No. 121371

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court) of Illinois, First District
Plaintiff-Appellant,	) No. 1-13-1944
v.	) There on appeal from the) Circuit Court of Cook County,) Criminal Division
ROBERT CAREY,	) No. 11 CR 3485
Defendant-Appellee.	) The Honorable) Matthew E. Coghlan,) Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Following his attack on two armored truck security guards, defendant was charged by indictment with (i) felony murder while committing attempted armed robbery; (ii) attempted armed robbery with a firearm; and (iii) two counts of unlawful use or possession of a firearm by a felon. Immediately before trial, the State announced that it was proceeding only on the felony murder charge, based on a predicate felony of attempted armed robbery with a firearm, and *nolle prosequied* the remaining counts. The jury found defendant guilty of felony murder and further found that during the commission of the offense, "defendant was armed with a firearm." The trial court sentenced defendant to twenty-five years of imprisonment for felony murder, plus an additional fifteen years of imprisonment because he used a firearm to commit the offense ("firearm enhancement").

The appellate court affirmed defendant's conviction but vacated the firearm enhancement. Defendant then filed a petition for rehearing, arguing for the first time that his conviction should be vacated because the indictment failed to sufficiently inform him of the felony murder charge. On rehearing, the appellate court held that the felony murder count was deficient and vacated defendant's conviction because that count did not provide the statutory citation to the predicate felony of attempted armed robbery or state whether a firearm was used in the offense. A question is raised on the pleadings, namely whether the indictment sufficiently informed defendant of the felony murder charge.

ISSUES PRESENTED FOR REVIEW

1. Whether Count I of the indictment — which was challenged for the first time in a petition for rehearing and which charged defendant with felony murder,

provided the statutory citation to felony murder, alleged that the murder occurred during the commission of an attempted armed robbery, named the accused and the victim, and identified the date and location of the offense — was deficient and requires vacatur of defendant's murder conviction because it did not also include the statutory citation for attempted armed robbery or state whether the offense was committed with a firearm.

2. Whether, the indictment, read as a whole, sufficiently informed defendant of the predicate offense underlying the felony murder charge where Count II charged defendant with attempted armed robbery, provided the statutory citation for that offense, and alleged that the offense was committed with a firearm.

3. Whether, assuming the indictment was deficient, defendant was prejudiced, given that, among other things, his counsel stated on the record prior to trial that she understood that the underlying predicate felony was attempted armed robbery with a firearm, defendant pursued a defense based on that understanding, defendant was convicted of that offense, and the evidence of defendant's guilt is overwhelming.

4. Whether, assuming the indictment failed to sufficiently detail the underlying predicate felony of attempted armed robbery, it was proper for the appellate court to vacate defendant's conviction rather than treating the predicate felony as the lesser-included charge of attempted robbery and affirming the felony murder conviction.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. On November 23, 2016, this Court allowed the People's petition for leave to appeal.

STATEMENT OF FACTS

On January 28, 2011, defendant and his brother, Jimmy Townsend, attempted to rob armored truck security guards Julio Rodriguez and Derrick Beckwith at gunpoint. During the course of the attack, Townsend was shot and killed. Defendant suffered gunshot wounds and was arrested at the scene while in possession of a handgun.

The State subsequently charged defendant by indictment with four counts: felony murder for causing the death of Townsend while committing attempted armed robbery (Count I); attempted armed robbery with a firearm (Count II); and two counts of unlawful use or possession of a weapon by a felon (Counts III and IV). C31-34.[1] In pertinent part, Count I identified the date and location of the offense and stated that defendant committed felony murder

> in that he, without lawful justification, committed the offense of attempt armed robbery, and during the commission of the offense, he set in motion a chain of events that caused the death of Jimmy Townsend in violation of Chapter 720 Act 5 Section 9-1(a)(3)[.]

C31. Count II alleged that defendant committed attempted armed robbery with a firearm when he pointed a "firearm" at the armored truck guards and threatened the use of force while armed with a "firearm." C32. Counts III and IV charged defendant with unlawful possession of a weapon, alleging that on the date of the attack he possessed "a firearm" after previously having been convicted of a felony. C33-34.

At a hearing several months before trial, defense counsel informed the court that the case concerned "allegations that [defendant] and his brother attempted to rob an armored car at gunpoint." R.I.V6. At several subsequent pre-trial hearings, the parties informed the court that the trial date depended on when the parties could complete their

[1] The common law record and report of proceedings are cited as "C" and "R," respectively.

testing of defendant's firearm. *See, e.g.*, R.I.X2-3, Y2-3. Defendant's counsel explained that she wanted to have a "Defense expert look at" the firearm defendant used in the attack and that the trial date depended on whether the testing "comes back favorable to me and my client." R.I.Y2-3.

On the day of jury selection, the State brought a motion in limine to prohibit defendant from arguing that his handgun had to be operable at the time of examination in order to qualify as a "firearm" and support the predicate felony of attempted armed robbery underlying the felony murder charge. C92. During that hearing, the prosecutor stated: "[t]he attempt armed robbery section that is the predicate for the felony murder is 18-2(a)(2), which requires proof of a firearm, not a dangerous weapon. It requires us to prove [a] firearm." R.II.BB7. Defense counsel acknowledged her understanding that the State "is going to ask that the jury find that this crime was committed with a firearm." R.II.BB13. The trial court granted the State's motion in part, ruling that the defense was precluded from arguing that the gun was not a firearm, but that the court would permit argument if the evidence showed that the gun fell within one of the statutory exceptions to the definition of firearm. R.II.BB16-17. At that same hearing, prosecutors *nolle prosequied* Counts II-IV. R.II.BB19.

At trial, the State presented testimony from the two security guards (Beckwith and Rodriguez) and three additional eyewitnesses. Those five witnesses established that on the morning of January 28, 2011, Beckwith and Rodriguez drove an armored truck to a Family Dollar store in Chicago, Illinois, then Rodriguez got out of the truck and entered the store to collect its cash receipts. R.III.CC25-27, 82-85. As Rodriguez exited the store holding a deposit bag filled with cash, Townsend approached Rodriguez from the left,

holding what appeared to be a sawed-off shotgun, while defendant approached Rodriguez from the right. R.III.CC33-35, 86-87. Townsend yelled at Rodriguez, "Don't move, motherfucker!" and then told defendant to kill Rodriguez. R.III.CC33-34, 86, 181-83. Rodriguez drew his service revolver and shot Townsend four times, and Townsend collapsed. R.IIII.CC35-36. Defendant picked up the shotgun, swung it at Rodriguez and missed, then put Rodriguez in a chokehold. R.III.CC36-38, 88-89, 135-36, 161-62. As they struggled, defendant stuck his handgun into Rodriguez's back. R.III.CC125, 137-38. Eventually Rodriguez broke free and ran toward the armored truck, while defendant gave chase, still carrying his handgun. R.IIII.CC38-40, 90-91, 188. Beckwith opened the truck's door, defendant pointed his gun at him, and Beckwith shot defendant twice in the head. R.IIII.CC41, 90-91, 187-88. Defendant fell to the ground, where he remained until police and paramedics arrived. R.III.CC41, 196-97. Townsend died from his gunshot wounds. R.III.CC229.

Police arrived at the scene shortly after the attack and recovered the handgun from defendant. R.IV.DD8. Forensic scientists testified that defendant's gun was a double-barreled .22 Derringer that was damaged and inoperable at the time it was examined and that Townsend's weapon was an inoperable homemade device designed to look like a shotgun. R.IV.DD23-24, 50-51, 113-17. Footage from two security cameras showing portions of the attack, including defendant's possession of the firearm, were also played for the jury. Exhs. 12, 13, 73; R.V.EE33.

Defendant testified that in the months leading up to the attack on the armored truck, his brother Townsend was suicidal and told defendant that he wanted to die "in a hail of bullets." R.V.EE49-58. Defendant had seen and held the Derringer multiple

times before the attack on the armored truck. R.V.EE62-63, 67-68. Defendant testified that he had no memory of the attack on the armored truck, admitted that he did not know Townsend's or his own state of mind on that day, and acknowledged that it was possible he and Townsend were attempting to rob the security guards. R.V.EE59, 69-70.

In closing, the prosecution asked the jury to find defendant guilty of felony murder and that defendant was "in possession of a firearm during the commission of that offense." R.V.FF28. Defense counsel argued that there was no attempted armed robbery, and thus no felony murder, because Townsend was suicidal and was hoping to get shot, and defendant was merely trying to save his brother's life, not committing a crime. R.V.EE.83-89. Defense counsel acknowledged that defendant possessed the Derringer during the incident but claimed that he did so for personal protection, due to his own fear of being robbed. R.V.EE86. In rebuttal, the prosecution argued that "[t]here's no reason for [defendant] to be pointing that gun [at the security guards] unless he's trying to commit an armed robbery." R.V.EE104.

The jury found defendant guilty of felony murder and further found that "during the commission of the offense of first degree murder the defendant was armed with a firearm." R.V.EE125. Defendant filed an unsuccessful motion for a new trial; defendant's motion did not claim that the indictment failed to sufficiently allege felony murder or that counsel had been unable to prepare a defense. C162-65. The trial court sentenced defendant to twenty-five years of imprisonment for felony murder, plus the fifteen-year firearm enhancement. R.V.HH14.

On appeal, defendant argued that (1) the State failed to prove that the Derringer was operable and qualified as a firearm or that defendant had the intent to commit armed

robbery with a firearm; (2) the trial court erred in finding defendant fit to stand trial; and (3) the fifteen-year firearm enhancement should be vacated. The appellate court affirmed defendant's conviction, holding that defendant was fit to stand trial and the evidence was sufficient to prove defendant guilty of felony murder based on a predicate felony of attempted armed robbery with a firearm. But the court vacated the sentencing enhancement because the State failed to provide sufficient statutory notice of its intent to seek it. *People v. Carey*, 2015 IL App (1st) 131944-U (*Carey I*); *see also* 725 ILCS 5/111-3(c-5) (2011).

Both parties filed petitions for rehearing. Defendant's petition for rehearing argued for the first time that his felony murder conviction should be vacated because the indictment did not specify which of Illinois's two versions of attempted armed robbery the State sought to use as the predicate for felony murder. *People v. Carey*, 2016 IL App (1st) 131944, ¶ 18 (*Carey II*). The appellate court agreed; it withdrew its original opinion and vacated defendant's conviction. *Id*. at ¶ 4. The appellate court noted that there are two types of armed robbery: (i) armed robbery with "a dangerous weapon other than a firearm," and (ii) armed robbery "with a firearm." *Id*. at ¶ 22 (citing 720 ILCS 5/18-2(a)(1-2)). The appellate court held that the indictment was deficient — and thus required vacatur of defendant's conviction — because the felony murder count "does not provide a statutory citation to the relevant provision [of armed robbery], nor does it include any specific detail" as to the weapon used in the offense. *Id*.

STANDARD OF REVIEW

The sufficiency of a charging instrument is a question of law that this Court reviews de novo. *People v. Robinson*, 232 Ill. 2d 98, 105 (2008).

ARGUMENT

The appellate court's judgment should be reversed, and defendant's conviction affirmed, because the indictment sufficiently informed defendant that he was charged with felony murder. *See* Section I. Moreover, even if the indictment were deficient, the proper remedy would be to treat the predicate felony as attempted robbery (rather than attempted armed robbery), and affirm defendant's murder conviction. *See* Section II.

I. Defendant's Indictment Was Not Deficient.

As a threshold matter, the timing of the challenge to an indictment is "significant in determining whether a defendant is entitled to reversal of his conviction on that ground." *People v. Cuadrado*, 214 Ill. 2d 79, 86 (2005) (internal quotations omitted). When the indictment is challenged before trial, the court must determine whether the indictment "*strictly* complies" with section 111-3(a) of the Code of Criminal Procedure, which requires, among other things, that the indictment state the statutory provision alleged to have been violated, the nature and elements of the charge, the date and location of the offense, and the name of the accused. *See, e.g.*, *People v. DiLorenzo*, 169 Ill. 2d 318, 321 (1996) (emphasis in original).

Where, as here, the indictment is challenged for the first time on appeal, however, section 111-3 does not apply and "the standard of review is more liberal." *Id*. at 322. A defendant's conviction should be affirmed unless he can establish both that (i) on its face the indictment did not contain enough information to permit preparation for trial and bar future prosecution arising out of the same conduct; and (ii) the defendant was actually prejudiced. *See, e.g., Cuadrado*, 214 Ill. 2d at 86-87; *DiLorenzo*, 169 Ill. 2d at 321-24. Defendant cannot carry his burden here.

A. The Indictment Sufficiently Informed Defendant of the Felony Murder Charge.

The appellate court's ruling that the indictment did not sufficiently inform defendant of the felony murder charge was incorrect for two independent reasons: (1) Count I fully informed defendant of the murder charge; and (2) even if Count I were deficient, read as a whole the indictment fully informed defendant of the murder charge.

1. Count I Fully Informed Defendant of the Felony Murder Charge.

Count I of the indictment charged defendant with "first degree murder," alleging that on January 28, 2011 in Cook County, Illinois he "committed the offense of attempt armed robbery, and during the commission of the offense, he set in motion a chain of events that caused the death of Jimmy Townsend in violation of Chapter 720 Act 5 Section 9-1(a)(3)." C31. Count I specified (i) the offense defendant allegedly committed (first degree murder); (ii) the statutory provision violated (9-1(a)(3)); (iii) the nature and elements of the offense (felony murder while committing attempted armed robbery, a forcible felony); (iv) the date and location of the offense; (v) the victim's name; and (vi) the accused's name. *Id*. Thus, even though the indictment should not be judged by the strict pleading requirements of section 111-3(a) (because defendant did not challenge the indictment until appeal), Count I complied with that statute. 725 ILCS 5/111-3(a) (2014).

Yet, according to the appellate court, Count I was deficient and requires vacatur of defendant's felony murder conviction because it (i) "does not provide a statutory citation" to the *underlying predicate felony* of attempted armed robbery; and (ii) does not include "specific detail" as to the weapon used in the offense. *Carey II*, 2016 IL App (1st) 131944, ¶ 22. The appellate court's conclusion ignores longstanding authority from this Court and should be reversed.

