2015 IL App (2d) 131176-U
No. 2-13-1176
Order filed October 2, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAYMOND GITCHEL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-3548 Honorable Ronald J. White, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in refusing to instruct the jury on the affirmative defense of defense of dwelling, which was inapplicable given that the victim's entry into defendant's dwelling was lawful.

¶ 2 After a jury trial, defendant, Raymond Gitchel, was acquitted of murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) but convicted of involuntary manslaughter (720 ILCS 5/9-3(a) (West 2010)) and sentenced to five years in prison. On appeal, he argues that the trial court erred in refusing to instruct the jury on the affirmative defense of use of force in defense of dwelling (see

720 ILCS 5/7-2 (West 2010); Illinois Pattern Jury Instructions, Criminal, No. 24-25.07 (4th ed. 2000)). We affirm.

¶ 3 Early in the morning of December 19, 2011, at defendant's house at 1802 S. Fourth Street in Rockford, defendant stabbed Terry Johnson in the thigh with a knife. Johnson walked out of the building but died a short time later. We summarize the pertinent trial evidence and proceedings.

¶ 4 Rockford police detective Timothy Stec testified as follows. On December 19, 2011, at about 9:15 a.m., he was dispatched to 1802 S. Fourth Street. There, he saw Johnson, lying dead on his back in the yard. The back of Johnson's jeans were covered with what appeared to be blood. One shoe and several of his possessions were scattered about, but no weapons were found in the yard. Defendant entered the yard and told Stec that he had been unaware of the body until the police arrived. Stec also encountered Edward Last, spoke with him there, then took him to the police station to talk to detectives. Patrol officer Apostolos Sarantopoulos testified that on the morning of December 19, 2011, he spoke to several people, including Kimberly Tober, whom he then drove to the police station. Tober told Sarantopoulos that she had stopped by 1802 S. Fourth at about 10:45 p.m. Defendant was there with Last and Johnson. Things were "fine," and she left after about 15 minutes.

¶ 5 Last testified on direct examination as follows. On December 18, 2011, he had been residing with defendant at 1802 S. Fourth for about two weeks. That evening, at about 11:30 p.m., when both of them were in the bedroom of the house, he heard persistent knocking on the back door. The door locked from the inside, as did the front door. Defendant told Last to get off the couch and answer the door. Last and defendant knew that the person outside was

Johnson, their acquaintance. Johnson said that he had something for defendant. Defendant got out of his bed and had Johnson go around to the front door, where he let him in.

¶ 6 Last testified that Johnson entered with a bag of cocaine. All three men smoked some. Last returned to the couch; Johnson sat on the chair by the computer in the corner of the room; and defendant lay down on his bed. Johnson stopped sharing the cocaine and smoked more while playing with his phone. There was a knock on the door. Somebody (not Last) let in Heidi Hoffman and Tober. Hoffman had a bag of heroin and wanted to sell it or trade it for cocaine. Only Johnson showed any interest, so the women left to try to move the heroin elsewhere. Last was still on the couch, defendant was still in his bed, and Johnson was still sitting by the computer. Johnson was not mad at anyone and no one had asked him to leave.

¶ 7 Last testified that, about 20 or 30 minutes after Hoffman and Tober left, Hoffman returned. Defendant let her in. She still had the heroin. Hoffman and Johnson started to negotiate for the heroin. She handed him the bag to inspect. Soon, she asked for it back, but he did not return it. Hoffman became upset and grabbed the bag. Both people pulled on the bag; Hoffman ended up with the "dorm tablet," which had been used to cut the heroin, while Johnson kept the heroin itself. Hoffman angrily demanded the rest of the bag, but Johnson refused. Defendant got up and told them to take the argument "out the door." At this point, Hoffman and Johnson were standing in the archway between the bedroom and the living room. The time was about 12:30 or 1 a.m.

¶ 8 Last testified that he next saw defendant take a long knife in one hand and push Johnson toward the door with both hands. Last had seen the knife before; defendant kept it in the headboard area of his bed. Johnson was facing toward the front door; defendant was behind him; and Hoffman was facing Johnson. Defendant was telling both of them to leave. The "next

thing" that Last saw was defendant "stick" Johnson in the thigh with his knife. Last got up. Johnson yelled, "He stuck me" several times. Defendant withdrew the knife, and Last saw blood about eight inches up the blade. Johnson and Hoffman were both screaming and tried to exit the house. Johnson left the house; Last did not see who let him out. Jim Shumate, who lived upstairs at 1802 S. Fourth, was also there by that time. Last told defendant that he could not believe what defendant had done; defendant responded, "Oh well—he should have left." About a half-hour later, Last heard Johnson crying for help. He and defendant discussed the situation briefly, but both then went to sleep.

