2012 IL App (1st) 102195-U

FOURTH DIVISION
August 2, 2012

No. 1-10-2195

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).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 08 CR 16453
	)	
ADRIAN GOMEZ,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD*: The circuit court did not err when it *sua sponte* tendered jury instructions on second degree murder based on provocation over both defendant's and the State's objections, where there was evidence presented that the victim struck and injured defendant.

¶ 2 Following a jury trial, defendant Adrian Gomez was convicted of first degree murder and sentenced to 48 years in prison. On appeal, defendant contends that the trial court erred in

tendering second degree murder instructions over his objection when they were not supported by the evidence and contradicted his theory of the case. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with the murder of Juan Torres in a shooting that occurred on June 20, 2008. At trial, Emilia Roman testified that on the evening of June 20, 2008, she and Torres were sitting in her parked van on the southeast corner of Campbell and Potomac in Chicago. Roman had known Torres for 15 years and they had been in a relationship for three months. When Torres got out of the van, Roman followed to see where he was going. She watched him cross Potomac and start talking with three people, including defendant. She then saw Torres hit defendant, who fell back and then stood up and ran down Potomac.

¶ 5 After defendant ran away, Torres started to cross Potomac toward where Roman was standing. As he was crossing the street, Roman saw defendant and Gilberto Vargas coming down Potomac in a van. The van swerved to hit Torres, but Torres was able to jump onto the sidewalk. The van turned down Campbell and stopped, and Roman heard Vargas tell Torres he had something for him and would be back, and then Vargas left. Torres asked Roman to leave the area so she went to her sister-in-law's house a few blocks away, but stayed less than two minutes. When she returned, Torres was being taken away in an ambulance.

¶ 6 Javier Santiago testified that at approximately 6 p.m. on June 20, 2008, he received a phone call from defendant that lasted 2 to 3 minutes. Santiago had known defendant for approximately six months. During the phone call, defendant told him he had "messed up" and

"you do your bed, you have to lay on it." Santiago testified that he did not ask defendant what he meant by "messed up." Santiago denied telling Assistant State's Attorney Eric Sauceda on July 29, 2008, that defendant had said he "fucked up by shooting Beetle Juice." Santiago also denied that initials appearing next to corrections on Sauceda's handwritten statement were his own, although he testified that he did sign the bottom of each page of the statement.

¶ 7 Jose Vasquez, the defendant's brother, testified that on June 20, 2008, at approximately 6:30 or 7 p.m., he was walking by himself when Vargas pulled up next to him in a van. Vasquez climbed into the passenger side of the van and they drove to Campbell just south of Potomac. There they each got out of the van with a baseball bat and Vasquez confronted Torres about "what's been going on" because Torres had been "running around beating up little kids." Vasquez testified that the confrontation had nothing to do with the earlier altercation between Torres and defendant. Vasquez saw Torres rush at Vargas and try to take the bat from him, but Torres was unsuccessful. Vasquez and Vargas ran back to the van when they saw 20 people running toward them, including Walberto Martinez, who also had a baseball bat. As they were driving away, a stone thrown through the open passenger window hit Vargas on the knee and the back window "exploded."

¶ 8 Vasquez denied telling Assistant State's Attorney Eric Sauceda on July 29, 2008, that he had wanted to fight Torres because Torres had hit defendant. He testified that a detective told him that if he "did not sign those statements that they wrote up, [he] was going to get charged with drugs," and that "they added what they wanted to add" to the statement.

¶ 9 Officer Gonzalez testified that he received an assignment at approximately 7 p.m. on July

28, 2008, to take defendant into custody. Gonzalez and a team of officers took defendant into custody without incident, and then he and his partner Officer Celio transported defendant to the 25th District where he was turned over to the detective division. Gonzalez testified that he did not speak to defendant.

¶ 10 Walberto Martinez testified that right before 7 p.m. on June 20, 2008, he was at Campbell and Potomac to see a couple of friends, including Torres. Martinez had known Torres for approximately 12 years. He said shortly after he arrived there was a commotion, and he observed defendant on the ground and assumed Torres had hit him. Defendant had a "busted mouth" and took off running toward Western. Martinez had known defendant for about two years.