This Court has long held that the law "does not require that [an indictment] set out the citation to the underlying felony charged." *People v. Simmons*, 93 Ill. 2d 94, 100 (1982). This Court also has made clear that "the omission of a material element does not per se render a charge void." *See, e.g., People v. Walker*, 83 Ill. 2d 306, 314 (1980); *see also People v. Williams*, 52 Ill. 2d 455, 460-61 (1972) ("[A]n indictment for conspiracy need not allege all the elements of the substantive offense which is the object of the conspiracy."). And it is settled that a defendant is entitled to notice of "the crime committed, not the manner in which it was committed," *DiLorenzo*, 169 Ill. 2d at 321, and that "in an indictment for attempt the crime intended need not be set out as fully or specifically as would be required for the completed offense," *People v. Evans*, 125 Ill. 2d 50, 97-98 (1988). Thus, the appellate court's conclusion that to sufficiently allege felony murder in Count I the State was required to also provide the "statutory citation" and other "specific detail" for the predicate felony of attempted armed robbery is flatly contrary to settled law.

The appellate court's judgment is also contrary to this Court's longstanding precedent holding that "there is only one crime of murder," not a variety of distinct offenses. *See, e.g., People v. Griffin*, 178 Ill. 2d 65, 83 (1997). Section 9-1(a) of the Illinois Criminal Code defines the offense of murder as follows:

> (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) 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; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

> (3) he is attempting or committing a forcible felony other than second degree murder.

720 ILCS 5/9-1(a) (2015). Subsections (1), (2) and (3) "describe a different means of committing the same crime" and "[are] not three distinct offenses." *See, e.g., Griffin*, 178 Ill. 2d at 83. Accordingly, this Court has held that felony murder need not be expressly charged in the indictment in order for a defendant to be convicted of felony murder, as long as the defendant was charged with murder in some form. *See, e.g., People v. Maxwell*, 148 Ill. 2d 116 (1992).

Maxwell is instructive. There, Count I charged Maxwell with murder under section 9-1(a)(1), alleging that he "intentionally and knowingly" killed the victim; Count II charged Maxwell with murder under section 9-1(a)(2), alleging that he shot at the victim knowing that doing so "created a strong possibility of death or great bodily harm"; and Count III charged Maxwell with attempted armed robbery. *Id.* at 133. Unlike the present case, the indictment in *Maxwell* did not expressly charge felony murder under Section 9-1(a)(3). *Id*. Nevertheless, the trial court instructed the jury on felony murder and Maxwell was found guilty of murder and attempted armed robbery; the trial court then sentenced Maxwell to death based on a finding that he committed murder in the course of an attempted armed robbery. *Id*. at 125, 133. On appeal, Maxwell argued that the indictment was deficient and that instructing the jury on felony murder, a charge that had not been expressly alleged in the indictment, violated due process. *Id*. at 133-34. This Court affirmed Maxwell's conviction and sentence. *Id*. at 150.

In rejecting Maxwell's argument that the indictment was deficient because it did not expressly allege felony murder, this Court stated:

> Illinois law recognizes only a single offense of murder, which may be committed in a variety of ways. Just as the method of committing murder

> is not integral to the offense and therefore need not be specified in the charging instrument, so, too . . . the precise statutory theory of the offense of murder is not a matter that must be specifically alleged.

Id. at 137 (internal citations omitted); *see also, e.g., Griffin*, 178 Ill. 2d at 83 (proper to instruct jury on felony murder where indictment charged defendant with intentional and knowing murder but did not expressly charge felony murder); *People v. Allen*, 56 Ill. 2d 536, 542-43 (1974) (same); *People v. Rosochacki*, 41 Ill. 2d 483, 491-92 (1969) (same).

The appellate court's holding that Count I of the indictment failed to sufficiently inform defendant of the felony murder charge cannot be reconciled with this longstanding and well-reasoned authority. If, as this Court has held, an indictment is sufficient to support a felony murder conviction where the indictment alleges intentional murder but not felony murder, it cannot logically be maintained that Count I here was insufficient to charge felony murder because it did not cite the armed robbery statute or specify the weapon used. Indeed, the appellate court's holding does not just rest on faulty logic — it also is bad policy. In particular, the appellate court's new rule would encourage prosecutors to provide less information in indictments. Rather than risk deficiently pleading felony murder, prosecutors instead might opt to charge only intentional and knowing murder which, under *Maxwell* and the cases cited above, would permit them to later request a jury instruction on felony murder and obtain a felony murder conviction even where it was not expressly charged in the indictment. Thus, the appellate court's new rule would not benefit defendants.

Although the appellate court acknowledged prior appellate court authority holding that to properly charge felony murder the State need not allege all the elements and acts of the predicate felony, *see Carey II*, 2016 IL App (1st) 131944, ¶¶ 23-24 (citing *People v. Jeffrey*, 94 Ill. App. 3d 455 (5th Dist. 1981)), it declined to follow that authority, *id*.

Instead, the appellate court relied on *People v. Hall*, 96 Ill. 2d 315 (1982). *See Carey II*, 2016 IL App (1st) 131944, ¶ 21.

In *Hall*, Count I charged Hall with violation of the Cannabis Control Act, alleging that he possessed cannabis with the intent to deliver; Count II charged Hall with armed violence predicated on an unspecified violation of the Cannabis Control Act. *Hall*, 96 Ill. 2d at 317-18. In the trial court, Hall argued that the armed violence charge was deficient because it did not specify how he committed the predicate felony of violation of the Cannabis Control Act. *Id*. at 319. This Court held that the indictment, when read as a whole, sufficiently informed Hall how he was alleged to have violated the Act. *Id*. at 320. In the course of that decision, this Court stated that section 111-3 of the Code of Criminal Procedure "applies to the predicate felony in a count charging armed violence just as it does to a count charging the underlying felony alone." *Id*. Because Hall's conviction was affirmed, these statements regarding section 111-3 were dicta. But even if they were not dicta, that language is inapplicable here and the appellate court was wrong to rely on it for three reasons.

First, *Hall* expressly referred to section 111-3, *id*., which governs challenges to an indictment raised in the trial court and requires the court to determine whether the indictment "*strictly* complies with the [pleading] requirements of section 111-3 of the Code of Criminal Procedure," *DiLorenzo*, 169 Ill. 2d at 321 (emphasis in original). In contrast, here defendant did not challenge the indictment until his petition for rehearing in the appellate court; thus, section 111-3 is inapplicable. *See, e.g., id*. at 322 (where indictment is challenged for first time on appeal, "the standard of review is more liberal."); *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976) (sufficiency of indictment

challenged for first time on appeal "is not to be determined by whether its form follows precisely the provisions of [section 111-3].").

Second, *Hall's* statement was restricted to the predicate felony "in a count charging armed violence." *Hall*, 96 Ill. 2d at 320 (citing armed violence cases). But here defendant was charged with felony murder, not armed violence. And for the reasons explained above, a requirement that the predicate for felony murder must be specified in minute detail is inconsistent with this Court's longstanding precedent that a defendant charged with one form of murder may be convicted of felony murder even if the indictment did not expressly allege felony murder. *Supra* pp. 9-12. Thus, to the extent that this language in *Hall* is not dicta and remains good law, it should be restricted by its own terms to armed violence charges.

Third, the unspecified predicate felony in *Hall* — violation of the Cannabis Control Act — was open-ended in that it could consist of delivery, possession with intent to deliver, manufacture, or possession with intent to manufacture. *Hall*, 96 Ill. 2d at 321. By contrast, alleging felony murder with a predicate of "attempted armed robbery" (including the date, location, description of events, and name of victim) specifically informed defendant that he was charged with felony murder for the death of his brother that occurred during an attempt to rob the security guards while in possession of a weapon. The supposed lack of detail regarding the weapon used cannot be compared to the lack of clarity in *Hall*. Thus, for these three independent reasons, *Hall* is inapposite.

Finally, not only is the appellate court's holding contrary to longstanding authority, it also introduces needless formalism into criminal law with no attendant benefit to defendants or the criminal justice system. Count I charged felony murder

while committing attempted armed robbery, Count II charged attempted armed robbery with a firearm, and Counts III and IV charged related firearm offenses. C31-34. Before trial the prosecutor stated in open court that to succeed on the felony murder charge the State was required to prove that defendant used a firearm, and defense counsel acknowledged her understanding of that fact. R.II.BB7, 13. At trial, the State presented multiple witnesses and video footage establishing that defendant used a firearm during the attack. *Supra* pp. 4-6. The jury found that "during the commission of the offense of first degree murder the defendant was armed with a firearm." R.V.EE125. The trial court held that the evidence was "overwhelming," R.V.GG27, and the appellate court held that the evidence was sufficient to establish felony murder during an attempted armed robbery with a firearm, *Carey I*, 2016 IL App (1st) 131944-U, ¶¶ 56-74. Yet, after defendant challenged the indictment for the first time in a petition for rehearing, the appellate court vacated defendant's conviction because the felony murder charge in Count I did not provide the statutory citation to attempted armed robbery or specify whether a firearm was used. It cannot reasonably be said that, had the State provided that information in Count I, defendant would have better understood the murder charge against him, that he would have been better prepared for trial, or that the outcome of the trial would have been different. The appellate court's proposed new rule thus would not benefit defendants, it does not serve the interests of justice, and it would result in needless re-trials at great expense to the judicial system.

The better rule is that established by the longstanding authority of this Court: to uphold a conviction for felony murder, an indictment challenged for the first time on appeal need not include the statutory citation to the predicate felony nor allege the

"specific details" of the predicate felony. *Supra* pp. 9-12. Notably, this longstanding rule does not prejudice defendants because, as this Court has noted on countless occasions, if a defendant believes he needs additional information to prepare his defense, he may request a bill of particulars. *See, e.g.*, *DiLorenzo*, 169 Ill. 2d at 324 (collecting cases: "to the extent that defendant may have been required to know 'some details' of the charge he could have filed a request for a bill of particulars.").

2. Even If Count I Were Deficient, Read as a Whole the Indictment Sufficiently Informed Defendant of the Felony Murder Charge.

Even if Count I failed to sufficiently notify defendant of the felony murder charge, the appellate court's judgment should be reversed because, read as a whole, the indictment provided all the information the court found lacking in Count I.

An indictment must be read as a whole and "elements missing from one count of a multiple-count indictment or information may be supplied by another count." *Hall*, 96 Ill. 2d at 320. Thus, a count that fails to allege its predicate felony is not deficient if the indictment separately alleges the predicate felony in a separate count. *See, e.g., id*. Here, the appellate court vacated defendant's conviction for felony murder because the felony murder count (Count I) did not provide the statutory citation for attempted armed robbery or state whether the offense was committed with a firearm. *Carey II*, 2016 IL App (1st) 131944, ¶ 22. But even if that information were necessary to charge felony murder, the indictment provided it.

Count II charged defendant with attempted armed robbery with a firearm, provided the statutory citation for that offense, and alleged that defendant pointed a "firearm" at the armored truck guards and threated the use of force while armed with a "firearm." C32. Similarly, Counts III and IV charged defendant with unlawful use or

possession of a weapon by a felon, alleging that on the date of the attack he possessed "a firearm" after previously having been convicted of a felony. C33-34. Thus, the appellate court's judgment was incorrect for the independent reason that all the information the court found to be necessary and missing from Count I was included in the other counts of the indictment.

The appellate court acknowledged that the indictment must be read as a whole but declined to consider Counts II-IV because the State *nolle prosequied* those charges before trial. *Carey II*, 2016 IL App (1st) 131944, ¶ 30. According to the appellate court, the dismissal of those charges "created an ambiguity as to" whether the predicate offense for felony murder was attempted armed robbery with a firearm or instead attempted armed robbery with a dangerous weapon other than a firearm. *Id*.

The appellate court's reasoning ignores both this Court's precedent and the record. First, charges dismissed before trial can provide necessary facts or elements missing from the remaining charges. *People v. Morris*, 135 Ill. 2d 540, 544-45 (1990). Second, the charges here were dismissed in open court on the first day of trial, and just prior to jury selection. R.II.BB19. During that same hearing, the prosecutor stated "[t]he attempt armed robbery section that is the predicate for the felony murder is 18-2(a)(2), which requires proof of a firearm, not a dangerous weapon. It requires us to prove [a] firearm." R.II.BB7. As she had indicated in prior hearings, defense counsel again stated her understanding that the State "is going to ask that the jury find that this crime was committed with a firearm." R.II.BB13. Thus, there was no ambiguity created by the dismissal of Counts II-IV. Rather, the record demonstrates defense counsel's continued

understanding that the underlying predicate for felony murder was attempted armed robbery with a firearm, which is precisely the crime of which defendant was convicted.

B. Defendant Cannot Establish Prejudice.

Even if the indictment did not sufficiently allege felony murder, the appellate court's judgment should be reversed (and defendant's conviction affirmed) because defendant cannot carry his burden to show that any alleged deficiency in the indictment actually prejudiced him. *See, e.g., People v. Davis*, 217 Ill. 2d 472, 478 (2005) (conviction affirmed where defendant did not prove actual prejudice).

The appellate court identified only one basis for concluding that defendant was prejudiced, reasoning that because the indictment did not (in the view of the appellate court) make clear whether the underlying felony was attempted armed robbery with a firearm or instead with a dangerous weapon other than a firearm, defendant was left to guess under what theory the State would seek to convict him. *Carey II*, 2016 IL App (1st) 131944, ¶¶ 33-34. But that reasoning ignores that the State is entitled to charge defendants under alternative theories of culpability and thus a defendant may have to defend against alternative charges. *See, e.g., People v. Bishop*, 218 Ill. 2d 232, 247-48 (2006) (charging defendant "under alternative theories of criminal culpability" is permissible and provides "no occasion to challenge the indictment."). For that reason, as this Court has long held, "broad assertions" that due to a defective indictment a defendant was "unable to prepare a meaningful defense" and "was 'left to guess' as to some of the details of the charge" are insufficient to establish prejudice. *DiLorenzo*, 169 Ill. 2d at 323. An unexplained assertion that defendant "could have adjusted his trial strategy" if the indictment provided more information is not enough to establish prejudice — the defendant must specifically "identify what, in fact, he could have done differently."

Davis, 217 Ill. 2d at 479. Thus, as a matter of law, the sole prejudice identified by the appellate court is insufficient to vacate defendant's murder conviction.

Moreover, the record establishes that defendant cannot meet his burden of establishing prejudice for four independent reasons.

First, the pre-trial record shows that defendant and his counsel knew that the State intended to proceed under the theory that the predicate felony was attempted armed robbery with a firearm. Discovery furnished by the State, motions filed by the parties, and discussions between the parties that inform a defendant of the details of the charges against him cure any alleged prejudice in a deficient indictment. *See, e.g., Cuadrado,* 214 Ill. 2d at 88 (no prejudice where motions and arguments raised by defense counsel made clear she understood charge despite deficiency in indictment); *DiLorenzo*, 169 Ill. 2d at 324 (no prejudice where witness statements produced in discovery provided details missing from indictment); *People v. Rege*, 64 Ill. 2d 473, 478 (1976) (no prejudice where record showed defendant understood details of charge against him).