¶ 9 Last testified that, later that morning, he woke up, looked into the backyard, and saw Johnson lying there. He told defendant, who went out, looked at Johnson, returned, and said that Johnson was dead. Last asked what they were going to do. Defendant responded, "I don't know. I'm going to make a sandwich." He did. Last went out and later spoke to the police.

¶ 10 Last testified on cross-examination as follows. At the time of the incident, he had known defendant for about a year. Before the two women arrived, everything was peaceful with defendant, Last, and Johnson; after the women left, Johnson was still welcome. After Hoffman and Johnson argued, they engaged in pushing and shoving, but no punching. The bag of heroin broke, however. For the first time, defendant told Johnson to leave. Despite defendant's repeated instructions, Johnson refused to go. Defendant walked over to him and tried to push him out. After Johnson said, "He stuck me" several times, Shumate came downstairs, carrying a baseball bat. Johnson did not leave right away. Last did not call 911.

¶ 11 Last testified on redirect as follows. He did not recall whether a curtain was up in the archway on December 18 or 19, 2011. Right before the stabbing, Last had not seen any weapon

on Johnson, and he never saw Johnson hit anyone that night. On recross-examination, he stated that defendant would have had to let out someone who wanted to exit through the front door.

¶ 12 Hoffman testified on direct examination as follows. On December 19, 2011, at about 1:20 a.m., she crossed the street from her home at 1902 S. Fourth to 1802 S. Fourth. She had been there before and knew defendant. Hoffman, a cocaine addict, was carrying a $20 bag of heroin that she hoped to sell or trade for cocaine. On entering, she found defendant, Last, and Johnson, all calm. She had met Johnson twice before in defendant's house. Hoffman said that she needed to get rid of the heroin so she could get crack but did not know anyone who was interested in heroin. Johnson said that he could make some calls and probably knew someone interested. He asked to see the heroin.

¶ 13 Hoffman testified that Johnson walked over from his chair and that she held her hand out. He took the bag, turned around, faced the wall, and started using his phone. After a few minutes, Hoffman asked for the bag back. Johnson turned around and gave her back the "knot," without the drugs. Hoffman angrily demanded her "shit," but Johnson refused. They argued for a few minutes, about four or five feet apart, with Johnson standing at the desk and Hoffman standing by the archway, which was covered by a curtain. Defendant was in bed and Last was on the couch. During the argument, Hoffman and Johnson did not touch each other, and Johnson did not have a weapon.

¶ 14 Hoffman testified that next defendant got out of bed and, as he did so, pulled his knife out if its case. He walked over to Johnson, poked him in the thigh a few times, and told him to give back the heroin to Hoffman and to leave the house. Johnson stood still as defendant was poking him. Defendant and Johnson then walked through the curtain into the living room and argued loudly. From the bedroom, Hoffman heard Johnson say, "I can't believe you just cut me. I can't

believe you just stuck me." Johnson also said that he would need stitches. Last and Hoffman approached. Johnson stood by the door but had not left yet. Defendant was holding the knife. Shumate had come downstairs, holding a baseball bat. He told Johnson to leave. Defendant unlocked the front door, and Johnson walked out.

¶ 15 After Johnson left, Hoffman returned to the bedroom. Defendant had also returned. Hoffman could see several inches of blood on the knife. Defendant got the knife's case, entered the kitchen, and put the knife on a towel. Hoffman left soon after but did not see Johnson again.

¶ 16 In the remainder of her testimony, Hoffman stated as follows. When defendant got up and told Johnson to leave, he said that it was because Johnson had been "rude" all night. When defendant poked Johnson with the knife in the thigh two or three times in the bedroom, Johnson did not yell or scream. Hoffman did not see defendant stab Johnson. Johnson did not raise his fist when he and defendant entered the living room. About five minutes elapsed between the initial pokes and Johnson's scream that he had been "stuck."

¶ 17 Detective Jason Bailey testified as follows. On December 19, 2011, he and another detective spoke to defendant at the police station and recorded the interview. The interview was played for the jury. Bailey testified that, when defendant spoke to the police early that morning, he denied knowing or ever having seen the person who was lying dead in his backyard. He later admitted otherwise. In the interview, defendant recounted that, when he wanted Johnson to leave the house, he initially put the knife to Johnson's neck, then poked him in the leg a few times. He said that he had not been afraid of Johnson and had not seen any weapon on him.