¶ 11 After defendant ran away, Torres crossed Campbell and Martinez walked the other way to talk to friends. Martinez then saw a van coming down Potomac, which swerved and tried to hit Torres, but Torres was on the sidewalk. The van left the intersection, went around the block, and came back. At that point, Martinez observed Vasquez and Vargas jump out of the van with baseball bats and start swinging at Torres. Martinez ran to his own car two blocks away to grab a baseball bat and then ran toward them, but as he was approaching Vasquez and Vargas ran back to the van. Martinez threw his bat through the back window as the van drove away, and saw Torres throw a large brick at the window.

¶ 12 After the van left, Martinez said he and Torres started walking north on Campbell, when someone screamed to "watch that little nigger." He testified that he looked back and saw defendant running toward them on Potomac with his hands in his pockets. When defendant got closer to the corner of Potomac and Campbell, Martinez saw defendant pull his hands out of his

pockets and saw a black handgun in his hands. When defendant reached the corner, about 8 to 10 feet from where Martinez was standing, he fired two rounds. Martinez said defendant was shooting over his right shoulder, so he looked back to see what defendant was shooting at and saw Torres trying to hide behind cars. Defendant then passed him and shot another two rounds. Martinez testified that he did not know where defendant went after that because he went to help Torres. He saw a bullet hole in Torres's stomach, a scar on his cheek, and that he was bleeding through his nose. He checked Torres's pulse and called 911. When the police arrived, Martinez told them that he "didn't know nothing" and "didn't want to get involved in nothing." He testified that he said that to the police because he "didn't want to put [his] kids through this."

¶ 13 Simon Chang, a staff sergeant on active duty in the military, testified that between 6:30 and 7:50 p.m. on June 20, 2008, he left his girlfriend's residence near Campbell and Potomac and got in his car to leave for the gym. He heard screeching tires and saw a brown van in his rearview mirror taking off south on Campbell. He observed a man throw a baseball bat at the van, shattering the windshield, and another throw "a rock of some sort." Chang exited his car to see what was going on, but at that point the individuals were just talking, so he got back in the car.

¶ 14 Chang then saw a young man in his rearview mirror appear out of an alleyway between Artesian and Campbell and run toward him on Potomac. Chang identified the young man in court as the defendant. He said defendant's arms were fully extended and he was holding a small firearm. When defendant reached the corner of Campbell and Potomac, he raised his arms and fired one round. Chang got out of his car to see what was going on, thinking the gun was "some

kind of toy" rather than a real firearm. When Chang reached the corner of Campbell and Potomac, he saw defendant, who was about 25 feet away, fire two or three times until Torres was down. Before falling down, Torres was between cars trying to get away and bleeding heavily around the face. Chang saw defendant flee northbound on Campbell.

¶ 15 At that point, Chang walked toward Torres to see if he could help, but his girlfriend yelled out the window to him to leave the area. He also observed that everyone was going back into their houses, so he decided to leave. He went to the gym, and did not call the police that night. He left the next day for a two-day training exercise, and when he returned to Chicago, he went to the police station, where he identified defendant as the shooter from a series of six photographs. Chang testified that he had seen defendant before in the couple of months he had been around the area.

¶ 16 Detective Folino testified that on June 20, 2008, he was assigned to participate in the investigation of the murder of Torres. At the scene he observed shell casings, a bullet hole in a vehicle, and a pooling of blood the size of a basketball directly in the middle of Campbell. Torres's body was not there when he arrived. Detective Folino also observed an aluminum baseball bat on the parkway on Campbell, and directly south of Potomac on Campbell a relatively large area of broken glass covering most of the center area of the street.

¶ 17 The parties stipulated that, if called as a witness, Dr. Michelle Jorden, a licensed medical doctor in the State of Illinois, would testify that she performed an autopsy on the body of Torres. She would further testify that she observed three gunshot wounds of entry into the body; one through and through the right cheek, one that penetrated the left back of the head, and one that

penetrated the abdomen. She would also testify that there was no evidence of close range firing of any of the three gunshots, which occurs when a firearm is discharged at a distance of 18 inches or less. Finally, she would testify that in her opinion Torres died as a result of multiple gunshot wounds, and the manner of his death was a homicide.