Here, the complaint for preliminary examination alleged that defendant committed felony murder in that "while armed with a handgun [he] attempted to rob a Garda armored truck guard," which resulted in Townsend's death. C20. Before trial, the State produced or made available defendant's gun, eyewitness statements, and video footage from a security camera that showed defendant in possession of the gun. C69-77. At a hearing months before trial, defense counsel informed the court that defendant's charges rested on "allegations that he and his brother attempted to rob an armored car at gunpoint." R.I.V6. Thereafter, at several other pre-trial hearings, the parties informed the court that setting the trial date depended on when the parties could complete the

testing of defendant's firearm. *See, e.g.*, R.I.X2-3, Y2-3. For example, the prosecutor noted that the State was testing the "firearm that defendant was found to be in possession of" at the crime scene and defendant's counsel responded that she wanted to have a "Defense expert look at it" and that the trial date depended on whether the testing "comes back favorable to me and my client." R.I.Y2-3. The State later filed a motion in limine to prohibit defendant from arguing that his gun had to be operable at the time of examination to qualify as a "firearm" and support the predicate felony of attempted armed robbery underlying the felony murder charge. C92. And, as noted above, before trial the prosecutor stated in open court that to succeed on the felony murder charge the State was required to prove that defendant used a firearm in the attempted robbery and defense counsel acknowledged her understanding of that fact. R.II.BB7, 13. Thus, even if the indictment were deficient (and it was not), it cannot be argued that the defense was unaware before trial that the predicate felony was attempted armed robbery with a firearm.

Second, defendant cannot prove prejudice because the trial record demonstrates that defense counsel mounted a defense based on the understanding that the predicate felony involved a firearm. *See, e.g., DiLorenzo*, 169 Ill. 2d at 324-25 (no prejudice where defense raised by counsel demonstrated understanding of charge); *Cuadrado,* 214 Ill. 2d at 88 (same); *People v. Pujoue*, 61 Ill. 2d 335, 339 (1975) (same). Among other things, defense counsel

- obtained a ruling that if the evidence at trial supported such an argument, counsel could claim that defendant's handgun did not meet the statutory definition of "firearm" necessary to establish the predicate felony of attempted armed robbery with a firearm, R.II.BB16-17;

- thoroughly cross-examined each eyewitness, including about whether defendant actually used a handgun during the attempted robbery, R.III.CC57-71, 104-124, 145-53, 169-74, 197-206;

- cross-examined the State's forensic scientist at length to emphasize that the gun recovered from defendant was an old, rusted Derringer that was damaged and did not work at the time it was tested, R.IV.DD128-32;

- called defendant to testify that, among other things (i) in the months leading up to the attack on the armored truck, defendant's brother was suicidal and said that he wanted to die in a "hail of bullets"; and (ii) defendant had seen the Derringer before, in his grandmother's purse, and he believed it to be an "insignificant" "little thing" that was incapable of killing anyone, R.V.EE37-65; and

- argued in opening and closing that (i) there was no attempted armed robbery, and thus no felony murder, because Townsend was suicidal and was hoping to get shot, and defendant was trying to save his brother's life rather than committing a crime himself; and (ii) defendant carried the Derringer only because he feared being robbed in his daily life, R.III.CC18-23, R.IV.EE83-96.

Accordingly, defendant cannot demonstrate prejudice because the record shows that his counsel was aware that the predicate felony was attempted armed robbery with a firearm and his counsel was able to — and did — mount a defense to that charge.

Third, defendant cannot establish prejudice because the details supposedly omitted from the indictment were irrelevant to the defense theory of the case. *See, e.g.*, *People v. Maggette*, 195 Ill. 2d 336, 350-51 (2001) (no prejudice from deficient sexual assault indictment where defendant claimed he never touched victim in any improper way); *People v. Bohm*, 95 Ill. 2d 435, 440-41 (1983) (failure to allege "permanently deprive" element of theft not prejudicial where defendant claimed he believed he had paid correct price for stolen item); *People v. Davis*, 82 Ill. 2d 534, 539 (1980) (no prejudice from indictment charging defendant with threatening wrong person where defendant claimed he did not threaten anyone at all). As noted above, defendant's theory was that his brother was attempting to commit suicide and defendant was trying to save him, and thus that defendant was not guilty of any crime. That theory does not depend in

any way on whether the underlying predicate felony was with a firearm or instead with a dangerous weapon other than a firearm.

Fourth, defendant cannot prove prejudice because the evidence that he used a firearm in the attack is overwhelming. *See, e.g., Walker*, 83 Ill. 2d at 314; *Davis*, 217 Ill. 2d at 479. For example, in *Walker*, this Court held that there was no prejudice in omitting from a murder charge the necessary element of intent because "[g]iven the facts of the case" the "intent to kill is clear." *Walker*, 83 Ill. 2d at 314. And in *Davis*, this Court held that Davis was not prejudiced by the omission of the element that he was the victim's father because the evidence at trial plainly established that the victim was his son. *Davis*, 217 Ill. 2d at 479-80. Likewise, here defendant cannot claim to have been prejudiced by the alleged failure of the indictment to inform him that the predicate felony involved a firearm because the evidence that he used a firearm is overwhelming.

Multiple witnesses testified that defendant used a firearm during the attack on the security guards and it is undisputed that defendant was apprehended at the scene while in possession of his handgun. *Supra* pp. 4-6. Defendant's theory that he was merely trying to prevent his brother from committing suicide is wildly implausible given the eyewitness testimony about the coordinated attack, including consistent eyewitness testimony that as the security guard Rodriguez attempted to run to the safety of his truck, defendant chased him and pointed his gun. *Id*. And defendant himself admitted that he did not know his brother's or his own state of mind on the day of the attack and acknowledged that it was possible that he and his brother were trying to rob the security guards. R.V.EE69-70. Indeed, the trial court held that the evidence against defendant was "overwhelming," R.V.GG27, and the appellate court held that the evidence was sufficient to convict

defendant of felony murder during an attempted armed robbery with a firearm, *Carey I*, 2016 IL App (1st) 131944-U, ¶¶ 56-74.

In sum, even if the appellate court were correct that the indictment was deficient, its judgment should be reversed, and defendant's conviction should be affirmed, because defendant cannot show that he was prejudiced by any alleged deficiency.

II. Even If the Indictment Were Deficient, the Appellate Court Applied the Wrong Remedy.

Even if the indictment were deficient, the appellate court erred in vacating defendant's conviction for felony murder. Instead, the appellate court should have treated the predicate felony as attempted robbery (rather than attempted *armed* robbery), and should have affirmed defendant's felony murder conviction.

A reviewing court has the power to reduce the degree of the offense for which a defendant was convicted and to convict a defendant of a lesser-included offense that was not charged or considered by the trier of fact. Ill. Sup. Ct. R. 615(b)(3); *People v. Kennebrew*, 2013 IL 113998, ¶ 53. The reviewing court may convict a defendant of an uncharged offense if (1) it is a lesser-included offense of a crime charged by the State; and (2) the evidence adduced at trial rationally supports a conviction for the lesser-included offense. *See, e.g., People v. Kolton*, 219 Ill. 2d 353, 360 (2006). Here, both elements exist.

First, attempted robbery is a lesser-included offense of attempted armed robbery. To determine whether an uncharged offense is a lesser-included offense, this Court applies the "charging instrument" approach, which requires that the indictment "contain a 'broad foundation' or 'main outline'" of the uncharged offense. *Id*. at 361. Thus "the absence of statutory elements [in the indictment] will not prevent [the court] from finding" that the

defendant may be convicted of the uncharged lesser offense. *Id*. at 364. For example, where an indictment alleges that a defendant committed residential burglary because he "entered the [victims'] dwelling place with the intent to commit a theft," the defendant may be convicted of theft, even though theft was not charged in the indictment and the indictment does not include all the elements of theft. *Id*. at 365-66 (citing *People v. Hamilton*, 179 Ill. 2d 319, 325 (1997)). Similarly, where an armed robbery charge is deficient, it is proper for the appellate court to reduce the armed robbery conviction to robbery (even if robbery was not charged), because robbery is a lesser-included offense of armed robbery. *See People v. Clark*, 2016 IL 118845, ¶ 48.

Here, Count I charged defendant with felony murder in that he "committed the offense of attempt armed robbery, and during the commission of the offense, he set in motion a chain of events that caused the death of Jimmy Townsend[.]" C31. Defendant has argued that Count I was deficient because it did not specify which particular type of attempted armed robbery — with a firearm or instead with a dangerous weapon other than a firearm — was the predicate offense. But defendant has never disputed that the indictment sufficiently alleged that he committed attempted robbery in some form. Nor could he credibly do so because even if Count I failed to specify the weapon used in the predicate offense, and thus failed to specify which particular type of "attempt armed robbery" was alleged, the indictment at the very least contained a "broad foundation" or "main outline" of the lesser-included predicate offense of "attempted robbery." *See, e.g., Clark*, 2016 IL 118845, ¶ 48; *Kolton*, 219 Ill. 2d at 365-66.

Second, it cannot be disputed that the evidence rationally supports a conviction for attempted robbery. Attempted robbery contains precisely the same elements as attempted

armed robbery, except that attempted armed robbery includes the additional element that the offense was committed while possessing a firearm or other dangerous weapon. *Compare* 720 ILCS 5/18-1 (2015) (elements of robbery) *with* 720 ILCS 5/18-2 (2015) (elements of armed robbery). As discussed above, (1) at trial, the State presented multiple eyewitnesses and security footage establishing that defendant attempted to rob the armored truck by attacking a security guard as he left a store with a large bag of cash; (2) defendant admitted at trial that, given his claimed amnesia, he could not affirmatively deny that he and his brother were attempting to rob the armored truck; and (3) for those reasons the jury found defendant guilty of felony murder based on a predicate felony of attempted armed robbery, the trial court held that the evidence against defendant was "overwhelming," and the appellate court held that the evidence was sufficient to convict defendant of felony murder based on a predicate felony of attempted armed robbery. *See supra* pp. 22-23. Defendant thus has no basis to dispute that the evidence rationally supports a conviction for the lesser-included offense of attempted robbery.

Therefore, even if the indictment failed to sufficiently allege attempted armed robbery, the appellate court should have treated the predicate felony as attempted robbery. A defendant is guilty of felony murder if, in performing the acts that led to the victim's death, the defendant was "attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (2015). Attempted robbery is a forcible felony. 720 ILCS 5/2-8 (2012). Accordingly, the proper remedy if the indictment were deficient would be to affirm defendant's conviction for felony murder predicated on attempted robbery, not to vacate the felony murder conviction.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Appellate Court.

March 7, 2017

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twenty-six pages.

/s/ Michael L. Cebula
MICHAEL L. CEBULA
Assistant Attorney General

TABLE OF CONTENTS TO THE APPENDIX

2015 IL App (1st) 131944-U

FIRST DIVISION
November 9, 2015

No. 1-13-1944

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 3485
	)	
ROBERT CAREY,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: First degree felony murder conviction affirmed where trial court's finding that defendant with amnesia was fit to stand trial was not against the manifest weight of the evidence; the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of the underlying felony of attempt armed robbery; defendant's 15-year firearm sentencing enhancement is vacated where the State failed to provide proper notification that it was seeking to prove defendant's possession of a firearm.

¶ 2 Following a jury trial, defendant, Robert Carey, was found guilty of first degree felony murder while armed with a firearm, and was sentenced to 25 years' imprisonment for the murder and an additional 15 years for the firearm sentencing enhancement. Prior to the trial, the State had *nolle prossed* the other three charges in the indictment against defendant: specifically, one

count of attempt armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)) (count II) and two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) (counts III and IV).

¶ 3 On appeal, defendant contends that: (1) the trial court erred in finding him fit to stand trial, given that he suffered from amnesia and had no recollection of the incident giving rise to the felony murder charge against him; (2) the State failed to prove beyond a reasonable doubt that he had the intent to commit armed robbery and that he took a substantial step toward the commission of the crime; and (3) the 15-year firearm enhancement should be stricken or vacated from his sentence because the State failed to satisfy the procedural requirements for notifying a defendant of its intent to seek the enhanced term. For the following reasons, we affirm in part and vacate in part.

¶ 4 BACKGROUND

¶ 5 The following facts are not in dispute. On the morning of January 28, 2011, defendant and his brother, Jimmy Townsend, attacked two armored truck guards working for Garda Cash Logistics (Garda): Julio Rodriguez and Derrick Beckwith. The guards arrived in an armored Garda truck at a Family Dollar store located at the corner of Chicago Avenue and Homan Avenue in Chicago. Beckwith drove the truck, and after pulling up to the entrance of the store, Rodriguez exited the truck and entered the store to collect the cash receipts for transfer while Beckwith stayed outside in the truck.

¶ 6 As Rodriguez exited the store holding a deposit bag filled with cash, defendant and Townsend ambushed him from two different directions. Townsend approached Rodriguez and pointed at him an object that appeared to be a sawed-off shotgun. Defendant also approached Rodriguez from another side. Rodriguez shot Townsend four times with his service revolver.

Townsend collapsed to the pavement from gunshot wounds. Defendant put Rodriguez in a chokehold. During his struggle with defendant, Rodriguez dropped the money bag, but eventually broke free from defendant's grip and ran toward the truck. By this time, Beckwith, who was still inside the truck, had opened the passenger-side door and drawn his firearm. He fired four shots at defendant. Two of the bullets struck defendant in the head—one directly in his eye—and he fell to the ground, where he remained until the police and paramedics arrived. Defendant's brother, Townsend, died from the gunshot wounds to his chest. As a result of his head injuries from the shooting, defendant was in a coma for a period of time. When he awoke, defendant claimed that he had no memory of the shooting or anything that had happened during the week preceding the incident.

¶ 7 A. The Fitness Hearing

¶ 8 Prior to trial, defense counsel requested a fitness examination for defendant. Eric Neu, a clinical psychologist, found defendant fit to stand trial. A few months later, at the prosecution's request, the court ordered a second fitness examination. Dr. Nishad Nadkarni, a forensic psychiatrist for the circuit court of Cook County, examined defendant in June 2012, and issued a letter indicating that he found defendant competent to stand trial. Following defense counsel's submission of a psychology report from another clinician, a fitness hearing was held.

