

2012 IL App (1st) 101546-U

SIXTH DIVISION  
NOVEMBER 9, 2012

Nos. 1-10-1546 and 1-10-1940  
(Consolidated)

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 12495
	)	
JAMES MCROY,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE R. GORDON delivered the judgment of the court.  
Justices Hall and Garcia concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Appeal number 1-10-1546 stricken; trial court did not err in refusing to give second degree murder instruction based on imperfect self-defense where evidence was insufficient to support such an instruction; judgment affirmed.
- ¶ 2 Following a jury trial, defendant James McRoy was convicted of first degree murder and sentenced to 42 years' imprisonment. On appeal, he contends that the trial court erred in refusing his request for the "imperfect self defense second degree murder" jury instruction.
- ¶ 3 The record shows that defendant and the victim, Cassandra Suggs-McRoy, were married and had two children, ages five and two years old. In April 2002, the victim and defendant separated, and the victim obtained an order of protection against defendant, which he was served

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with on April 16, 2002. The next day, the victim was found dead in her apartment with a plastic bag tied around her head. Defendant was in the bathtub, semiconscious and with cuts to his wrists and chest. Defendant was subsequently charged with, *inter alia*, first degree murder of the victim.

¶ 4 At trial, during opening statements, defense counsel argued that there had been a heated passionate argument between defendant and his wife. Counsel further argued that "[s]uddenly [the victim] was dead," and that not every homicide is first degree murder.

¶ 5 Cook County Deputy Sheriff Albert Love testified that he worked in the warrant and eviction unit, and on April 16, 2002, he received an assignment to serve the order of protection on defendant. Sheriff Love went to defendant's place of employment and personally served him there. The order provided that defendant was not to have any contact with the victim at her place of employment or residence.

¶ 6 Erma Suggs testified that the victim was her daughter, had been married to defendant for four years, and had two children with him. In April 2002, the victim and defendant separated. On April 12, 2002, the victim obtained an order of protection against defendant, and then stayed at Suggs' home at 79th and Green Streets in Chicago with her children over the weekend. At 5 p.m. on April 17, 2002, the victim went to her apartment at 8005 South Ada Street with her two-year-old child, Kyla. The victim always called Suggs to let her know she arrived home safely, but did not call this time. Suggs called the victim numerous times, but received no answer. Suggs asked her other daughter, Daphne Suggs-Flores, to check on the victim. Suggs-Flores testified that she went to the victim's home but no one answered the door so she returned home. Suggs testified that she subsequently called police and went with Suggs-Flores to the victim's home where they met the police.

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¶ 7 Che Miles, a Chicago police officer, testified that he owned the two-flat apartment building at 8005 South Ada Street. He lived in the first floor apartment with his wife, Justina Sufuentes-Miles, and their children; the victim and defendant resided in the second floor apartment. On April 17, 2002, Miles was on the back porch of his apartment building doing some work, and when he returned to his apartment, he noticed water dripping from the ceiling in his bathroom which was directly under the bathroom in the second floor apartment. He also noticed Kyla in his living room watching television with his son. Miles called the victim, but received no answer. He also knocked on her door, but did not get an answer. Miles had a key to the apartment which he tried to open the door with but it would not open.

¶ 8 Shortly thereafter, Suggs arrived with police. Miles, Sufuentes-Miles, and Suggs went with police to the staircase in the back hallway where there was a window to the second floor apartment. Sufuentes-Miles was able to crawl through the window, and opened the door for police. Miles entered with police and saw defendant in the bathtub with blood in the water which was also on the floor. In the living room, he saw the victim leaning over the couch with a bag over her head.

¶ 9 Chicago police officer James Wilson testified that he was working with his partner Officer William Sweeney on the night in question. He received an assignment to conduct a welfare check on the victim at 8 p.m. When Detective Wilson arrived at the victim's home, he met the victim's mother and Miles. They eventually gained entry to the victim's apartment. The officer saw water coming out of the bathroom, and inside the bathroom he found defendant almost completely submerged in the bathtub which was filled with bloody water. Officer Wilson pulled defendant out of the bathtub. Defendant was semiconscious, had lacerations to his wrists, and a tiny cut on his chest. The officer called an ambulance. He then went into the living room where he observed the victim on her knees with a grocery bag tied tight around her neck,

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encompassing her head, and a pillow on top of her head. Officer Sweeney removed the pillow from the victim's head and was unable to get a pulse. The victim was pronounced dead on the scene by the paramedics.