¶ 18 The State rested. For the defense, Stec testified that Last told him that, when he woke up, he saw Johnson grab the back of his leg and heard him yell, "He just stuck me. He just stuck

me." Last also saw defendant hold the knife as Johnson ran out. Last told Stec that he woke up because defendant and Johnson were arguing over Johnson's theft of Hoffman's heroin.

¶ 19 During the instructions conference, defendant requested an instruction on defense of dwelling. He relied on the pattern instruction that reads:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to [(prevent) (terminate)] another's unlawful [(entry into) (attack upon)] a dwelling.
>
> [However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if
>
> [1] the entry is made or attempted in a violent, riotous, or tumultuous manner and he reasonably believes that such force is necessary to prevent an [(assault upon) (offer of personal violence to)] himself or another then in the dwelling.
>
> [or]
>
> [2] he reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling.]" Illinois Pattern Jury Instructions, Criminal, No.24-25.07 (4th ed. 2000).

¶ 20 The State objected, arguing that, under *People v. Ellis*, 107 Ill. App. 3d 603 (1982), the instruction is not available unless there is some evidence that the victim's entry into the dwelling was unlawful. Defendant countered that, under *People v. Stombaugh*, 52 Ill. 2d 130 (1972), he was entitled to the instruction. The judge noted that the instruction specifically references an "unlawful" entry and commented that there was no evidence that Johnson had entered defendant's house unlawfully. Defendant responded that although Johnson's entry had initially

been lawful, it became unlawful when "the authority to be there was withdrawn." The judge declined to give the instruction.

¶ 21 The jury acquitted defendant of murder but convicted him of involuntary manslaughter. Defendant filed a posttrial motion raising, among other issues, the trial court's refusal to give the instruction on defense of dwelling. The trial court denied the motion, sentenced defendant as noted, and denied his motion to reconsider the sentence. Defendant timely appealed.

¶ 22 On appeal, defendant contends that the trial court abused its discretion in refusing to give the jury the instruction on defense of dwelling. Defendant concedes that *Ellis* holds that the instruction is not proper unless the victim's initial entry was unlawful, which was not the situation here. Nonetheless, defendant maintains that, under *Stombaugh*, *Ellis* was wrongly decided. The State responds that the instruction was inapplicable, given that Johnson entered the house lawfully, and that *Ellis* is sound. For the reasons that follow, we agree with the State.

¶ 23 The trial court's decision on whether to give a jury instruction is reviewed for abuse of discretion. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). However, very slight evidence of a given theory will justify giving an instruction based on that theory. *Id.* If there is some foundation in the evidence for the instruction, then the trial court should give it. *Id.* at 131-32.

¶ 24 We hold that the trial court did not abuse its discretion in refusing to give the instruction on defense of dwelling, because there was not even slight evidence to support this affirmative defense. We note that the instruction tracks section 7-2 of the Criminal Code of 1961 (720 ILCS 5/7-2(a) (West 2010)) (now the Criminal Code of 2012 (see 720 ILCS 5/1-1 (West 2012))). Thus, under section 7-2(a), as phrased at the time of the alleged offense, a person may use force against another "when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's *unlawful entry into or attack upon* a dwelling."

(Emphasis added.) 720 ILCS 5/7-2(a) (West 2010). This language sets the outer bounds of the defense, which can be constricted further by the language in the remainder of section 7-2.

¶ 25 Under the plain language of the statute, a prerequisite to the defense is an unlawful entry or an attack upon a dwelling. If the language of a statute is plain, a court must apply it straightforwardly. *People v. Pierce*, 367 Ill. App. 3d 203, 205 (2006). Thus, a trial court may not give a jury instruction that misstates an applicable statute. See *People v. Morgan*, 197 Ill. 2d 404, 452 (2001) (instruction on second-degree murder based on provocation would have been improper, as felony murder with which defendant was charged did not allow this defense); *People v. McLennon*, 2011 IL App (2d) 091299, ¶ 21 (requested self-defense instruction was properly refused as inconsistent with self-defense statute).

¶ 26 Here, the instruction that defendant sought lacked a basis in the plain language of section 7-2. At trial, there was no evidence that Johnson had entered defendant's dwelling unlawfully. Defendant conceded that Johnson's entry was lawful—defendant was the one who let him in. Even assuming that an unlawful "attack" on a dwelling by one already inside it could have supported giving the instruction—an argument that defendant does not appear to make—there was no evidence of any such unlawful attack on *defendant's dwelling* by Johnson. Johnson had committed no vandalism. Moreover, there was no evidence that, when defendant plunged his knife eight inches or so into Johnson's thigh, he was defending his *dwelling* from an attack. All of the evidence showed that defendant attacked Johnson because he was upset at Johnson's conduct and wanted him to leave the house. Wearing out one's welcome is not attacking a dwelling. Section 7-2(a) does not justify the use of force to make an invitee depart when he is no longer desired as company.