¶ 9 Dr. Nadkarni testified that during his interview with defendant, he found defendant to be "fully oriented" and "alert, in no apparent distress," notwithstanding the loss of his right eye. Defendant reported that he developed seizures after undergoing surgery to remove his eye, but said the seizures subsided with medication. According to Dr. Nadkarni, defendant showed no signs of cognitive or psychiatric impairment, and had no trouble following his questions during the interview. In fact, defendant's answers to Dr. Nadkarni's questions demonstrated "good

linearity, good direction and logic and showed at least on a cursory gross level of the testing that [defendant's] memory and ability to form new memories was just fine." Defendant was aware that he had been accused of attempted robbery, and understood that his stepbrother had been killed during the incident. Dr. Nadkarni said defendant reported having no problems working with his attorney or reviewing documents with her to reconstruct the details of the incident.

¶ 10 With regard to defendant's amnesia, Dr. Nadkarni testified that the condition itself "is not a bar for fitness from a medical perspective." Based upon his assessment, he believed that defendant "ha[d] the capacity to form new memories [and] to be able to sit down and rationally and logically discuss information that's being presented to him by the State and by the defense." Defendant was able to verbalize his understanding of the consequences of pleading guilty versus not guilty to the charges. In Dr. Nadkarni's opinion, even if defendant never recovered his memory of what happened at and around the time of the shooting, defendant was able to create new memories of the incident through external data, by reviewing police records, working with his attorney, and talking with his family.

¶ 11 Dr. Nadkarni found, to a reasonable degree of medical and psychological certainty, that defendant was fit to stand trial under these circumstances. He concluded that while it was "highly unlikely that [defendant] would be able to precisely remember what happened," defendant, nonetheless, was capable of "assist[ing] his counsel in his defense."

¶ 12 Dr. Robert Louis Heilbronner, a clinical neuropsychologist, testified at the fitness hearing as the defense expert. He interviewed defendant and conducted two days of neuropsychological testing on him. He found that defendant had no memory of the shooting incident or any of the events during the week leading up to the incident. Like Dr. Nadkarni, Dr. Heilbronner believed

that defendant understood his role in the adversarial process, as well as that of the judge and the prosecutor. He found defendant also willing and able to discuss his defense with his attorney.

¶ 13 Dr. Heilbronner believed that the gunshot wound to defendant's head and brain had caused "a significant memory impairment." He concluded that although defendant "certainly possesses the ability to learn and remember things *** it would take him a lot longer and he would remember far less information tha[n] he would have before compared to most people in the courtroom today." While Dr. Heilbronner acknowledged that defendant was "competent" for purposes of "understanding the process of trial," he nonetheless found, to a reasonable degree of neuropsychological certainty, that defendant was not fit to stand trial "because of the profound impairment in his ability to recollect and relate occurrences." On cross, Dr. Heilbronner explained that his opinion regarding defendant's fitness to stand trial was based on his assessment of defendant's "fitness to testify on his own behalf." He also agreed that defendant was capable of collaborating with his attorney, reviewing police documentation about the crime, and discussing strategies for his defense in the case.

¶ 14 Following the hearing, the trial court determined that defendant was fit to stand trial. The trial court concluded that while defendant did suffer "an impairment as to his ability to recollect and relate" the events surrounding the robbery incident, that single impairment did not preclude a finding of defendant's fitness to stand trial. The court found that based on the "totality of the evidence," the State had met its burden of establishing defendant's fitness to stand trial.

¶ 15 B. Motion *in limine*

¶ 16 Prior to commencement of the trial, the State brought a motion *in limine* to prohibit defense counsel from arguing that the Derringer handgun that was recovered from defendant's person at the crime scene had to be "operable" in order to qualify as a "firearm" under the

Firearm Owners Identification Act (the FOID Act) (430 ILCS 54/1.1 (West 2010)). During the hearing on the motion, the prosecution advised the court and defense counsel that the statutory offense at issue, attempt armed robbery under section 18-2(a)(2) of the Criminal Code of 1961 (720 ILCS 5/18-2(a)(2) (West 2010)), required proof of a firearm. The prosecution indicated that it intended to prove that defendant "was armed with a nickel-plated automatic handgun [that] was sufficient to qualify as a 'firearm' within the meaning of Section 1.1 of the FOID Act despite the Defendant's contention that it was inoperable." The following discussion regarding the firearm enhancement occurred between the trial court and the assistant State's Attorney:

> "THE COURT: Attempt armed robbery with a bludgeon could be defined as a forcible felony and so felony murder is when the death occurs during the course of a forcible felony.
>
> [ASA]: Correct. Except that the Defendant is subject to enhancement if the jury finds he was armed with a firearm.
>
> THE COURT: So you want the firearm because -- for the enhancement, not just the felony murder won't lie based on the armed robbery or attempt armed robbery based on a bludgeon.
>
> [ASA]: Correct. *** "

¶ 17 The court granted the motion, ruling that the defense was precluded from arguing that the gun was not a "firearm"; however, the court indicated that it would permit the argument if the evidence showed that the gun fell within an exception to the statutory definition of a firearm.

¶ 18 C. Evidence at Trial

¶ 19 The State presented witnesses at trial who either saw or heard the confrontation on the morning of January 28, 2011, including both of the Garda security guards. Also testifying on

behalf of the State were the police officer, medical examiner, forensics expert and a firearm identification expert. Defendant testified on his own behalf.

¶ 20 1. Julio Rodriguez

¶ 21 Julio Rodriguez testified that he and his partner, Derrick Beckwith, were employed as security guards by Garda, a company specializing in the transportation of currency. On January 28, 2011, Beckwith was driving the armored truck, while Rodriguez had the responsibility for retrieving the cash receipts from the business and then securing it in the truck. Both of them were dressed in their Garda uniforms, and each carried a firearm in his holster. Around 9:40 that morning, the two guards pulled up in their armored truck to the Family Dollar store on Chicago Avenue and Homan Avenue. Rodriguez exited the armored truck and entered the store, secured the money in a clear plastic bag, and exited the store, heading back to the truck. He testified that his revolver was holstered at his right side and was visible as he walked to the truck. All of a sudden, Rodriguez noticed "[some] feet running real fast towards [him]" on his left side, and turned to see a man in a camouflage jacket, later revealed to be Townsend, rapidly approach him while wielding what appeared to be a sawed-off shotgun.[1] Townsend pointed the weapon at Rodriguez's face and yelled to defendant, who was running toward them, to kill Rodriguez. Rodriguez raised his gun and shot Townsend four times. Townsend threw his weapon to defendant and collapsed to the ground.

¶ 22 According to Rodriguez, defendant caught the weapon and swung it at Rodriguez. Rodriguez stated that he dodged the blow and tried to hit defendant, who subsequently grabbed him and put him in a chokehold from behind. As Rodriguez struggled with defendant, the money

[1] During direct examination, Rodriguez identified the item marked as People's Exhibit 5 as the weapon that Townsend had used during the attack, *i.e.*, the object that appeared to be a "sawed-off shotgun." Neither side disputes that the weapon Townsend was holding was not a firearm, and, instead, consisted of two metal pipes taped together to a wooden board.

bag fell to the ground. He eventually escaped from defendant's grip, and ran towards the back of the truck, where he slid to the ground. As he was reloading his gun, Rodriguez heard gunshots and saw defendant fall. Rodriguez ran to retrieve the money bag from the ground, and then returned to the truck. Once he was safely inside, his partner, Beckwith, called 911 and the police.

¶ 23 During cross-examination, Rodriguez acknowledged that the weapon resembling a sawed-off shotgun that Townsend threw to defendant was in fact not a shotgun, or even a firearm, of any kind. He admitted that neither Townsend nor defendant attempted to take the money bag from him during the ambush. Finally, Rodriguez also testified that he did not notice a handgun in defendant's hands at any time during the incident.

¶ 24 2. Derrick Beckwith

¶ 25 Derrick Beckwith, the other security guard, drove the armored vehicle on the morning of January 28, 2011. He testified that he had parked in front of the Family Dollar store entrance in such a way that would allow Rodriguez to travel "the shortest distance for safety reasons." Beckwith stayed in the truck while Rodriguez went inside to collect the cash receipts. When he saw Rodriguez exit the store, he moved to unlock the passenger's side door so that Rodriguez could get back in the truck. That was when he heard someone shout "don't move, motherf****." Beckwith looked out the passenger's side window, heard four gunshots, and saw Townsend lying on the ground. He then saw Rodriguez struggling with defendant. At that point, Beckwith opened the passenger's side door and drew his semiautomatic pistol. As soon as Rodriguez escaped, Beckwith fired four shots at defendant, who fell to the ground. Beckwith testified that prior to being shot, defendant had been "holding a small handgun" pointed in his direction. After Rodriguez retrieved the money bag and entered the truck, Beckwith called the police. The two guards then stayed in the truck and kept watch on defendant, who attempted to get up but kept

falling back down to the ground. Beckwith identified the exhibit shown by the prosecution (People's Exhibit 9) as a photograph of the handgun that defendant had pointed at him.

¶ 26 3. Michael Burton

¶ 27 Michael Burton was waiting for a northbound bus at the intersection of Chicago and Homan Avenues, across the street from the Family Dollar store entrance, on the morning of January 28, 2011. He testified that he saw Rodriguez get out of the armored truck and enter the store. He then saw Rodriguez walk out of the store, at which point Townsend approached Rodriguez with a "shotgun" and wrapped his arm around his neck. As Rodriguez was struggling with his assailants, Burton heard gunshots. He then saw Townsend throw the "shotgun" to defendant before falling to the ground. Defendant then held Rodriguez as they struggled with each other. Burton testified that defendant had "something in his hand that [Burton] thought was a gun." When Beckwith opened the truck door and began shooting, defendant attempted "to run, to get away, with the gun pointed at" Beckwith. After defendant was shot, he "fell to the floor and was holding his eye in his hand." During cross-examination, Burton admitted that he had been previously convicted of possession of a controlled substance.

¶ 28 4. Carl Robinson

¶ 29 Carl Robinson, an employee of a beauty supply store directly west of the Family Dollar store, testified that around 9:40 a.m. on January 28, 2011, he was taking out the trash in the alley located between the stores. He saw a male wearing camouflage wrestling with Rodriguez. Robinson approached the scene to investigate further, heard "some shots," and retreated back to the alley. Robinson heard more gunshots. Later, when police arrived, Robinson noticed that Townsend was not moving and that defendant was severely wounded.

1-13-1944

¶ 30 5. Victor Cabrera

¶ 31 Victor Cabrera, an assistant store manager/merchandiser of the Family Dollar store, testified that he was inside the store when Rodriguez walked in to collect the cash receipts. Through the store windows facing the street, Cabrera saw Rodriguez leave the store and walk to his truck. He then saw two men approach Rodriguez, and heard Townsend yell to defendant, "shoot him, shoot him." At that point, he heard gunshots and saw Townsend fall to the ground. Cabrera next saw Rodriguez struggling with defendant. When Rodriguez escaped, Beckwith opened the truck door and fired his gun at defendant. Defendant collapsed, and as he was lying on the ground, Cabrera noticed a black, "smaller handgun" in defendant's hand. Cabrera testified that he believed defendant was holding the gun depicted in People's Exhibit 9 at the time he was shot. During cross-examination, Cabrera acknowledged that during the grand jury hearing, he had described the gun in defendant's hand as "an old time gun" but that he did not describe it as such during his direct examination.

¶ 32 6. Officer Kaczorowski

¶ 33 Chicago police officer Kaczorowski testified that he was on patrol at the time of the incident. He learned over the radio that someone had been shot, and went to the scene of the shooting. After arriving at the Family Dollar store, Officer Kaczorowski observed paramedics opening defendant's shirt to examine him for wounds; at that time, he also saw the paramedics "remove[] a gun out of [defendant's] pocket or his waist area" and place it on the ground. Kaczorowski testified that he moved the handgun with his foot so that it would be out of defendant's reach, and left it on the ground. He also noticed a firefighter recover a large knife from inside defendant's jacket. He identified the item in the photograph admitted as People's Exhibit 9 as the gun that he saw on the ground at the crime scene.

1-13-1944

¶ 34 7. Dr. Ponni Arunkumar

¶ 35 Ponni Arunkumar, M.D., the Cook County assistant chief medical examiner, testified as the State's pathology expert. Dr. Arunkumar stated that she reviewed the photographs and post-mortem examination report related to Townsend's autopsy. It was her opinion, to a reasonable degree of medical certainty, that the manner of Townsend's death was homicide, attributable to the gunshot wounds that he sustained from the January 28, 2011 shooting.

¶ 36 8. Larry Goodson

¶ 37 Larry Goodson, a forensic investigator, testified that when he and his team examined Townsend's weapon, they discovered that it was not, in fact, a sawed-off shotgun. Instead, it was a homemade object crudely designed to resemble a shotgun; the weapon consisted of two metal pipes fastened to a piece of wood with duct tape, with what appeared to be a brown household rag wrapped across one of the ends to act as a handle.

¶ 38 9. Elizabeth Haley

¶ 39 Forensic scientist Elizabeth Haley testified as an expert in firearm identification. She testified that the gun defendant had been holding was a double-barreled .22 Derringer, which was designed to fire live ammunition. When Haley attempted to load ammunition into the Derringer, she discovered an obstruction in the top barrel, which prevented her from chambering a round. There was no such obstruction in the lower barrel. When she attempted to fire the weapon, the cartridge did not discharge. Upon further investigation, Haley learned that the firing pin had hit the cartridge, but "not with enough force in order to set out the priming material." Haley concluded that the gun was inoperable in its current state.

¶ 40 10. Defendant Robert Carey

¶ 41 Defendant testified on his own behalf. Although he had no memory of the incident, he

remembered the circumstances preceding the shootout. Defendant testified that sometime in November or December of 2010, Townsend told him that he wanted to "end his life" and desired to "go out in a hail of bullets." He recalled that the topic of suicide often came up during conversations with his brother. Defendant admitted that he had seen and even held the Derringer handgun multiple times before the date of the incident. He also recalled having seen the makeshift "shotgun" prior to the incident, as it was usually kept in the van that he and Townsend often drove. Finally, defendant acknowledged that it was possible that he and Townsend were trying to rob the armored truck on the date in question; however, he had no memory of the incident and could not say with any certainty if he did or did not.