¶ 10 Detective Timothy Murphy testified that he and his partner, Detective Brian Johnson, were assigned to investigate the murder. At 9:15 p.m. on April 17, 2002, they went to the apartment in question on Ada Street. When they arrived there, Detective Murphy observed that the victim had a plastic bag over her head which was knotted. Inside the bathroom, the detective observed three 12 inch long knives in the filled bathtub which had a red stain. Detective Murphy also searched the victim's vehicle, found within it the order of protection against defendant, and inventoried that order. A certified copy of the order of protection was admitted into evidence.

¶ 11 Detective Murphy further testified that on April 18, 2002, he advised defendant of his rights and interviewed him at the hospital. Defendant told the detective that his wounds were self-inflicted. The detective met with defendant three separate times on April 18, 2002, during which he never changed his story that his wounds were self-inflicted. The detective further testified that he did not torture defendant.

¶ 12 Assistant State's Attorney (ASA) Brian Holmes testified that on April 19, 2002, he spoke with defendant after advising him of his rights. Defendant told ASA Holmes that his wounds to his wrist and chest were self-inflicted. Defendant did not tell him that he was tortured by police.

¶ 13 Dr. Mitra Kalelkar testified that he performed the autopsy of the victim who weighed 228 pounds and was five feet seven inches tall. The doctor observed numerous hemorrhages on the victim's neck, a hemorrhage on her right shoulder, and a bruise on her right knee. The doctor conducted an internal examination which revealed that the victim had a bite mark on her tongue, internal hemorrhages to her neck, eyes, larynx, and the scalp, and swelling of the brain. The doctor testified that the hemorrhages were consistent with being strangled or suffocated. The

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doctor also noted that there was a fingernail mark on the victim's neck. The doctor explained that this factor along with the other injuries to the victim were consistent with someone putting their hands around the victim's neck and strangling her. Dr. Kalelkar testified that in his opinion the victim died of asphyxiation, and strangulation.

¶ 14 Defendant testified that he was six feet tall and weighed 200 pounds, had a cocaine addiction, and received treatment in 2001 at the Salvation Army. After the six-month drug rehabilitation program, he lived with his oldest daughter, Keisha Whiteside. While he lived with Whiteside he continued to have a drug problem. In November 2001, he was hospitalized, and afterwards the victim allowed him to move back in with her. On April 16, 2002, while he was working at Walgreen's, he was served with an order of protection. He was upset that he was served at his job. That evening he could not go home because of the order of protection, so he spent the night in a motel where he drank and used cocaine. The following morning, he went home, but when he arrived there, he remembered that he could only be there with a third party present, so he rang the doorbell of his landlord but no one answered. He then rang the doorbell to his apartment several times, and the victim, after finding out it was him, buzzed him in. When he came into the apartment, he brought with him a plastic bag to carry some things into the house that he had in his car, and to remove some items from the home. He also testified that he was not planning on removing anything from the house.

¶ 15 Defendant further testified that when he entered the apartment, the victim was changing Kyla's diaper. The victim told defendant he was not supposed to be there, and he said that he knew and asked to finish changing Kyla's diaper. The victim allowed him to finish changing the baby's diaper after she shoved the diaper into his hand and then walked out of the room into the kitchen. A few minutes later, the victim called him into the kitchen telling him she needed to speak to him and that it was important. He entered the kitchen and an argument ensued over

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finances. Kyla was still in the apartment and defendant told the victim he was going to go get her, but the victim told him to leave her and ask Miles to take her, so he called and asked him to take her in.

¶ 16 Defendant further testified that he continued to argue with the victim, and she pulled a knife on him. He was "quite afraid for [his] life," and told her to put the knife down, but she swiped at his hand, nicking him. He eventually disarmed her and a "couple knives hit the floor." In the process of disarming her, he aggravated his shoulder which had been pulled out of the socket a couple weeks earlier by the victim. He started to flee in agony, but as he got to the dining room, the victim came up behind him, grabbed him with her arm and plunged a knife into his chest. He turned around in shock, and the victim proceeded to the kitchen. He then pulled the knife out of his chest, threw the knife into the bathroom, and grabbed his wife by the neck pulling and forcing her into the living room where they continued to struggle. He had his hands on the victim, who spat in his face, and then he "just totally lost it." He "was not thinking" and then "just totally blanked out." The next thing he remembers is waking up in the hospital with tubes in his chest and nose.