¶ 18 The State then called Detective Folino again, who testified that he spoke to Javier Santiago on two occasions. The first occasion was on June 22, 2008, at Santiago's residence, where Santiago told Detective Folino that defendant had called him on June 20, 2008, and told him Torres had punched him in the face and he had "fucked up and didn't know what to do." Defendant also told Santiago he "did something bad to Torres and he could not speak about it on the telephone." Detective Folino testified that the second occasion he spoke to Santiago was on July 29, 2008, at the Internal Affairs Division of the Cook County Department of Corrections. Assistant State's Attorney Eric Sauceda and Detective Folino's partner Detective Tim McDermott were also present. Santiago was in custody at that point and had a new gun charge, but Detective Folino testified that no promises or threats were made with regard to the gun charge in exchange for him giving a statement. He also testified that after Sauceda wrote down the statement, Sauceda read it aloud while Santiago followed along and corrected and initialed any inaccuracies, and that Santiago signed every page acknowledging that the statement was accurate.

¶ 19 Detective Folino also testified that on that same date, July 29, 2008, he had an opportunity to speak with Jose Vasquez at the Area 5 police headquarters. He stated that he and Detective McDermott were alone with Vasquez for about 15 to 20 minutes before Assistant

State's Attorney Eric Sauceda arrived, but neither of them ever made any threats of charging Vasquez with drug possession if he was uncooperative. He also testified that the handwritten statement was taken in the same manner as Santiago's.

¶ 20 Marc Pomerance testified that he was employed by the Illinois State Police, Division of Forensic Sciences, and had specialized training in the field of firearms and tool mark identification. He testified that he received in sealed condition two fired bullets, two fired cartridge cases, two fired bullet jacket fragments and one metal fragment. He was able to determine from the markings left by the barrel of the firearm that the two fired bullets and one of the fired bullet jacket fragments were fired from the same firearm. The findings on the second bullet jacket fragment were inconclusive, and the metal fragment was unsuitable because it did not have any marks on it left by the firearm. He also found that the two cartridge cases were fired from the same firearm, but said without the firearm he could not determine if the two cartridge cases and two fired bullets were fired from the same firearm. On cross-examination, he said he could not say for sure whether the bullets were from a 0.38-caliber revolver or semi-automatic firearm, but that they were consistent with the type of bullet found in a 380 auto caliber cartridge typical of a semi-automatic firearm.

¶ 21 Assistant State's Attorney Eric Sauceda testified that on July 29, 2008, he was part of the Felony Review Unit and received an assignment to go to Area 5 where there was a witness named Jose Vasquez. Sauceda interviewed Vasquez in an interview room at Area 5 with Detective Folino present. Sauceda testified that after an initial 20 minute interview, he conducted an additional interview and wrote a summary of what Vasquez told him. At the

conclusion of the second interview, Vasquez reviewed the entire statement and initialed any changes. Sauceda testified that Vasquez did not indicate in any way that he had been threatened, forced, or promised something in exchange for his cooperation.

¶ 22 Sauceda further testified that later the same day he interviewed Javier Santiago, who was in custody at the Cook County Correctional Center. Sauceda said there was an initial interview that lasted approximately 20 to 25 minutes, and then a second interview where he took down Santiago's statement. After the statement was taken, Santiago read the first page aloud to confirm he could read and then reviewed every page. Sauceda testified that he also took the statement of Gilberto Vargas and met with Walberto Martinez and Simon Chang.

¶ 23 At that point, the State rested its case in chief. Outside the presence of the jury, defense counsel moved for a directed verdict on the basis that the State had not met its burden of proof. The trial court denied the motion. The trial court then confirmed that defense counsel was not asking for second degree murder instructions, and asked the State for its position on second degree based on provocation. The State answered that "there was a sufficient period of time for a cooling off period that would not allow this Defendant to afford himself of a second degree." The trial court also asked defendant if he understood the court could give a lesser included offense of second degree murder instruction, and defendant confirmed that he was not asking for one. At that time, the trial court said it believed there was "sufficient evidence to give a second degree murder instruction with regard to provocation" and that it was doing so *sua sponte* "even though the defense objects and even though the State objects."

¶ 24 In the presence of the jury, the parties stipulated that defendant had a tattoo of the word

Campbell on his right hand, and Potomac on his left hand. The defense then rested its case.

