies on cases such as People v. Ramey, 237 Ill.App.3d 1001, 606 N.E.2d 39 (1994), in which this court ruled that the medical examiner's opinion was improper because it lacked a proper foundation and the State sought to use the underlying facts and data for substantive purposes. Defendant's brief attacks the lack of foundation for the testimony at issue. However, the record shows that defendant made no objection to Dr. Jacob's testimony in his post- trial motion. Defendant has not shown that he objected on foundational grounds at trial. Thus, defendant has waived the argument.

Similarly, defendant argues that he was denied a fair trial because the State allegedly used the testimony at issue for substantive:purposes. While an expert may disclose the underlying facts, data and conclusions for the limited purpose of explaining the basis for his opinion, the contents of reports relied upon by experts would clearly be inadmissible as hearsay if offered for the truth of the matter asserted. Pasch, 152 Ill.2d at 176, 604 N.E.2d at 311. However, as with the foundational argument, defendant failed to raise this objection in his post-trial motion, resulting in waiver on appeal. Moreover, the record shows that at trial, defendant objected to only one of the references cited in his brief. The defense objected to the statement that the fracturing of Johnson's jaw was "the kind of break that a kick might be able to do or maybe even something like a two by four." Such a comment, which was the only specific reference to a two by four in the State's closing arguments, not reversible error. See People v. Wicks, 236 Ill.App.3d 97, 603 N.E.2d

594 (1992). In sum, defendant has failed to show reversible error.

III Finally, defendant argues that his sentence should be vacated, contending that he is ineligible for an extended term sentence and that the sentence is excessive in any event. Defendant has waived review of his sentence by his failure to file a post-sentencing motion pursuant to section 5-8-1(c) of the Unified Code of Corrections. People v. Reed, No. 81422 (Ill. Sept. 25, 1997), slip op. at 4.

Nor does there appear to be plain error in the sentencing at issue. Defendant contends that he is ineligible for an extended term sentence. The trial court found defendant eligible for two separate reasons: (1) the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty (730 ILCS 5/5-5-3.2(b)(2) (West 1994)); and (2) the defendant had been convicted of first degree murder and convicted of a separate offense under section 5-5-3(c)(2) within the prior 10 years (see 730 ILCS 5/5-5- 3.2(b)(7); 730 ILCS 5/ 5-5-3(c)(2) (West 1994)). On December 13, 1990, defendant had been convicted and sentenced pursuant to section 5-5-3(c)(2)(F), which applies when a defendant is convicted of a Class 2 felony within 10 years of a prior Class 2 felony conviction. Both of the convictions were for burglary.

*8 Regarding the prior conviction under section 5-5-3(c)(2)(F), defendant argues that "[t]he cross-reference [in section 5-5-3.2(b)(7)], which carries its own ten-year limitation, is so cumbersome and wreaking of double enhancement that the legislature could not rationally have intended it to qualify as an extended term provision." However, the cases defendant cites in support of this argument, People v. Ferguson, 132 Ill.2d 86, 547 N.E.2d 429 (1989), and People v. White, 114 Ill.2d 61, 499 N.E.2d 467 (1986), do not involve these statutory provisions. Moreover, there is only one enhancement occurring in this proceeding. Furthermore, assuming arguendo that this is a case of double enhancement, that result is not improper where the legislature intended the result. People v. Thomas, 171 Ill.2d 207, 224, 664 NE.2d 76, 85 (1996).

In this situation, the statute clearly provides that a defendant sentenced pursuant to section 5-5-3(c)(2) within the prior 10 years may provide the predicate for an extended term sentence. 730 ILCS 5/ 5-5-3.2(b)(7). It is not irrational that the legislature would provide that a defendant who had been recidivist at the level of Class 2 felonies who then commits first degree murder would be eligible for an extended term sentence. Defendant notes that the first of his prior burglaries did not occur within 10 years of his murder conviction, but section 5-5-3.2(b)(7) does not require that both Class 2 felonies fall within 10 years of the murder conviction. Thus, defendant was eligible for an extended term sentence.

