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2013 IL App (3d) 100761-U

Order filed February 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-10-0761
) Circuit No. 09-CF-1233
)
WILLIAM BROWN, JR.,) Honorable
) Edward Burmila, Jr.,
Defendant-Appellant.) Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright and Justice McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* It was not plain error for the trial court to give the jury an aggressor self-defense instruction.
- ¶ 2 Following a jury trial, defendant, William Brown, Jr., was convicted of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2008)) and sentenced to 24 months' probation. Defendant appeals, arguing that the trial court abused its discretion by giving the jury an aggressor self-defense instruction that was not supported by any evidence. We affirm.

¶ 3 **FACTS**

¶ 4 Defendant was charged with one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2008)). The indictment alleged that defendant had knowingly and without legal justification made physical contact of an insulting or provoking nature with Q.R., a family or household member, by grabbing her about the neck. The cause proceeded to a jury trial.

¶ 5 At trial, Q.R. testified that she lived part time with her mother, Q.B., and her stepfather, defendant. One of her chores while at their house was to clean the kitchen. On March 15, 2009, Q.R. failed to clean the kitchen. Later that day, she heard defendant and her mother arguing in the master bedroom because the kitchen had not been cleaned. During the argument, Q.R. heard defendant call her mother a "stupid-assed bitch[.]" Q.R. informed defendant that she was tired of him talking to her mother in that manner. Defendant and Q.R. approached each other and began to argue. Q.B. stepped between Q.R. and defendant and began pushing Q.R. from the master bedroom and into Q.R.'s bedroom. Q.B. tried to calm Q.R. down, but she continued to argue with defendant. Eventually, Q.B. grabbed Q.R. by the shirt and pushed her. Q.R. then pushed her mother down onto the bed. Defendant grabbed Q.R. by her shirt and pushed her.

¶ 6 At some point during the conflict, two men entered the residence. Q.R. stated they entered after hearing a lot of noise and screaming coming from the house. After the men approached Q.R., she informed both men that defendant had choked her. She also repeated the allegation in writing. At trial, however, Q.R. stated that the force defendant used was more of a grab than a choke.

¶ 7 Cook County Deputy Chief Probation Officer Philippe Loizon testified that he was outside of defendant's residence on March 15, 2009, when he heard screaming and loud noises coming from inside. At one point he heard an individual scream, "stop choking me." He then

entered the residence and made his way upstairs, where he saw defendant with his hands around Q.R.'s neck.

¶ 8 Will County Sheriff's Deputy James Eiden testified that he spoke with Q.R. and Q.B. right after the incident. Q.R. told him that her mother and defendant had gotten into an argument, and when Q.R. tried to separate them, defendant put his hands around her neck and choked her.

¶ 9 Q.B. testified for the defense. She stated that she and defendant were arguing on March 15 and that Q.R. tried to intervene. At one point, Q.R. pushed her down. Thereafter, defendant grabbed the collar of Q.R.'s shirt and said that he was not going to let her hit her mother. Q.B. believed that defendant was trying to defend her from Q.R.

¶ 10 In rebuttal, Eiden testified that Q.B. had never previously said that Q.R. pushed her or that defendant's actions towards Q.R. were an attempt to protect her. Further, when initially asked what had happened, Q.B. stated that defendant had put his hands around Q.R.'s neck, not on the collar of her shirt.

¶ 11 Following the close of the evidence, the trial court held a jury instruction conference. After defendant requested an instruction regarding the justifiable use of force in defense of another person, the court suggested that the jury be given the following instruction:

"A person who initially provokes the use of force against himself is justified in the use of force only if in good faith, he withdraws from physical contact with the other person and indicates clearly to the other person that he desires to withdraw and terminate the use of force, but the other person continues or resumes the use of

force." Illinois Pattern Jury Instructions, Criminal, No. 24-25.09
(4th ed. 2000).

¶ 12 The court thought this instruction was appropriate because the facts in the case could lead the jury to conclude that the situation had subsided to some degree before flaring up again when Q.B. was pushed onto the bed. The prosecutor eventually agreed with the court, and the instruction was given to the jury over defense counsel's objection.

¶ 13 The jury found defendant guilty of domestic battery, and he was sentenced to 24 months' probation. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 Defendant argues that the trial court abused its discretion by giving the jury an aggressor self-defense instruction that defendant claims was not supported by any evidence. Initially, we note that defendant failed to raise the issue in his posttrial motion, and therefore the issue was forfeited and cannot be considered on appeal absent plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). The plain-error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). In the first instance, the defendant must prove that the error was prejudicial, *i.e.*, that the error alone severely threatened to tip the scales of justice against him. *Id.* In the second instance, the defendant must prove that the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Id.* However, before we can determine whether an error fits under either of the above categories, we must first determine whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 16 It is within the discretion of the trial court to determine which issues have been raised by the evidence and whether a particular instruction should be given to the jury. *People v. Mohr*, 228 Ill. 2d 53 (2008). However, there must be some evidence in the record to justify an instruction. *Id.* We will not disturb a trial court's decision regarding jury instructions unless it is clear that the court abused its discretion. *Id.*

¶ 17 Here, the trial court presented the jury with the aggressor self-defense instruction, which requires a person who has initially provoked the use of force against himself to exhaust reasonable means of escape before responding to the force used against him. Illinois Pattern Jury Instructions, Criminal, No. 24-25.09 (4th ed. 2000). Our review of the record reveals that Q.R. injected herself into a dispute between defendant and Q.B. Further, the evidence established that defendant did not initiate any physical contact; instead, physical contact was initiated by Q.R. and Q.B. Defendant only made physical contact after Q.R. pushed Q.B. There was no indication force was used against defendant. Therefore, we find that there was no evidence that defendant initially provoked the use of force against himself, and it was error for the trial court to include the aggressor self-defense instruction.

¶ 18 Having found error, the next step is to determine whether the evidence was close, regardless of the seriousness of the error, or the error was serious, regardless of the closeness of the evidence. Initially, we find that the evidence was not close. A person is justified in the use of force against another in defense of a third party only when they reasonably believe that such conduct is necessary to defend the other against an imminent use of unlawful force. 720 ILCS 5/7-1 (West 2008). Here, the evidence clearly showed that the force defendant used against Q.R. was not meant to stop an attack, but as retaliation against Q.R. Defendant choked Q.R. after she

pushed Q.B. There was no evidence that Q.R. was continuing her attack on Q.B. when defendant choked her. Therefore, we find that the evidence overwhelmingly established that defendant choked Q.R. in retaliation and that his use of force was not legally justified.

¶ 19 We note also that even if one concludes that the evidence is closely balanced, we cannot conclude that the instruction prejudiced defendant. We find nothing in this instruction that makes it more likely that the jury would have voted to convict.

¶ 20 Having concluded that the evidence was not close, we must next determine whether the error was serious enough to constitute plain error under the second prong of the doctrine. The supreme court has equated the second prong of plain-error review with structural error, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *People v. Thompson*, 238 Ill. 2d 598 (2010). The supreme court has found structural error to exist in only a limited class of cases, such as a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Thompson*, 238 Ill. 2d 598. Here, the court's error is not analogous to the limited number of cases where the supreme court has found structural error; therefore, it does not constitute plain error under the second prong of the doctrine.

¶ 21 Having concluded that the evidence was not close and the error not structural, we find that plain error has not occurred. Therefore, defendant has forfeited review of the issue.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Will County is affirmed.

¶ 24 Affirmed.