¶ 17 Defendant further testified that he did not believe that he strangled his wife. He denied placing a plastic bag over the victim's head and tying it around her neck. When asked if he killed his wife, he responded, "[n]o, I did not." When asked if he remembered or did not tie the bag around the victim's neck, defendant responded, "I didn't do it." Defendant also testified that he did not cut his wrists or stab himself, and that while he was hospitalized the detectives burned his nose. Defendant stated that the officers refused to allow him to have an attorney and did not advise him of his rights. Defendant denied making any statements to police and claimed that they threatened and tortured him.

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¶ 18 At the close of evidence, the defense asked the court to provide the jury an instruction on "involuntary murder," and the court responded that "the facts of this case do not support such an instruction [and that it] believe[d] the proper instruction is first degree murder and second degree" murder. Counsel then requested instructions on second degree murder under the theory of imperfect self-defense and serious provocation, and also an instruction on self-defense. The court only allowed the second degree murder instruction based on serious provocation, and noted that "[t]here was no defense -- affirmative defense filed in this matter and the evidence that [it] heard would be insufficient to support such an instruction."

¶ 19 During closing arguments, defense counsel argued, in relevant part, that the background against which the "incident" took place was passionate, and explosive. Counsel argued that the victim picked up a knife and came at defendant with it. The victim jumped on defendant's back and stabbed him in the chest with the struggle continuing into the living room. Counsel stated that defendant lost his mind, loved the victim, and "can't even say now that he killed her. He can't acknowledge the fact that he killed her." Counsel further noted that defendant testified that he did not believe police that he killed her, and that not every homicide is first degree murder. Counsel stated that the second degree murder instruction provides that it can occur under sudden and intense passion, that in this case there were two people under such intense passion, and that the incident started with the victim "exploding." Counsel then asked the jury to return a verdict of guilty of second degree murder.

¶ 20 The jury subsequently returned a verdict of guilty of first degree murder of the victim. Defendant filed a motion for a new trial, alleging, in relevant part, that the court erred in refusing to allow the jury an instruction on the self-defense prong (imperfect self-defense) of second degree murder. The trial court denied the motion.

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¶ 21 As an initial matter, we observe that two notices of appeal were filed in this case, Nos. 1-10-1546 and 1-10-1940, and were subsequently consolidated. The State, however, requests that appeal number 1-10-1546 be stricken pursuant to Supreme Court Rule 606(b) (eff. Mar. 20, 2009). That rule provides, in relevant part, that the notice of appeal must be filed within 30 days after entry of the final judgment appealed from, and that a notice of appeal filed before disposition of a post-trial motion shall be stricken by the trial court. Ill. S. Ct. R. 606(b); *People v. Serio*, 357 Ill. App. 3d 806, 816 (2005). We observe that defendant was sentenced on March 30, 2010, and filed a motion to reconsider sentence on April 27, 2010. Defendant executed a *pro se* notice of appeal on April 27, 2010, before the trial court denied his motion to reconsider on May 4, 2010, and, accordingly, we strike that appeal number 1-10-1546. We further observe that appellate counsel filed a timely notice of appeal on May 27, 2010, appeal number 1-10-1940, providing us with jurisdiction over this appeal. Ill. S. Ct. R. 606(b); *People v. Stanford*, 2011 IL App (2d) 090420, ¶19.

¶ 22 On appeal, defendant maintains that the trial court erred in refusing to give the jury an instruction on "imperfect self-defense second degree murder." He claims that there was at least some evidence that he actually, though unreasonably, believed in the need to use self-defense against the victim after she allegedly stabbed him in the chest.

¶ 23 A person commits second degree murder based on the mitigating factor of imperfect self-defense when he commits the offense of first degree murder, and he believes, at the time of the murder, that the circumstances are such that they justify the use of deadly force under the principles of self-defense, but defendant's belief is unreasonable. *People v. Blue*, 343 Ill. App. 3d 927, 936 (2003). An instruction on second degree murder based on imperfect self-defense should be given where there is any evidence presented showing that defendant had a subjective belief that the use of force was necessary. *People v. Lockett*, 82 Ill. 2d 546, 552 (1980).

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Defendant is entitled to a jury instruction on a defense theory if there is at least slight evidence in the record supporting it. *People v. Davis*, 213 Ill. 2d 459, 478 (2004). The issue of whether there was sufficient evidence in the record to support the giving of a jury instruction is a question of law which we review *de novo*. *People v. Washington*, 2012 IL 110283, ¶19.