¶ 42 11. Detective Thomas Crain

¶ 43 Detective Thomas Crain was assigned to investigate the shooting incident that occurred on January 28, 2011. He and his partner, Detective Wayne Raschke, arrived at the Family Dollar Store location and gathered some information about the shooting. Subsequently, he interviewed the witnesses, including the two victims, Rodriguez and Beckwith. During cross-examination, he testified that he did not recall Rodriguez telling him that Townsend had thrown the "shotgun" weapon to defendant over his head; he recalled, instead, that Rodriguez told him that Townsend dropped the shotgun after Rodriguez discharged his own gun. Detective Crain also agreed that his handwritten notes from the interview with Rodriguez did not reflect a statement from Rodriguez that he was being dragged backwards during defendant's chokehold. Detective Crain also stated that he did not make a supplemental report to add any information that may have been omitted from his original notes. Finally, he also admitted that Rodriguez never told him that the money bag fell to the ground during his struggle with defendant and that Rodriguez had reloaded his weapon in seconds while he was on the ground.

1-13-1944

¶ 44 D. Jury Instructions and Deliberations

¶ 45 Following closing arguments, the trial court held a jury instructions conference. During the conference, the State informed the court and defense counsel that it was seeking the firearm enhancement and tendered a firearm instruction. Defense counsel raised an objection to the firearm instruction, arguing that it had received no notice of the State's intent to seek a firearm enhancement on the sentence.

¶ 46 The trial court gave various instructions to the jury, including an accountability instruction and firearm instruction. Over the defense's objection, the trial court gave the jury the verdict form for the firearm enhancement. During deliberations, the court granted the jury's request for permission to review recorded footage from the Chicago police department pod video and the security video from the Family Dollar store. Following about an hour of deliberations, the jury sent a note to the trial judge stating as follows:

> "Judge, we have discussed the case, reviewed the evidence and taken two votes both with the same outcome 11 to 1. We have reached an impasse in our discussions and are in need of guidance. On behalf of the jury the foreman or forewoman. Any suggestions?"

After conferring with the prosecution and defense counsel, the judge responded in a note to the jury, "continue to deliberate." The jury subsequently found defendant guilty of first degree felony murder, based on the predicate offense of attempt armed robbery while armed with a firearm. Defendant's motion for a new trial was denied by the court, and the court sentenced him to 25 years' imprisonment for first degree felony murder, with an additional 15-year term based on his possession of a firearm. Defendant's motion for reconsideration of the sentence was

denied, and he timely appealed on June 5, 2013.

¶ 47 We have jurisdiction pursuant to Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. Dec. 11, 2014).

¶ 48 ANALYSIS

¶ 49 Defendant raises three issues on appeal. First, he contends that his felony murder conviction must be reversed because the State did not present sufficient evidence to prove him guilty beyond a reasonable doubt of the underlying forcible felony of attempt armed robbery. Second, he argues that the trial court improperly ruled him fit to stand trial, where he could not remember the events of January 28, 2011 and could not actively assist in his own defense. Third, he claims that the State failed to provide proper notification of its intent to seek a 15-year firearm enhancement at sentencing and, therefore, that portion of his sentence should be stricken.

¶ 50 A. Fitness to Stand Trial

¶ 51 Before we turn to the merits of the trial, we must determine whether the trial court properly determined that defendant was fit to stand trial. A defendant is presumed to be fit to stand trial (725 ILCS 5/104-10 (West 2010)), and will be found unfit to stand trial only if, as a result of his mental or physical condition, the defendant is unable to understand the nature and purpose of the proceedings against him, or is unable to assist in his own defense. *People v. Griffin*, 178 Ill. 2d 65, 79 (1997). Where a *bona fide* doubt exists as to a defendant's fitness to stand trial, the defendant is entitled to a fitness hearing. *Id.* At the hearing, the State carries the burden of establishing the defendant's fitness by a preponderance of the evidence. 725 ILCS 5/104-11(c) (West 2010). Ultimately, it is the trial court's function to assess the credibility and weight to be given to any expert testimony. See *People v. Coleman*, 168 Ill. 2d 509, 525 (1995) (holding that "the ultimate issue of fitness is for the trial court, not the experts, to decide"). On

review, the trial court's determination of fitness will not be disturbed unless it is against the manifest weight of the evidence. *People v. Haynes*, 174 Ill. 2d 204, 226 (1996).

¶ 52 When determining whether a defendant is fit to stand trial, the trial court may consider the following evidence:

> "(1) The defendant's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process;
>
> (2) The defendant's ability to observe, recollect and relate occurrences, especially those concerning the incidents alleged, and to communicate with counsel;
>
> (3) The defendant's social behavior and abilities; orientation as to time and place, recognition of persons, places and things; and performance of motor processes." 725 ILCS 5/104-16(b) (West 2010).

Whether a defendant is fit or not is a matter to be judged based on the totality of the circumstances. *People v. Stahl*, 2014 IL 115804, ¶ 26. In *Stahl*, the Illinois supreme court addressed the issue of whether a "defendant's amnesia render[ed] him *per se* unfit to stand trial" under article 104. *Id.* ¶ 25. Following a *de novo* review of article 104, the *Stahl* court determined that amnesia did not, *per se*, compel a finding that the defendant was unfit to stand trial. *Id.* ¶ 39. The court then applied a "totality of the circumstances" analysis to determine whether the trial court's finding that the defendant was unfit to stand trial was against the manifest weight of the evidence. *Id.* ¶ 40. Where two of the three psychiatric experts had concluded "that [the] defendant's short-term memory was substantially impaired and would affect his ability to assist

in his own defense," and one had found that the defendant "ranked in the lowest one percentile with regard to short-term memory retention after 20 to 30 minutes," the court held that the trial court's finding was not against the manifest weight of the evidence. *Id.*

¶ 53 Defendant contends that the trial court's ruling was against the manifest weight of the evidence because a case of retrograde amnesia prevented him from remembering the events of the shooting and adversely impacted his ability to assist in his own defense. Defendant claims that he did not have the ability to testify about his intent to commit robbery, which is a necessary element of the crime. He also claims he had no ability to speak about Townsend's frame of mind at the time of the shooting, since none of that evidence was or would be contained in police documents. Finally, he contends that, as a result of his amnesia, he "was wholly unable to communicate anything meaningful to assist his trial attorney in his defense and starkly provided nothing to the jury regarding his defense."

¶ 54 The record shows that the trial court carefully considered the testimony of both experts and found that their findings were generally consistent, noting the following:

> "The testimony of the doctors is basically in agreement as to findings. They just disagree as to legal conclusions their findings require. They both indicated that the defendant shows an understanding and knowledge of the charges against him, the roles of the different parties in a courtroom, the consequences of a plea of guilty or not guilty, the roles of the jury. He [defendant] demonstrated an ability to observe and recollect and relate occurrences for all periods other than during this period of memory loss. He's oriented towards as [*sic*] to time and place, as to his

> rights in these proceedings. He does have an impairment as to his ability to recollect and relate those incidents concerning or the occurrences concerning the incidents alleged. As the case law shows and it says that one impairment does not, per se, mean that an individual's unfit to stand trial. That is the only impairment here. I am considering it on a case by case basis and based on the totality of the evidence, I find that the State has met its burden that the defendant is fit to stand trial. The defendant is found fit."

As the trial court explained, the experts agreed that defendant was capable of understanding the adversarial nature of the proceedings against him and the roles of the prosecution, defense, witnesses, and jury. See *People v. Schwartz*, 135 Ill. App. 3d 629, 639 (1985) (finding defendant fit to stand trial despite amnesia where defense psychiatrist's testimony indicated that the defendant understood the proceedings against him, the roles of courtroom personnel, and could effectively communicate with his lawyer and make trial decisions). Additionally, both experts agreed that defendant was able to collaborate with his attorney, review police documentation, and discuss his defense strategy. The only difference was that Dr. Heilbronner found that defendant was unfit to *testify* on his own behalf because of a "profound" impairment in his ability to recall and relate events and occurrences. Based on the totality of the circumstances, however, we find that the court's finding of fitness was not against the manifest weight of the evidence.

¶ 55 B. Sufficiency of Evidence of Attempt Armed Robbery

¶ 56 Turning to the merits of the appeal, defendant contends that the evidence was insufficient to sustain his first degree felony murder conviction because the State failed to prove him guilty of the predicate offense of attempt armed robbery. Defendant contends that there was no

evidence to establish: (1) that he intended to commit a robbery and (2) that the Derringer handgun the police recovered from his person constituted a "firearm" under the FOID Act. 430 ILCS 65/1.1 (West 2011); 720 ILCS 5/2-7.5 (West 2011). Without proof of these facts, defendant maintains that the State failed to show that he had the intent to rob and that he was armed with a firearm during the incident in which Townsend was killed.

¶ 57 A person commits first degree felony murder if, "in performing the acts which cause the death: * * * he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 2010). Under the "proximate cause theory" of felony murder, a felon is liable for the deaths "proximately resulting from the unlawful activity" that are a direct and foreseeable consequence of his actions. *People v. Lowery*, 178 Ill. 2d 462, 465 (1997). As a result, we hold a person who commits a forcible felony accountable for accidental deaths and deaths committed by third parties that are the foreseeable consequence of the person's acts during the commission of a felony. *Id.* at 469. The State need not show that the defendant was aware "that his actions would result specifically in death." *People v. Hudson*, 354 Ill. App. 3d 648, 655 (2004). It must only prove that the defendant intended to commit the underlying felony. *Id.*

¶ 58 All forms of robbery are considered to be forcible felonies. 720 ILCS 5/2-8 (West 2010). A person commits robbery "when he or she knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1 (West 2010). Armed robbery occurs when the person committing a robbery is carrying, on or about his person, or is otherwise armed with, a firearm. 720 ILCS 5/18-2 (West 2010). Attempt armed robbery occurs when the person has "intent to commit [armed robbery]" and "does any act that constitutes a substantial step towards the commission of that offense." 720 ILCS 5/8-4(a) (West 2010).

¶ 59 A conviction for felony murder cannot stand if the record lacks sufficient evidence to establish the accused's guilt for the predicate offense. *People v. Shaw*, 186 Ill. 2d 301, 325 (1998). When the sufficiency of the evidence is challenged on appeal, our function is not to retry the defendant or substitute our judgment. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Instead, we must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011) (citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985)). We will not reverse a conviction unless the evidence is so " 'improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *Id.* Furthermore, we must "allow all reasonable inferences in favor of the prosecution." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 60 1. Evidence of Intent to Rob

¶ 61 Defendant argues that the State did not present sufficient evidence to convict him of the predicate offense, *i.e.*, attempt armed robbery while armed with a firearm (720 ILCS 5/18-2 (West 2010)), because there was no evidence to support the jury's finding that he intended to rob Rodriguez and Beckwith. He points to the fact that no witnesses, including the security guards who were the victims of the confrontation, testified that he or Townsend made a demand for any money or attempted to grab the money bag at any time leading up to or following the shooting. Defendant asserts that Townsend's order for him to kill Rodriguez reflected Townsend's desire to "go out in a hail of bullets," not a manifestation of an intent to deprive a person of his property. Consequently, he argues, there exists a reasonable doubt as to his intent to rob the victims during the assault.

¶ 62 "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2010). The State was thus required to prove beyond a reasonable doubt both that (1) defendant intended to commit the offense of armed robbery, and (2) defendant took a substantial step toward the commission of that offense.

¶ 63 We find that the record supports a finding that defendant intended to rob Rodriguez (or any person or entity in possession of the cash receipts of the Family Dollar store). Establishing an intent to rob does not require the State to show that the accused made any specific demand for money or property. *See, People v. Murff*, 29 Ill. 2d 303, 305 (1963); *People v. Leahy*, 295 Ill. 588, 593 (1920); *People v. Armour*, 15 Ill. App. 3d 529, 539 (1973). Instead, the intent to rob can be inferred from the circumstantial evidence surrounding the incident. *People v. Turner*, 108 Ill. App. 2d 132, 138 (1969). Here, the nature and timing of defendant and Townsend's attack indicated that they intended to commit an armed robbery. Defendant and Townsend chose to attack two armored truck guards protecting a van full of cash. One of the guards was carrying a deposit bag out of a retail store at the time. Certainly, the jury could have inferred that the attack was somehow related to the money being transported. The fact that defendant and Townsend were unsuccessful in their attempt to take the Family Dollar cash receipts does not automatically require a finding that there was no intent to rob. See *People v. Kuhn*, 291 Ill. 154, 158 (1919) (finding that "[t]he fact that [the victim] defended himself and prevented the robbery has no tendency to disprove the alleged intent"). The jury was also entitled to reject the defense theory that defendant and Townsend were on a suicide mission and, instead, accept the State's armed robbery theory. *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001).

¶ 64 Defendant argues that since neither he nor his brother made any attempt to grab Rodriguez's money bag, his actions are more indicative of an intent to kill rather than to rob. He cites *People v. Thomas*, 127 Ill. App. 2d 134 (1970) in support of his argument. We find the case distinguishable on its facts. In *Thomas*, the defendant stood guard at the entrance to a tavern while his friend proceeded to the back of the room. *Id.* at 136. The defendant's friend then walked up to the tavern's bartender and shot him in cold blood. *Id.* He then told defendant, who was still at the door to the tavern, "I got him." Both left without taking any money or property, jumped into a car that was in a nearby alley, and sped off. At trial, the defendant argued that there was insufficient evidence to establish that defendant, as either the principal actor or an accomplice, had attempted to commit robbery when the incident occurred. *Id.* at 138. Defendant was nonetheless convicted of felony murder. On appeal, the *Thomas* court ruled that there was no evidence of an intent to rob on part of the defendant's friend, and because there was no evidence that established proof beyond a reasonable doubt of an underlying forcible felony, *i.e.*, attempted robbery, the defendant's conviction had to be reversed. *Id.* at 140.

¶ 65 Here, unlike the facts in *Thomas,* the record shows a series of actions by defendant, in tandem with his stepbrother, that support the jury's finding that he intended to take the bag of cash that Rodriguez was transporting from the Family Dollar store into the Garda armored truck. The evidence reveals a relatively organized and planned ambush. On a Friday morning in late January, defendant and Townsend were waiting near the Family Dollar store. They did not enter the store or make their presence known to the employees or staff inside the store. Instead, they remained out of sight. As they waited, an armored security vehicle pulled up to the front entrance of the store. Defendant and Townsend did not attempt to enter the store after Rodriguez walked in, nor did either of the perpetrators harass or threaten Beckwith while he was sitting in the

armored truck. It was not until Rodriguez was walking out of the store, carrying clear bags containing the cash and heading for the truck, that defendant and Townsend approached Rodriguez from both sides in a coordinated fashion: Townsend from the left and defendant from the right. Townsend ordered defendant to kill Rodriguez as Rodriguez was holding the money bag. Despite defendant's testimony that his brother, Townsend, wanted to "go out in a hail of bullets" a month or two prior to the January 2011 incident, the evidence does not support any alternative motive or purpose for the brothers' ambush of the guards other than the goal of forcibly taking money. Instead, the evidence points to a scenario in which defendant and his brother *waited* outside the Family Dollar, after one of the guards left the armored vehicle and went inside the store to retrieve the funds. There was no evidence that defendant's brother attempted to draw gunfire from either of the guards—to initiate a "hail of bullets"—until after Rodriguez exited the store with the funds and started back to his vehicle. Even after Townsend fell from the gunfire, defendant did not stop the violent confrontation with Rodriguez. Three other eyewitnesses besides Rodriguez—Beckwith, Burton, Cabrera—saw defendant struggling with Rodriguez, the only person who had been holding the money bag. None of the witnesses reported seeing defendant or Townsend going after Beckwith. Viewing the evidence in the light most favorable to the prosecution, we find that a reasonable trier of fact could have easily concluded that defendant possessed the intent to commit armed robbery.