¶ 25The jury found defendant guilty of first degree murder, and that he personally discharged a firearm during the commission of that offense. Defendant timely filed a motion for a new trial, claiming the "[c]ourt erred when it sua sponte entered Second Degree Murder jury instructions, over defendant's objection."

¶ 26 At the next hearing, defense counsel Michelle Gonzalez asked for leave to withdraw and Raymond Prusak asked for leave to file his appearance on behalf of the defendant. The court granted Prusak leave to amend the previously filed motion for a new trial. The amended motion claimed the defendant was denied effective assistance of counsel and did not mention the second degree murder instruction. At the hearing, defense counsel said to the judge, "You were the one that suggested a second degree murder instruction because you knew that this jury should have been allowed to hear that. And in your wisdom you granted it to him." He also said, "[Trial counsel] would have had at least an option of a mistaken belief of self-defense or maybe the instruction that the Court gave." Defendant's motion for a new trial was denied. Following a sentencing hearing, defendant was sentenced to 48 years in prison. Defendant's motion to reconsider sentence was denied. Defendant timely filed this appeal.

¶ 27 ANALYSIS

¶ 28 Defendant contends the trial court erred when it tendered jury instructions on second degree murder over both his and the State's objections. Issues raised on appeal are preserved for review by both objecting during trial *and* filing a written posttrial motion raising the alleged error. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defense counsel objected to the alleged

error at trial and raised it in defendant's posttrial motion. However, the amended posttrial motion filed by defendant's subsequent attorney did not include this claim. Defendant argues that if he failed to preserve this issue for appeal, his conviction should be reversed under the second prong of the plain error doctrine. The State argues defendant has waived this claim because of statements made by Raymond Prusak during the hearing on the motion for a new trial; however, Prusak's chief argument was that the defense strategy should have been self-defense or second degree murder based on a mistaken belief of self-defense, not provocation.

¶ 29 The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, before conducting a plain error analysis we must determine whether an error in fact occurred. *People v. Sims*, 192 Ill. 2d 592, 621 (2000).

¶ 30 Instructions convey to the jury the correct principles of law applicable to the evidence presented at trial so that the jury may arrive at the correct conclusion according to the law and the evidence. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). The proper standard of review is whether the trial court abused its discretion. *Mohr*, 228 Ill. 2d at 66. "There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to determine which issues are raised by the evidence and whether an

instruction should be given." *Id.* Instructions not supported by either the evidence or the law should not be given. *Id.* "[T]he trial court has the right to instruct the jury *sua sponte* on a lesser-included offense, even where the State does not request such an instruction and the defendant objects." *People v. Knaff*, 196 Ill. 2d 460, 473 (2001). " 'It is only where the evidence establishes that the defendant is guilty of murder or is not guilty, as for example in cases in which the defense is alibi, or mistaken identity, that a defendant may be said to have a right not to have the jury charged as to lesser included offenses.' " *People v. Garcia*, 188 Ill. 2d 265, 273 (1999) (quoting *People v. Taylor*, 36 Ill. 2d 483, 489 (1967)).

¶ 31 Defendant acknowledges that the trial court had the authority to tender lesser-included offense instructions over his objections, but argues that the instructions were not supported by the evidence. Defendant first contends that there was insufficient evidence that he was acting under a "sudden and intense passion" as a result of the provocation. Second degree murder is a lesser mitigated offense of first degree murder. *Mohr*, 228 Ill. 2d at 66. The elements of first and second degree murder are identical, but second degree murder involves the presence of a mitigating factor, such as serious provocation. *Id.* The categories of provocation recognized in Illinois are (1) substantial physical injury or substantial physical assault; (2) mutual combat; (3) illegal arrest; and (4) adultery. *People v. Garcia*, 165 Ill. 2d 409, 429 (1995).