¶ 24 Here, defendant maintains that the trial court should have provided the jury an instruction on second degree murder based on imperfect self-defense where there was some evidence that he unreasonably believed in the need to use self-defense against the victim after she attacked him and stabbed him in the chest. We observe, however, that defendant testified at trial that he blacked out during the murder. As stated above, second degree murder based on imperfect self-defense should only be given where defendant presents some evidence showing that he had a "subjective belief" that the use of force was necessary. *Lockett*, 82 Ill. 2d at 552. Here, defendant did not present any evidence of a subjective belief where he claimed he blacked out during the murder. Raising the issue of self-defense, requires as its *sine qua non* that defendant had admitted the killing as the basis for a "reasonable belief" that the exertion of force was necessary. *People v. Lahori*, 13 Ill. App. 3d 572, 577 (1973). Defendant, however, maintained at trial that he blacked out during the killing, and, therefore, there can be no subjective belief, whether reasonable or unreasonable. Accordingly, the trial court did not err in refusing to give the jury a second degree murder instruction based on imperfect self-defense.

¶ 25 In reaching this conclusion, we have considered *People v. Robinson*, 189 Ill. App. 3d 323 (1989), and *People v. Bedoya*, 288 Ill. App. 3d 226 (1997), cited by defendant for his contention that a defendant may receive a second degree murder instruction even where his primary defense is that he did not commit the murder or it was accidental, and find them distinguishable. In *Robinson*, this court explained that where there is evidence of serious provocation and sudden intense passion which, if believed by the jury, would reduce the killing to voluntary manslaughter

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rather than murder, a voluntary manslaughter instruction based on provocation must be given, and that this is so even if the defense is that defendant did not commit the murder. *Robinson*, 189 Ill. App. 3d at 349. This court then found that the trial court committed reversible error in failing to give the voluntary manslaughter instruction based on serious provocation in its case where two knives were recovered from the scene, with one found under the victim, and the neighbors testified that they heard a heated, physical argument with furniture being overturned in the victim's apartment immediately prior to the murder. *Robinson*, 189 Ill. App. 3d at 349-51.

¶ 26 We find *Robinson* distinguishable because in that case the issue was whether defendant should have been granted a voluntary manslaughter (now second degree murder) instruction based on serious provocation and not imperfect self-defense. Moreover, in this case, unlike *Robinson*, defendant maintained that he blacked out during the murder, and as such, could not have any subjective belief (*Lahori*, 13 Ill. App. 3d at 577), whether it be reasonable or unreasonable.

¶ 27 In *Bedoya*, 288 Ill. App. 3d at 237-38, the State argued on appeal that the trial court erred in instructing the jury on self-defense where defendant had alleged that the victim initially pulled out a gun that went off accidentally during a life and death struggle. This court first found that the State's objection was late, and that, "[b]esides," there was no error because where there is evidence of self-defense in addition to an accident, defendant had the right to rely on an accident theory as to the ultimate injury *and* self-defense theory as to his preceding acts. (Emphasis in original.) *Bedoya*, 288 Ill. App. 3d at 237, citing *People v. Robinson*, 163 Ill. App. 3d 754, 768 (1987). Here, unlike in *Bedoya*, defendant did not allege that the victim was accidentally stabbed but, rather, that defendant blacked out during the murder.

¶ 28 In any event, even if there was error, it was harmless. Instructional errors are harmless if it is demonstrated that the trial would not have been different had the jury been properly

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instructed. *Washington*, ¶60. Here, the evidence against defendant was overwhelming such that the result of the trial would not have been different had the jury been given the second degree murder instruction based on imperfect self-defense. *People v. Bui*, 381 Ill. App. 3d 397, 426 (2008). The record specifically shows that an order of protection was issued against defendant, but, despite that order, he went to the victim's home where police later discovered the victim in the living room with a bag over her head along with a pillow, and defendant in the bathroom with several knives and wounds to his wrists and chest. Detective Murphy testified that defendant told him that his wounds were self-inflicted, and that he met with defendant on three separate occasions during which defendant never once changed his story that his wounds were self-inflicted. ASA Holmes also testified that defendant told him that his wounds were self-inflicted. In addition, Officer Wilson testified that the wound to defendant's chest was a small cut. This evidence dispels any notion that the victim went after defendant and stabbed him, and that he, in turn, committed the murder based on an unreasonable belief that the use of force against the victim was necessary. Rather, the evidence presented shows that defendant strangled the victim with a plastic bag around her head, and then self-inflicted his wounds. Therefore, the result of the trial would not have been different had the jury been instructed on second degree murder based on imperfect self-defense. *Washington*, ¶60.

¶ 29 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.