¶ 66 2. Evidence of A Substantial Step

¶ 67 Defendant contends that he did not take a substantial step towards the commission of an armed robbery. He argues that there was no evidence or testimony from any witness that he made a demand for the money or attempted to grab the bag with the money deposit. In *Thomas*, he notes, the court vacated a felony murder conviction under similar circumstances, finding that

"[n]o intention to commit robbery was orally communicated to either alleged victim by either defendant or Robinson, nor was any money or property demanded or taken." 127 Ill. App. 2d at 139.

¶ 68 A substantial step towards the commission of a crime is taken when the defendant has all of the materials required to complete the crime and is present at or near the location of the intended criminal act. See *People v. Smith*, 148 Ill. 2d 454, 460 (1992); *People v. Terrell*, 99 Ill. 2d 427, 434 (1984). The facts and circumstances of each case must be evaluated to determine whether a defendant's actions constituted a substantial step. *Terrell*, 99 Ill. 2d at 431-32. A substantial step requires action beyond mere preparation (*id.* at 433); it should put the defendant in a "dangerous proximity to success" toward commission of the crime. (Internal quotation marks omitted.) *People v. Morissette*, 225 Ill. App. 3d 1044, 1046 (1992). The crime of *attempt* is complete once there has been a substantial step with the requisite intent and subsequent abandonment of the criminal purpose is no defense. *People v. Myers*, 85 Ill. 2d 281, 290 (1981).

¶ 69 We find that defendant's act of ambushing an armed guard carrying a deposit bag to an armored truck, itself, constituted a substantial step towards an armed robbery. The reasonable inference to be drawn is that defendant was attempting to steal the money in the guard's possession. We are not persuaded that defendant did not take a substantial step towards an armed robbery simply because he did not make a demand for money or attempt to grab the money bag. Under the circumstances, it is reasonable to infer that defendant and Townsend made plans to ambush only the guard who was carrying the money from two different sides. As Rodriguez testified, he suddenly found himself approached by both men from different directions. Taking all reasonable inferences in the light most favorable to the prosecution, we find that the evidence demonstrates a coordinated attack in which Townsend and defendant were out of sight—

according to all of the witnesses, including both guards, who testified at trial—until a point in time when Rodriguez was neither safely inside the store or the armored truck. Relying on the element of surprise, which was necessary to avoid arousing the suspicion of the guard waiting inside the truck (Beckwith), required some degree of coordination between the two brothers. The fact that neither Townsend nor defendant was successful in taking the money bag does not diminish the evidence establishing their "dangerous proximity to success" under the circumstances. Moreover, the fact that their ability to execute the robbery was interrupted when Rodriguez fired four shots from his revolver and hit Townsend is not relevant to the question of what actions the *offenders* took toward completing the crime.

¶ 70 This case is distinguishable from *Thomas* where there was no money or property demanded or taken, and "[the offender] simply walked up to the bar, pointed the gun at the bartender without saying anything, and shot him dead" before walking out. *Thomas*, 127 Ill. App. 2d at 139. In this case, defendant never voluntarily left the scene without the money; rather, he was taken away by ambulance after he was incapacitated from the shootout with the guards. The jury could have reasonably found that defendant remained at the scene until he was shot because he was intent on getting the money in the guards' possession. Under the circumstances, we find that the State presented sufficient evidence of a substantial step and thus proved the elements of attempt beyond a reasonable doubt.

¶ 71 3. Possession of a Firearm

¶ 72 Finally, in his challenge to the sufficiency of the evidence, defendant argues that because the Derringer .22 caliber handgun recovered from his person was inoperable, it could not possibly meet the legal definition of a "firearm." In Illinois, the term "firearm" is defined under the FOID Act (430 ILCS 65/0.01 *et seq.* (West 2012)) as "any device, by whatever name known,

which is *designed* to expel a projectile by the action of an explosion, expansion of gas or escape of gas." (Emphasis added.). 430 ILCS 65/1.1 (West 2010); *People v. Fields*, 2014 IL App (1st) 110311, ¶ 35. Our primary objective is to enforce the legislature's intent, and the most reliable way in which to do this is to give the statute's language its plain and ordinary meaning. *People v. Perry*, 224 Ill. 2d 312, 323 (2007). Where the language of a statute is clear and unambiguous, we must apply it as written. *Id.* We review defendant's claim, which presents a question of statutory interpretation, *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 34.

¶ 73 Here, defendant argues that the Derringer handgun does not "possess the essential characteristics of a firearm" because it was unable to expel projectiles at the time of his offense, effectively rendering it inoperable. This court, however, has previously held that an inoperable gun can satisfy the FOID statutory definition of a "firearm." *People v. Williams*, 393 Ill. App. 3d 286, 291 (2009). Whether or not a firearm in a state of disrepair can still be said to be "designed" as a firearm due to loss of its essential characteristics is a question of fact for the trier of fact to determine; one important factor to be considered is whether the firearm can be repaired or restored to its original state. *Id.*

¶ 74 The plain language of the statute indicates that an item must only be *designed* to expel a projectile; there is nothing in the statute that indicates that the object must be *able* to at the time of the offense. During her testimony, Haley, qualified as a firearms and firearms identification expert, testified that this was exactly the case – the gun, while not operable, was designed to operate as a standard firearm. There was no evidence elicited at trial, not by Haley nor anyone else, which would indicate that defendant's Derringer gun could not be repaired or restored to an operable condition. Moreover, defendant never contested Haley's conclusions regarding his Derringer. Therefore, we conclude that the trier of fact reasonably determined that defendant's

Derringer constituted a firearm. As such, we hold that the State presented sufficient evidence to convict defendant of attempt armed robbery and, therefore, established his guilt as to the predicate offense for first degree felony murder.

¶ 75 C. Notification of 15-Year Firearm Enhancement

¶ 76 Lastly, defendant argues that the 15-year firearm enhancement on his sentence is void and should be stricken from his sentence because the State failed to notify him of its intent to seek the enhancement pursuant to section 111-3(c-5) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3(c-5) (West 2010)). A sentence that does not conform to a statutory requirement is void and may be corrected at any time. *People v. Arna*, 168 Ill. 2d 107, 113 (1995). We review *de novo* the State's compliance with section 111-3(c-5). *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 26.

¶ 77 The Illinois legislature enacted section 111-3(c-5) of the Code following the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "which held that whenever a fact other than a prior conviction is considered to enhance a penalty beyond the statutory maximum, that fact must be found to exist beyond a reasonable doubt by the trier of fact." *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 26. Section 111-3(c-5) provides that "if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111-3(c-5) (West 2010); but see *People v. Robinson*, 232 Ill. 2d 98, 110

(2008) (noting that "*Apprendi* does not speak to indictment-related issues" and did not address the charging instrument).

¶ 78 As we previously noted, it is undisputed here that the only charge on which the State proceeded to trial against defendant was the first degree felony murder charge under count I of the indictment. The remaining three counts were *nolle prossed*. Count I contains no allegation about a firearm, and states, instead, that defendant:

> "committed the offense of FIRST DEGREE MURDER
>
> in that HE, WITHOUT LAWFUL JUSTIFICATION, COMMITTED THE OFFENSE OF ATTEMPT ARMED ROBBERY, AND DURING THE COMMISSION OF THE OFFENSE, HE SET IN MOTION A CHAIN OF EVENTS THAT CAUSED THE DEATH OF JIMMY TOWNSEND
>
> IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 9-1(A)(3) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED *** [.]"

¶ 79 There is no language in count I concerning the commission of an offense while carrying a firearm. We next look to Section 9-1(A)(3) of the Criminal Code, the statutory provision setting forth the elements of first degree felony murder. Again, there is no reference to a firearm. We must conclude that the alleged fact necessary for the firearm enhancement was not included in the charging instrument, and the indictment fails to meet the requirements of section 111-3(c-5). By agreeing to *nolle prosse* counts II, III and IV, the State effectively informed the defendant that it was not willing to prosecute defendant for the charges containing the firearm element. It would be absurd to find, as the State urges, that defendant was notified that the State would be seeking to prove his possession of a firearm when, in fact, the State specifically *declined* to prosecute all charges alleging his possession of a firearm. Furthermore, the State never sought leave to amend the indictment to add or "restore" the language necessary to strictly comply with section 111-3(c-5).

1-13-1944

¶ 80 The question then becomes whether the State cured the defect in the indictment by providing the alternative statutory written notification to defendant that is permitted under the statute. 725 ILCS 5/111-3(c-5). The State argues that it satisfied the written notification requirement because the facts regarding defendant's possession of a firearm during the forcible felony were included in its motion *in limine*, when it sought to prohibit defense counsel from arguing that the Derringer handgun was inoperable and, therefore, not a firearm. According to the State, defendant acknowledged, and was aware of, the State's intent to seek the firearm sentencing enhancement during the hearing on the motion *in limine*. We disagree.

¶ 81 The State's motion *in limine* was not intended as a written notification to defendant prior to trial under section 111-3(c-5); instead, the clear purpose of the motion was to bar the defense from asserting, at trial, that the Derringer .22 caliber handgun was inoperable and therefore not a firearm. Furthermore, at the time the State presented and argued its motion *in limine*, the counts in the indictment containing the firearm allegations had not yet been *nolle prossed*. The State, therefore, had no reason to give an alternative written notification to defendant under section 111-3(c-5). We find the State's argument unpersuasive.

¶ 82 The remaining issue, then, is whether defendant is entitled to any relief. "An indictment challenged before trial must strictly comply with the pleading requirements of section 111–3." *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶33, citing *People v. Nash*, 173 Ill. 2d 423, 429 (1996). "In contrast, when an indictment is attacked for the first time posttrial, a defendant must show that he was prejudiced in the preparation of his defense." *Mimes*, 2014 IL App at (1st) 082747-B at ¶ 33 (citing *People v. Davis*, 217 Ill. 2d 472, 479 (2005)). This case falls somewhere in between a pretrial and posttrial challenge. During the pretrial hearing on the State's motion *in limine*, defense counsel acknowledged the State's intent to establish that defendant was in

possession of a firearm, both as an element of the underlying felony and as an enhancing factor on sentencing, when it raised a concern to the trial court regarding double enhancement; however, defendant did not challenge the indictment itself. Later, during the jury instruction conference, defendant argued that he was not given adequate notice of the State's intention to prove that he was armed with a firearm. He later raised the same issue in his motion to reconsider the sentence.

¶ 83 In *People v. Cuadrado*, our supreme court held that a midtrial challenge to an indictment requires a showing of prejudice unless there has been prosecutorial misconduct. 214 Ill. 2d 79, 87-88 (2005). Here, no allegations of prosecutorial misconduct have been made. Accordingly, we must find that defendant was prejudiced in the preparation of his defense by the State's failure to strictly comply with section 111-3(c-5).

¶ 84 Defendant was charged with felony murder predicated on attempt armed robbery. The offense of armed robbery may be proven by evidence that defendant was either "armed with a dangerous weapon other than a firearm" or that he was "armed with a firearm." 720 ILCS 5/18-2(a)(1)-(2) (West 2010). Because the indictment lacked any reference to either section 18-2(a)(1) or section 18-2(a)(2), the State was effectively free to proceed at trial under either a dangerous weapon theory *or* a firearm theory. This is evidenced by the fact that the prosecution elicited testimony to establish that during defendant's struggle with the armed guard, he swung a metal-and-wood weapon that resembled a double-barreled sawed-off shotgun at the guard. While the State did not seek to prove that the Derringer .22 caliber handgun was used as a bludgeon, it did nonetheless present testimony that defendant caught the metal-and-wood weapon purportedly tossed by Townsend and then used it to swing at Rodriguez during their confrontation. By leaving open the dangerous weapon theory, the State protected its ability to

convict defendant even if the court found that the .22 Derringer was not a firearm. Under the circumstances, this was clearly prejudicial to defendant and we can find no justifiable reason to excuse the prosecution's lack of compliance with section 111-3(c-5). Pursuant to our authority under Illinois Supreme Court Rule 615, we vacate defendant's 15-year sentence enhancement based on his possession of a firearm. Ill. S. Ct. R. 615(b).

¶ 85 CONCLUSION

¶ 86 For the foregoing reasons, we affirm defendant's conviction of first degree felony murder and his 25-year sentence for this offense, but vacate the 15-year sentence enhancement for possession of a firearm during the commission of first degree murder.

¶ 87 Affirmed in part; vacated in part.

2016 IL App (1st) 131944

FIRST DIVISION
AUGUST 22, 2016

No. 1-13-1944

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 3485
	)	
ROBERT CAREY,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion.
Justices Connors and Harris concurred in the judgment.

OPINION

¶ 1 Defendant, Robert Carey, was tried by a jury, found guilty of first degree felony murder while armed with a firearm, and sentenced to 25 years' imprisonment for the murder and an additional 15 years for the firearm sentencing enhancement. Prior to the trial, the State had *nolle prosequied* three additional charges in the indictment against defendant: one count of attempt armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)) (count II) and two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) (counts III and IV).

¶ 2 In his appeal, defendant makes the following three arguments: (1) the circuit court erred in finding him fit to stand trial, given that he suffered from amnesia and had no recollection of the incident giving rise to the felony murder charge against him; (2) the State failed to prove beyond a reasonable doubt that he had the intent to commit armed robbery and that he took a

substantial step toward the commission of the crime; and (3) the 15-year firearm enhancement should be stricken or vacated from his sentence because the State failed to satisfy the procedural requirements for notifying a defendant of its intent to seek the enhanced term. We filed our original decision in this matter on November 9, 2015, in which we affirmed defendant's conviction for first degree felony murder and vacated the 15-year sentencing enhancement which was based on his possession of a firearm.