Defendant's brief states in passing that the State's request for the extended term sentence appeared "solely vindictive" because he was allegedly offered a 20 year sentence as part of a plea agreement. Defendant cites no authority in support of his argument. Generally, it is not improper or evidence of prosecutorial vindictiveness to offer a defendant a reduced sentence as an incentive to plead guilty as part of a plea agreement but to recommend a greater sentence when the State's offer was refused, particularly where the sentence imposed falls within the statutory guidelines. See People v. Walton, 240 Ill.App.3d 49, 60, 608 N.E.2d 59, 67 (1992).

Defendant further contends that the sentence imposed was excessive, even if he was eligible for an extended term. Sentencing is a matter for the discretion of the trial court; its decision is entitled to great weight and deference. People v. La Pointe, 88 Ill.2d 482, 492-93, 431 N.E.2d 344, 348 (1981).

Defendant maintains there were no aggravating factors to this homicide. When a sentence is enhanced to Class X because of prior convictions, the trial court may not use the same convictions as aggravating factors. People v. Ward, 243 Ill.App.3d 850, 852, 611 N.E.2d 590, 592 (1993). However, the trial court could allocate the rest of defendant's prior convictions toward aggravation. Cook, 279 Ill.App.3d at 727-28, 665 N.E.2d at 305. In this case, aside from the two burglaries, the trial court could consider that defendant had prior convictions for aggravated battery, theft, concealment of a homicidal death and robbery. Moreover, even if no aggravating factors are present, defendant is not entitled to a near-minimum sentence. People v. Harvey, 162 Ill.App.3d 468, 475, 515 N.E.2d 337, 342 (1987).

*9 The record in this case indicates that the trial court carefully considered the statutory factors in

aggravation and mitigation, and even considered non-statutory factors in mitigation. The sentence imposed falls within the lower half of the statutory range. Thus, there was no abuse of discretion in imposing the sentence in this case.

For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

O'BRIEN, J., concurs.

BUCKLEY, P.J., dissents.

Presiding Justice BUCKLEY dissents:

I must respectfully dissent. I believe that the evidence was sufficient to justify instructing the jury on the offense of involuntary manslaughter and failure to do so constitutes reversible error.

It is well established that an instruction defining a lesser offense should be given if there is evidence in the record that, if believed by the jury, would reduce the crime to a lesser-included offense. People v. Valdez, 230 Ill.App.3d 975, 985 (1992). There was evidence in this case to warrant a jury instruction on involuntary manslaughter.

A person commits involuntary manslaughter when he "unintentionally kills an individual without lawful justification * * * [and] 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 (West 1992). The crux of the offense of involuntary manslaughter is recklessness. A "reckless" mental state is a "conscious disregard of a substantial and unjustifiable risk that circumstances exist or that a result will follow." 720 ILCS 5/4-6 (West 1992). The majority, relying on three factors set forth in People v. Rodgers, 254 Ill.App.3d 148, 153 (1993), concludes that there was no evidence of recklessness to support the giving of an involuntary manslaughter instruction. I respectfully disagree.

Regarding the first factor, the majority briefly notes that there was a disparity in size between Johnson and defendant. However, consideration of this factor does not defeat an instruction for involuntary manslaughter in this case. In People v. Drumheller, 15 Ill.App.3d 418 (1973), the case cited in Rodgers, the defendant killed a 14-month-old child by punching it in the stomach. The court held that a fatal blow from a fist may constitute murder where there is a great disparity in size and strength between the defendant and decedent. Drumheller, 15 Ill.App.3d at 421. There is no great disparity here. As the majority points out, this is not a case where an adult has killed a small child. See e.g. People v. Ward, 101 Ill.2d 443 (1984) (holding that involuntary manslaughter instruction was unwarranted where evidence showed that savagely brutal beating of four-year-old victim with mop handle resulted in bruises to the chest muscles, lungs, and brain and were too numerous to be counted). In fact, Johnson who was 5'2" and weighed 191 pounds was 20 pounds heavier than defendant who was 5'7" and weighed 170 pounds. Certainly this factor provides no basis for preclusion of the involuntary manslaughter instruction.