¶ 32 In the case *sub judice*, Roman testified that she saw Torres strike defendant, knocking him down. Martinez testified that as a result of being struck, defendant had a "busted mouth." Defendant then stood up and ran away, and, according to the testimony of Martinez, returned only minutes later with a gun. To justify an instruction on a lesser-included offense, there need

only be any, some, slight, or very slight evidence which tends to prove the lesser offense rather than the greater. *Garcia*, 188 Ill. 2d at 284 (citing *People v. Novak*, 163 Ill. 2d 93, 108-09 (1994)). Torres striking the defendant and causing him to have a "busted mouth" is at least "very slight" evidence of substantial physical injury or substantial physical assault which justifies the trial court's decision to tender instructions on second degree murder based on provocation. Although the strategy pursued by defendant at trial was mistaken identity, the evidence did not clearly establish that defendant was either guilty of murder or not guilty, and therefore he did not have a right to keep the jury from being instructed as to the lesser-included offense. This is because " 'the State has no legitimate interest in obtaining a conviction for a crime greater than that warranted by the evidence, but neither does the defendant have a right to an acquittal when the evidence, although not sufficient to establish the greater crime, is sufficient to establish a lesser included offense.' " *Id*. at 282 (quoting *State v. Howell*, 649 P.2d 91, 95 (Utah 1982)).

¶ 33 Defendant further contends that under the second degree murder statute there must also be evidence that he "negligently or accidentally" killed Torres in order to justify the instruction. This argument has no merit. Section 9-2 of the Criminal Code of 1961 provides, in pertinent part, that a person commits second degree murder if "he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill but he negligently or accidentally causes the death of the individual killed." 720 ILCS 5/9-2(a)(1) (West 2008). This language clearly indicates that the defendant's actions must be the result of serious provocation by either the victim, or by someone else who the defendant attempts to kill and, in the process, he negligently or accidentally kills an individual who did not

provoke him. Defendant was charged with killing Torres, the perpetrator of the serious provocation. Evidence that the victim was negligently or accidentally killed would only have been relevant here if someone other than Torres had been the victim.

¶ 34 Defendant cites to *People v. Pugh*, 187 Ill. App. 3d 860, 868 (1989), in which the defendant claimed to have been struck three times during a fight with the victim, for the proposition that being struck once would not be enough evidence to support a second degree murder instruction based on provocation. However, in *Pugh* the court was being asked to reduce the defendant's conviction to manslaughter because the defendant claimed he and the victim had been in mutual combat. *Id.* The amount of evidence necessary for a reviewing court to reduce a sentence from murder to manslaughter is not the same as the amount of evidence necessary for the trial court to tender a jury instruction, and therefore defendant's reliance on *Pugh* is misguided. See also *People v. Thompson*, 354 Ill. App. 3d 579, 589-90 (finding that one punch was not enough provocation to reduce conviction for first degree murder to second degree murder).

¶ 35 Defendant also cites to *People v. Medina,* 221 Ill. 2d 394 (2006), and *People v. Brocksmith*, 162 Ill.2d 224 (1994), for the proposition that tendering instructions on second degree murder was tantamount to defendant admitting to the jury that he killed Torres. However, these cases simply stand for the proposition that it is the defendant's decision, rather than defense counsel's decision, whether to tender a lesser-included offense instruction. This is because "the defendant is arguing, in essence stipulating, that the evidence is such that a jury could rationally convict him of the lesser-included offense, and he is exposing himself to potential criminal

liability, which he otherwise might avoid." *Medina*, 221 Ill. 2d at 408. However, just because a defendant tenders a lesser-included offense instruction does not mean he is entitled to one, *id.* at 410, and the defendant is still subject to the trial court's authority to submit instructions to the jury *sua sponte. Garcia*, 188 Ill. 2d at 278-79. Defendant further cites to *Mohr*, but the facts in *Mohr* are easily distinguishable from this case. In *Mohr,* the State charged the defendant with only second degree murder and told the jury it was conceding the issue of provocation. *Mohr,* 228 Ill. 2d at 62-63, 66. This, combined with an instruction tendered by the trial court defining provocation, effectively operated to relieve the State of its burden to prove an altercation occurred and could have led the jurors to speculate about the presence of provocation despite no evidence of provocation being presented. *Id.* at 68.

¶ 36 Evidence in the record that Torres struck the defendant, causing him to have a "busted mouth," was enough to justify the trial court's decision to *sua sponte* tender second degree murder instructions based on provocation. Therefore, the trial court did not abuse its discretion in tendering this instruction and no error occurred, making a plain error analysis unnecessary. For the reasons stated, we affirm the judgment of the circuit court.

¶ 37 Affirmed.