¶ 3 Following our decision, both parties filed petitions for rehearing. In its petition, the State argues that the firearm sentencing enhancement should not be vacated because defendant was not prejudiced in the preparation of his defense. In defendant's petition, he contends that this court misapplied the applicable law and relevant facts in concluding that he was fit to stand trial; and further in finding that there was sufficient evidence to convict him of attempt armed robbery. Additionally, for the first time, defendant argues that the felony murder conviction must be vacated because he was prejudiced by an indictment that did not specify which version of attempt armed robbery the State sought to use as the predicate offense for felony murder. We ordered the State to file a response to defendant's petition for rehearing, and for defendant to file a reply, specifically addressing the issue of whether the felony murder count of the indictment "apprised [defendant] of the offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct."

¶ 4 Following our review of the supplemental briefing, we granted both parties' petitions for rehearing and withdrew our original decision. This opinion now stands as our resolution of this matter. For the reasons that follow, we reverse defendant's conviction and remand to the circuit court for further proceedings consistent with this opinion.

¶ 5 BACKGROUND

¶ 6 The undisputed facts are as follows. On the morning of January 28, 2011, defendant and his brother, Jimmy Townsend, attacked two armored truck guards working for Garda Cash Logistics (Garda): Julio Rodriguez and Derrick Beckwith. The guards arrived in an armored Garda truck at a Family Dollar store located at the corner of Chicago Avenue and Homan Avenue in Chicago. Beckwith drove the truck, and after pulling up to the entrance of the store, Rodriguez exited the truck and entered the store to collect the cash receipts for transfer while Beckwith stayed outside in the truck.

¶ 7 As Rodriguez exited the store holding a deposit bag filled with cash, defendant and Townsend ambushed him from two different directions. Townsend approached Rodriguez and pointed at him an object that appeared to Rodriguez to be a sawed-off shotgun, while Defendant approached Rodriguez from a different side with a handgun. Townsend yelled for defendant to shoot Rodriguez. Rodriguez shot Townsend four times with his service revolver and Townsend collapsed to the pavement from the gunshot wounds. Townsend threw his weapon to defendant, who then put Rodriguez in a chokehold. During his struggle with defendant, Rodriguez dropped the money bag, eventually broke free from defendant's grip, and ran toward the truck. By this time, Beckwith, who was still inside the truck, had opened the passenger-side door and drawn his firearm. He fired four shots at defendant. Two of the bullets struck defendant in the head—one directly in his eye—and he fell to the ground, where he remained until the police and paramedics arrived. Townsend died from the gunshot wounds to his chest. As a result of the head injuries he suffered from the shooting, defendant was in a coma for a period of time. When he awoke, defendant claimed that he had no memory of the shooting or anything that had happened during the week preceding the incident.

¶ 8 Prior to trial, defense counsel requested that defendant receive a behavioral clinical examination to determine his fitness to stand trial. This examination was completed in February 2012 by Dr. Eric Neu, a clinical psychologist, who found defendant fit to stand trial. Defense counsel then retained a clinical neuropsychologist, Dr. Robert Louis Heilbronner, to assess defendant's fitness. Dr. Heilbronner interviewed defendant and subjected him to two days of testing, then issued a psychological report on his findings. Following this, at the State's request, the court ordered an additional fitness examination to supplement the other reports. Dr. Nishad Nadkarni, a forensic psychiatrist for the Cook County circuit court, examined defendant in June 2012 and issued a letter indicating that he found defendant competent to stand trial. At the fitness hearing, the court heard argument from the parties as well as testimony from both Dr. Nadkarni and Dr. Heilbronner, and determined that defendant was fit to stand trial. The court concluded that while defendant did suffer "an impairment as to his ability to recollect and relate" the events surrounding the robbery incident, that single impairment did not render defendant unfit to stand trial. The court found that, based on the "totality of the evidence," the State had met its burden of establishing defendant's fitness.

¶ 9 The State brought a pretrial motion *in limine* to prohibit defense counsel from arguing that the handgun recovered from defendant at the crime scene had to be "operable" in order to qualify as a "firearm" under the Firearm Owners Identification Act (the FOID Act) (430 ILCS 65/1.1 (West 2010)). During the hearing on the motion, the State advised the court and defense counsel that the statutory offense at issue, attempted armed robbery under section 18-2(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/18-2(a)(2) (West 2010)), required proof of a firearm. The State indicated its intention to prove that defendant "was armed with a nickel-plated automatic handgun [that] was sufficient to qualify as a 'firearm' within the meaning of Section

1.1 of the FOID Act despite defendant's contention that it was inoperable." The court granted the motion, ruling that the defense was precluded from arguing that the gun was not a "firearm" however, the court indicated that it would permit the argument if the evidence showed that the gun fell within an exception to the statutory definition of a firearm.

¶ 10 Initially, the State charged defendant with four counts: first degree felony murder for causing the death of Townsend while committing a forcible felony, attempt armed robbery (720 ILCS 5/9-1(a)(3) (West 2010)) (count I); attempted armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)) (count II); and two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) (counts III and IV). Immediately before trial, the State *nolle prosequied* counts II, III, and IV, and proceeded solely on count I.

¶ 11 At trial, the State presented eyewitness testimony from the Garda security guards and three other witnesses who either saw or heard the confrontation. Those five witnesses presented a generally consistent account of the events of the morning of January 28, 2011. The State also provided testimony from the police officer who arrived at the scene, a medical examiner who reviewed Townsend's autopsy report, a forensic investigator, a firearm identification expert, and the detective assigned to investigate the shooting incident.

¶ 12 Larry Goodson, the forensics investigator, testified that when he and his team examined Townsend's weapon, they discovered that it was not, in fact, a sawed-off shotgun. Instead, it was a homemade object crudely designed to resemble a shotgun; the weapon consisted of two metal pipes fastened to a piece of wood with duct tape, with what appeared to be a brown household rag wrapped across one of the ends to act as a handle.

¶ 13 Forensic scientist Elizabeth Haley testified as an expert in firearm identification. She testified that the handgun defendant had been holding was a double-barreled .22 Derringer which

had been designed to fire live ammunition. Haley stated that when she attempted to load ammunition into the Derringer, she discovered an obstruction in the top barrel that prevented her from chambering a round. There was no such obstruction in the lower barrel. When she attempted to fire the weapon, the cartridge did not discharge. Upon further investigation, Haley learned that the firing pin had hit the cartridge but "not with enough force in order to set out the priming material." Haley concluded that the gun was inoperable in its current state.

¶ 14 Defendant testified on his own behalf. Although he had no memory of the incident, he remembered some of the circumstances preceding the shootout. Defendant testified that sometime in November or December 2010, Townsend told him that he wanted to "end his life" and desired to "go out in a hail of bullets." He recalled that the topic of suicide often came up during conversations with his brother. Defendant admitted that he had seen and even held the Derringer handgun multiple times before the date of the incident. He also recalled having seen the makeshift "shotgun" prior to the incident, as it was usually kept in the van that he and Townsend often drove. Finally, defendant acknowledged that it was possible that he and Townsend were trying to rob the armored truck on the date in question; however, he had no memory of the incident and could not say with any certainty whether that was what happened.

¶ 15 Following closing arguments, the trial court held a jury instruction conference. The State informed the court and defense counsel that it was seeking the firearm sentencing enhancement and tendered a firearm instruction. Defendant objected, arguing that he had received no notice of the State's intent to seek a sentencing enhancement, but the verdict form for the sentencing enhancement was given to the jury over defendant's objection. The jury subsequently found defendant guilty of first degree felony murder based on the predicate offense of attempted armed robbery while armed with a firearm. The trial court denied defendant's motion for a new trial and

sentenced him to 25 years' imprisonment for first degree felony murder, plus an additional 15-year term based on his possession of a firearm. Defendant's motion for reconsideration of the sentence was denied, and he timely appealed on June 5, 2013.

¶ 16 We have jurisdiction to consider this appeal pursuant to Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. Dec. 11, 2014).

¶ 17 ANALYSIS

¶ 18 Defendant initially raises three issues on appeal. First, he contends that his felony murder conviction must be reversed because the State did not present sufficient evidence to prove him guilty beyond a reasonable doubt of the underlying forcible felony of attempted armed robbery. Second, he argues that the trial court improperly ruled him fit to stand trial, where he could not remember the events of January 28, 2011, and could not actively assist in his own defense. Third, he claims that the State failed to provide proper notification of its intent to seek a 15-year firearm sentencing enhancement and, therefore, that portion of his sentence should be stricken. In his petition for rehearing, in addition to asking this court to further consider his first two arguments, defendant raises for the first time the additional argument that he was prejudiced and his conviction must be vacated where the indictment failed to specify which predicate offense his felony murder charge was based on. Because we find the issue to be dispositive, we begin by addressing defendant's last argument.

¶ 19 Defendant argues that the charging instrument upon which he was convicted of first degree felony murder was deficient in its failure to specify which of Illinois' two attempted armed robbery offenses the State sought to prove as the predicate offense. Defendant asserts that, due to this deficiency, he was deprived of his due process right to be informed of the precise

offense charged, prejudiced in his ability to prepare a defense, and wrongfully convicted of an offense he was not charged with committing.

¶ 20 We first must comment on the fact that defendant did not raise this argument at trial, nor did he raise it in his initial appeal—rather, purportedly inspired by this court's reasoning in that decision, he raised it for the first time in his petition for rehearing of this court's decision dated November 9, 2015. Generally, points not argued in a party's appellate brief may not be raised for the first time in a petition for rehearing. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); see also *O'Hare International Bank v. Feddeler*, 16 Ill App. 3d 35, 39 (1973). However, the failure to charge an offense is a defect that may be attacked at any time. *People v. DiLorenzo*, 169 Ill. 2d 318, 321 (1996); *People v. Alvarado*, 301 Ill. App. 3d 1017, 1022 (1998) ("When a charging instrument fails to state an offense, this constitutes a defect implicating due process concerns, and the defective charge may be attacked at any time."). Therefore, this court may address defendant's argument regarding the sufficiency of the charging instrument.

¶ 21 A defendant has a "fundamental due process right to notice of the charges brought against him" and "may not be convicted of an offense he has not been charged with committing." *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). This constitutional right to be adequately informed of the charged offense with sufficient specificity to form a defense "applies to the predicate felony in a count *** just as it does to a count charging the underlying felony alone." *People v. Hall*, 96 Ill. 2d 315, 319-20 (1982). Section 111-3(a) of the Code of Criminal Procedure of 1963 requires the charging instrument to include the name of the offense, the statutory provision allegedly violated, the nature and elements of the offense charged, the date and county where the offense was allegedly committed, and the name or description of the accused. 725 ILCS 5/111-3(a) (West 2010). When the sufficiency of charges is attacked for the first time in a pretrial motion,

the instrument must strictly comply with these requirements. *DiLorenzo*, 169 Ill. 2d at 321-22. When the charging instrument is attacked for the first time on appeal, as is the case here, the standard of review is "more liberal." *Id.* In this situation, the reviewing court uses a two-pronged test that was first set out in *People v. Pujoue*, 61 Ill. 2d 335 (1975). Rather than determine whether the indictment includes each necessary element of section 111-3(a), the *Pujoue* test requires the court to determine whether the defendant was "apprised *** of the precise offense charged with enough specificity to (1) allow preparation of his defense and (2) allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." *DiLorenzo*, 169 Ill. 2d at 322 (citing *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991); and *Pujoue*, 61 Ill. 2d at 339).

¶ 22 As we previously noted, it is undisputed here that the only charge on which the State proceeded to trial against defendant was the first degree felony murder charge under count I of the indictment. The remaining three counts were *nolle prosequied.* Count I against defendant alleged that:

> "on or about January 28, 2011 at and within the County of Cook,
>
> Robert Carey
>
> committed the offense of FIRST DEGREE MURDER
>
> in that HE, WITHOUT LAWFUL JUSTIFICATION, COMMITTED THE OFFENSE OF ATTEMPT ARMED ROBBERY, AND DURING THE COMMISSION OF THE OFFENSE, HE SET IN MOTION A CHAIN OF EVENTS THAT CAUSED THE DEATH OF JIMMY TOWNSEND
>
> IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 9-1(a)(3) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED *** [.]"

Count I does not specify which version of the attempted armed robbery offense served as the predicate offense for the felony murder charge. Under Illinois law, there are two mutually exclusive types of armed robbery: (a) armed robbery "with a dangerous weapon other than a firearm" (720 ILCS 5/18-2(a)(1) (West 2010)), and (b) armed robbery "with a firearm" (720 ILCS 5/18-2(a)(2) (West 2010)). By distinguishing between these two methods of committing armed robbery, section 5/18-2(a) creates two "substantively distinct offenses." *People v. Washington*, 2012 IL 107993, ¶ 6; see also *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38 (noting that "the language of the current statute clearly demonstrates that a violation under section 18-2(a)(1) and one under section 18-2(a)(2) are mutually exclusive of each other"). Count I of the indictment in this case does not provide a statutory citation to the relevant provision, nor does it include any specific detail or other indication of which of these two offenses the State sought to prove at trial. Due to this ambiguity, we must conclude that the indictment was defective in its failure to adequately inform defendant of the charges brought against him with sufficient detail to prepare an adequate defense.

¶ 23 The State argues that it is unnecessary for the charging instrument to set forth the "particular elements" of attempted armed robbery because defendant was not being prosecuted for attempted armed robbery, but for felony murder. In support, the State cites *People v. Jeffrey*, 94 Ill. App. 3d 455 (1981), which involved a defendant who was tried on the charge of felony murder predicated on the felony of burglary. *Jeffrey*, 94 Ill. App. 3d at 461. The charging instrument stated that the defendant caused the victim's death "while committing the forcible felony of Burglary in violation of Chapter 38, Section 19-1, Illinois Revised Statute, 1975, as amended" but did not provide any further description of the alleged underlying offense. *Id.* The defendant challenged the sufficiency of the charging instrument in its failure to include the

elements of the predicate offense of burglary. *Id.* As the defendant first challenged the indictment in the trial court, the *Jeffrey* court considered the defendant's challenge under the more rigid requirements set forth in section 111-3. *Id.* at 463. Even under that higher standard, the court disagreed with the defendant's argument and found that the indictment was not deficient. *Id.* It reasoned that, because the defendant was being prosecuted for murder, not burglary, the precise elements that constituted burglary and unnecessary in the indictment. *Id.* at 464.