*10 The majority next cites the "duration and brutality of the beating" and the nature of Johnson's injuries as factors which preclude a finding of recklessness. I again respectfully disagree with the majority's conclusion. According to defendant, he struck Johnson in the face causing her to spin around and grab onto a dumpster to regain her balance. Defendant then kicked Johnson in her back side and then punched her in the jaw. Johnson fell to the ground and defendant kicked her in the back and ribs "numerous" times. The majority analogize this case to People v. Rodgers, 254 Ill.App.3d 148 (1993). However, the beating in Rodgers was quite different. In Rodgers, the victim was asleep on a couch when defendant approached and very forcefully punched the victim in the face approximately 7 to 13 times. The victim died almost immediately thereafter due to bleeding over the surface of the brain. Rodgers, 254 Ill.App.3d at 153. In the instant case, Johnson was able to get up, walk home, wash her face and remain ambulatory for a day or two. Johnson refused medical treatment. The medical testimony presented at trial was that Johnson had bruises on her right shoulder, left breast, right knee and right side of her face. Defendant caused no broken bones other than the jaw. Defendant caused no injuries to vital organs and no lacerations. Defendant did not use a lethal weapon. Johnson died as a result of a bacterial infection due to the neglected treatment of her broken jaw, not as a direct result of the blows inflicted by defendant. Her injuries, unfortunately, did not appear life-threatening to anyone. This was not a "savagely brutal" beating certain to cause death. Rather, this was a sudden and short episode brought on by a

jealous rage. The beating took place within a 15-minute interval from the time she left her home with defendant to the time she returned--alone. Additionally, the parties had been drinking several hours before which constitutes additional evidence of recklessness. See People v. Bembroy, 4 Ill.App.3d 522, 526 (1972).

The evidence could support a finding that defendant did not reasonably know or intend deadly consequences. Defendant and Johnson had been dating for over 13 years. Defendant had been physical with Johnson in the past. Enraged and jealous over Johnson's possession of another man's housekey, defendant struck her. The jury could have found that defendant was reckless in hitting Johnson, but that defendant did not intend to kill her and did not know that his actions would have such a result. The jury could reasonably have found that the fact that defendant gave Johnson her purse before he left was indicative of his lack of murderous intent since had defendant known that Johnson's death was imminent he probably would not have returned her purse. Moreover, Johnson herself did not even seek medical treatment for her injuries and refused the offer of her nephew's assistance in obtaining medical treatment.

*11 Because even slight evidence tending to show involuntary manslaughter entitles a defendant to the jury instruction (People v. Jenkins, 30 Ill.App.3d 1034 (1975)) I would reverse and remand this cause for a new trial.

FN1. Defendant also complains that the trial court rejected the defense request to change the word "offenses" to "conduct" in submitting Illinois Pattern Instruction 3.14, limiting the consideration of the collateral incidents, to the jury. See IPI Criminal 3d No. 3.14 (1992). However, defendant does not expressly claim error, let alone reversible error. Nor did defendant cite any authority on this point in his brief. Thus, the argument is waived on appeal. Nor is there a question of plain error. The committee notes to the most recent version of IPI Criminal 3d No. 3.14 explain that the term "conduct" is to be used where defendant's actions are not technically an "offense." As the State points out in its brief, the incidents in this case are in the nature of batteries. This is not a case where conduct not generally considered an offense--e.g, adultery, membership in a street gang--is used to prove motive. Accordingly, defendant cannot show the trial court abused its discretion on this point. Cf People v. Curtis, 262 Ill App 3d 876, 890-91, 635 N.E.2d 860, 871 (1994)

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