¶ 24 The *Jeffrey* court quoted *People v. Gilmore*, 63 Ill. 2d 23 (1976), to explain the standard it used to determine whether the charging instrument adequately described the predicate offense: " 'due process requires that an indictment or information must apprise the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and allow the pleading of the judgment as a bar to future prosecution arising out of the same conduct.' " *Jeffrey*, 94 Ill. App. 3d at 464 (quoting *Gilmore*, 63 Ill. 2d at 28-29). Although this is the same standard that we apply here, there are key differences between the indictment in *Jeffrey* and count I in this case that prevent this court from reaching the same outcome. The first is that the *Jeffrey* indictment included the statutory citation for the predicate offense of burglary, which provided the defendant with notice of the specific predicate offense the State sought to prove at trial, even if the elements of that offense were not listed in the indictment itself. *Id.* at 461. Count I here includes no such citation. Also significant is the fact that the predicate offense in *Jeffrey* was burglary, which the Code defined as a single offense. Ill. Rev. Stat. 1975, ch. 38, ¶ 19-1. There was not more than one type of burglary, as there now are two types of armed robbery. Therefore, even without a statutory citation for burglary in the indictment, the defendant in *Jeffrey* would have nonetheless been sufficiently informed of the predicate offense charged because there was no ambiguity. In contrast, because the phrase "attempt armed robbery" could

refer to either of two mutually exclusive offenses, and because the indictment did not identify, through a statutory citation or in any other manner, which of the two offenses the State sought to prove at trial as the predicate offense for felony murder, defendant was not adequately informed of the charge against him "with sufficient specificity to prepare his defense," as due process requires.

¶ 25 In its briefs, the State acknowledges the importance of conforming with the statutory requirements of section 111-3 for its charge of felony murder but downplays the importance of precisely defining the predicate offense of felony murder, referring to its mention in the charging instrument as an "allusion" that was only "necessary to allege that the murder was one committed during the course of a felony." The State argues that all essential elements of felony murder were provided in the indictment and "any further facts defendant wished to have been alleged *** would have been surplusage." We cannot agree.

¶ 26 Sufficiently informing a defendant of the precise predicate offense charged directly implicates the sufficiency of the overall charge, and it is not enough to simply assert that "a felony" was being committed at the time of the murder. A defendant's due process right to be adequately informed of the charged offense with sufficient specificity to form a defense applies to a predicate offense just as if it were a count charging that underlying felony alone. *Hall*, 96 Ill. 2d at 319-20. The predicate offense is an essential element of the crime of felony murder, and each element of the predicate offense must be proved beyond a reasonable doubt. *People v. Pecina*, 132 Ill. App. 3d 948, 955 (1985). Where a defendant is not informed of the particular predicate offense in the charging instrument, the defendant is not adequately informed of all elements of the overall charge.

¶ 27 This is not to say that the manner of informing a defendant of the precise predicate offense must adhere to a specific format, or that the charging instrument must necessarily include the relevant statute in order to satisfy this requirement. This was established in *People v. Simmons*, 93 Ill. 2d 94 (1982), where the defendant was charged with, *inter alia*, the offense of armed violence based on the underlying felony of murder, which sustained the only valid conviction against the defendant by the time our supreme court reviewed the case.[1] *Simmons*, 93 Ill. 2d at 96-97. The charging instrument described the predicate offense as "murder, in that he shot and killed [the victim] with a gun, *knowing that such shooting with a gun created a strong probability of death or great bodily harm* to [the victim]." (Emphasis in original.) *Id.* at 100. The charge did not set out the statutory provision of the underlying felony, but the court found that such a citation was not necessary, as the charge must include the citation to only the charged offense, which in that case was armed violence. *Id.* However, the court did recognize the need for the defendant to be informed in some way of the precise predicate offense charged. As the court explained, "[t]he inclusion of the italicized language of the charge made it clear that murder under section 9-1(a)(2), rather than murder under section 9-1(a)(1), was the underlying felony in the charge of armed violence." *Id.* Although the charging instrument did not include a statutory citation for the predicate offense, it was nevertheless valid where it adequately informed the defendant of the precise predicate offense charged.

¶ 28 Even an "allusion" to the predicate offense may be sufficient if, by way of that allusion, the defendant can discern the precise offense the State asserts as the predicate offense. However,

[1]We note that, while this count served as the basis for the defendant's conviction, the conviction was for armed violence based on involuntary manslaughter. *Simmons*, 93 Ill. 2d at 96-97. The defendant also argued that the charging instrument was deficient for failing to state "which, if any, lesser offenses of murder were involved." *Id.* at 100. The court explained that "a charge of murder may serve as the basis for a conviction of any lesser included offense," including involuntary manslaughter, and upheld the sufficiency of the charging instrument. *Id.* These details do not affect our analysis of the relevant facts of this case.

that is not the case here, where there was nothing to indicate which of the two attempted armed robbery offenses served as the predicate offense.

¶ 29 The State further argues that, even if count I was deficient, the missing necessary elements were supplied by another count. In support of this proposition, the State cites *People v. Hall*, 96 Ill. 2d 315 (1982), wherein the defendant was charged and tried on two separate counts. Count II alleged the offense of armed violence, which was predicated on a violation of the Cannabis Control Act, which could be violated by the manufacture, delivery, possession with intent to deliver, or possession with intent to manufacture cannabis. *Hall*, 96 Ill. 2d at 319. The defendant argued that he did not receive adequate notice of the specific crime with which he was charged where count II did not specify which of the four acts the State alleged the defendant had committed. *Id.* However, count I, on which the defendant was also tried, was itself for the violation of the Cannabis Control Act, and it specified that the State sought to prove that the defendant *possessed cannabis with intent to deliver*. *Id.* at 317. Reasoning that "elements missing from one count of a multiple-count indictment or information may be supplied by another count," the court found that count II was not defective. *Id.* at 320. It explained that, "when one count of a multiple-count indictment states the purported predicate offense for another count with specificity, the latter count should not be held void unless *** the prosecutor indicates affirmatively that some other offense is the predicate or there remains a realistic possibility of prejudicial uncertainty as to the predicate offense in light of facts agreed upon or placed in dispute." *Id.* at 321. Finding no evidence to the contrary, the court did not "disturb the presumption" that the predicate offense identified in count II referred to the offense sufficiently explained in count I. *Id.* at 321-22.

¶ 30 The State asserts that, pursuant to *Hall*, "the indictment read as a whole in the case at bar," including count II, which charged defendant with the offense of attempted armed robbery with a firearm, adequately informed defendant of the felony murder charge against him. We do not agree, and *Hall* is inapplicable here. The State specifically declined to prosecute defendant for all other charges, including count II, when it *nolle prosequied* those charges prior to trial. By not pursuing count II, the State cannot rely on its contents to supplement a defective count I. Contrary to the State's assertion that defendant was "clearly informed of the nature of the charge" based on the contents of count II, the State's action of dropping that charge prior to trial effectively informed defendant that it was not willing to prosecute defendant for the charges therein contained. At best, it created an ambiguity as to which of the two attempted armed robbery offenses was asserted as the predicate offense in count I. It is not relevant, as the State argues, that at trial defendant presented *some kind* of a defense to murder. Nor does it matter whether the evidence and testimony the State presented at trial was tailored to only one of the attempted armed robbery offenses, ostensibly showing the State's intent to pursue one and not the other. Arguments based on hindsight do not address whether the indictment sufficiently informed defendant of the charged offense in the first instance, and nothing that may have occurred at trial could have remedied such a fundamental deficiency.

¶ 31 Nor did the State cure the defect in the indictment through its motion *in limine*, in which the facts regarding defendant's possession of a firearm during the forcible felony were included where the State sought to prohibit defense counsel from arguing that the handgun was inoperable and, therefore, not a firearm. This motion *in limine* was not intended as notification to defendant prior to trial that the State sought to pursue the specific offense of attempted armed robbery while armed with a firearm; rather, the clear purpose of the action was to bar the defense from

making certain arguments at trial. Moreover, at the time the State presented and argued its motion *in limine*, the counts in the indictment containing the firearm allegations had not yet been *nolle prosequied.* The State's defective indictment cannot, therefore, be cured in this fashion.

¶ 32 The remaining issue, then, is whether defendant is entitled to any relief. "An indictment challenged before trial must strictly comply with the pleading requirements of section 111-3." *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 33 (citing *People v. Nash*, 173 Ill. 2d 423, 429 (1996)). "In contrast, when an indictment is attacked for the first time posttrial, a defendant must show that he was prejudiced in the preparation of his defense." *Mimes*, 2014 IL App (1st) 082747-B, ¶ 33 (citing *People v. Davis*, 217 Ill. 2d 472, 479 (2005)). Accordingly, in order to grant relief, we must find that defendant was prejudiced in the preparation of his defense by the State's failure to inform him of which attempted armed robbery offense served as the predicate offense for felony murder.

¶ 33 The offense of armed robbery may be established by evidence that defendant was either "armed with a dangerous weapon other than a firearm" or that he was "armed with a firearm." 720 ILCS 5/18-2(a)(1), (2) (West 2010). Because the indictment lacked any reference to either subsection 18-2(a)(1) or subsection 18-2(a)(2), the State was effectively free to proceed at trial under *either* theory. Indeed, the prosecution elicited testimony to establish that, during defendant's struggle with the armed guard, he *swung a metal-and-wood weapon* that resembled a double-barreled sawed-off shotgun at the guard. By leaving open the dangerous weapon theory, the State protected its ability to convict defendant even if the court found that the .22 Derringer was not a firearm.

¶ 34 As the *Hall* court explained, the constitutional requirement that an indictment apprise a defendant of the precise offense charged "protects the defendant against being forced to

speculate as to the nature or elements of the underlying offense, thus spreading his resources thin, attempting to rebut all of the possibilities, while the prosecutor merely focuses on the most promising alternative and builds his case around that." *Hall*, 96 Ill. 2d at 320. Under these circumstances, we conclude that defendant was prejudiced by the State leaving open its ability to convict him using either of the attempted armed robbery offenses as the predicate offense for felony murder.

¶ 35 We further note that that "[o]ur supreme court has held that '*** the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the proceedings leading to the conviction.' " *People v. Smith*, 2015 IL App (1st) 122306, ¶ 46 (quoting *People v. Olivera*, 164 Ill. 2d 382, 393 (1995)); see also *People v. Bailey*, 31 Ill. App. 3d 1045 (1975) (finding that the State may reindict and prosecute defendant on the same grounds on which he was previously prosecuted and convicted where the original conviction was reversed due to being founded upon a void indictment). Therefore, given the circumstances, we find it appropriate to remand this case to the circuit court.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the Cook County circuit court is reversed, and the case is remanded to the circuit court for further proceedings consistent with this opinion. As a result of our disposition of this case, we need not, and do not address defendant's remaining arguments on appeal regarding his fitness to stand trial, the sufficiency of evidence for the offense of attempted armed robbery, and notification of the 15-year firearm sentencing enhancement.

¶ 38 Reversed and remanded.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

The FEBRUARY 2011 Grand Jury of the
Circuit Court of Cook County,

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 28, 2011 at and within the County of Cook

Robert Carey

committed the offense of FIRST DEGREE MURDER

in that HE, WITHOUT LAWFUL JUSTIFICATION, COMMITTED THE OFFENSE OF ATTEMPT ARMED ROBBERY, AND DURING THE COMMISSION OF THE OFFENSE, HE SET IN MOTION A CHAIN OF EVENTS THAT CAUSED THE DEATH OF JIMMY TOWNSEND

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 9-1(a)(3) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 1
CASE NUMBER 11CR-3485
CHARGE ID CODE: 0735200

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 28, 2011 at and within the County of Cook

Robert Carey

committed the offense of ATTEMPT ARMED ROBBERY

in that HE, WITH THE INTENT TO COMMIT THE OFFENSE OF ARMED ROBBERY, DID ANY ACT, TO WIT: APPROACHED JULIO RODRIGUEZ, POINTED A FIREARM AT JULIO RODRIGUEZ, AND PULLED ON A BAG CARRIED BY JULIO RODRIGUEZ, BY THE USE OF FORCE OR BY THREATENING THE IMMINENT USE OF FORCE WHILE ARMED WITH A DANGEROUS WEAPON, TO WIT: A FIREARM, WHICH CONSTITUTED A SUBSTANTIAL STEP TOWARD THE COMMISSION OF THE OFFENSE OF ARMED ROBBERY,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 8-4(18-2(a)(2)) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 2
CASE NUMBER 11CR-3485
CHARGE ID CODE: A0012366

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 28, 2011 at and within the County of Cook

Robert Carey

committed the offense of UNLAWFUL USE OR POSSESSION OF A WEAPON BY A FELON

in that HE, KNOWINGLY POSSESSED ON OR ABOUT HIS PERSON A FIREARM, AFTER HAVING BEEN PREVIOUSLY CONVICTED OF THE FELONY OFFENSE OF ARMED ROBBERY, UNDER CASE NUMBER 89CR-18975, UNDER THE LAWS OF THE STATE OF ILLINOIS,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.1(a) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 3
CASE NUMBER 11CR-3485
CHARGE ID CODE: 0012309

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 28, 2011 at and within the County of Cook

Robert Carey

committed the offense of UNLAWFUL USE OR POSSESSION OF A WEAPON BY A FELON

in that HE, KNOWINGLY POSSESSED ON OR ABOUT HIS PERSON A FIREARM, AFTER HAVING BEEN PREVIOUSLY CONVICTED OF THE FELONY OFFENSE OF ARMED ROBBERY, UNDER CASE NUMBER 89CR-18976, UNDER THE LAWS OF THE STATE OF ILLINOIS,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.1(a) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 4
CASE NUMBER 11CR-3485
CHARGE ID CODE: 0012309

Anita Alvarez

Index to Record on Appeal

Common Law Record

Report of Proceedings (Volume 2 of 5)

Report of Proceedings (Volume 3 of 5)

Report of Proceedings (Volume 4 of 5)

Report of Proceedings (Volume 5 of 5)

* These dates are not in chronological order

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

The undersigned deposes and states that on March 7, 2017, the **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by electronic mail and by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in an envelope bearing sufficient first-class postage:

Manuel S. Serritos
Assistant Appellate Defender
Office of the State Appellate Defender, First District
203 North LaSalle Street, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

Additionally, upon its acceptance by the Court's electronic filing system, the original and twelve copies of the brief will be mailed to the Clerk of the Supreme Court of Illinois, 160 North LaSalle Street, Chicago, Illinois 60601.

/s/ Michael L. Cebula
MICHAEL L. CEBULA
Assistant Attorney General

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

AMENDED PROOF OF FILING AND SERVICE

The undersigned deposes and states that on March 7, 2017, the **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by electronic mail and by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in an envelope bearing sufficient first-class postage:

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/s/ Michael L. Cebula

MICHAEL L. CEBULA
Assistant Attorney General

***** **Electronically Filed** *****

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03/07/2017

Supreme Court Clerk

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