¶ 27 Defendant's argument at the trial level, that Johnson's lawful entry was converted into an "unlawful entry" as soon as defendant withdrew his consent, is based on unsound usage. When Johnson refused to exit after he was told to do so, he might have unlawfully *remained* in the dwelling, but it does not follow that his initial *entry* was unlawful. Unlawfully remaining simply does not mean "unlawfully entering."

¶ 28 As defendant concedes, this court in *Ellis* rejected the argument that he now makes. There, the defendant had allowed the victim to stay at his apartment. One evening, after they had been out drinking, they returned to the apartment. An argument developed; the defendant told the victim to move out; the victim belligerently refused. The defendant retrieved a gun and fired a warning shot at a room divider. The victim then lunged at the defendant and the defendant shot the gun, apparently from close range, at the bigger and more mobile victim, killing him. *Ellis*, 107 Ill. App. 3d at 605-09. The jury convicted the defendant of murder. *Id.* at 605.

¶ 29 This court reversed outright the defendant's conviction of murder but held that the evidence supported a conviction of voluntary manslaughter. *Id.* at 610-11. We then addressed the defendant's argument that the trial court erred by refusing to give the defense-of-dwelling instruction. We noted that, by the terms of section 7-2(a), and according to case law, the use of force in the defense of a dwelling is justified only if the entry into the dwelling was unlawful or there was an attack on the dwelling. *Id.* at 613. There had been no evidence of either prerequisite in *Ellis*. Nonetheless, the defendant argued that, under *Stombaugh*, a defense-of-dwelling instruction should be given "even if the entry was lawful and the rightful occupant has used force to attempt to evict one who has refused to leave." *Id.* We rejected that reading of *Stombaugh*. To explain why, and why we do so again, we discuss *Stombaugh* now.

¶ 30 In *Stombaugh*, the defendant, the victim's estranged wife, and her child by the victim were inside the wife's apartment. For their protection, especially against the victim, they had left the safety-chain lock on the slightly opened door. The victim, who had harassed and threatened both his wife and the defendant on previous occasions, came to the door and angrily asked whether the defendant was there. When the child said that he was, the victim threatened to harm the defendant and he put his arm through the door opening. The defendant got a gun. The victim pushed on the door so hard that the safety-chain lock broke, and he rushed into the apartment, shouting that he would kill the defendant. *Stombaugh*, 52 Ill. 2d at 133-34. The defendant aimed the gun at the victim and told him to get out. The victim kept advancing at the defendant until the defendant shot him fatally. *Id.* at 134-35. A jury convicted the defendant of murder.

¶ 31 The supreme court held that the trial court had erred by refusing to give the jury the pattern instruction on defense of dwelling (essentially identical to the one in *Ellis* and that in the present case). The court explained that the statute allowed the use of force " 'to prevent *or terminate*' another's unlawful entry into the dwelling." (Emphasis added.) *Id.* at 136 (quoting Ill. Rev. Stat. 1969, ch. 38, ¶ 7-2). Thus, as there was evidence that the defendant had shot the victim in order to terminate his unlawful entry into the apartment (and that the force he used was justified under section 7-2's restrictions), the trial court erred in refusing the instruction. *Id.*

¶ 32 We cannot agree with defendant that *Stombaugh* somehow allows a defendant to invoke the defense-of-dwelling statute in a case where the entry was lawful. The opinion held only that the use of force can be justified both to prevent an unlawful entry from being effectuated and to terminate an *unlawful* entry that has been effectuated. *Stombaugh* itself involved the application of section 7-2 to an unlawful entry. Nothing in the opinion suggests that section 7-2 has any

application to a case in which the victim entered lawfully but the occupier sought to revoke his consent to the victim's presence. The language of section 7-2(a) negates any such application.

¶ 33 We note that defendant cites no opinions that endorse his construction of the defense-of-dwelling statute. In addition to *Stombaugh* and *Ellis*, several opinions have rejected the application of the defense to a case in which the entry into the dwelling was lawful. See *People v. Kauffman*, 308 Ill. App. 3d 1, 17-18 (1999), *overruled on other ground People v. Parker*, 223 Ill. 2d 494 (2006) (defendant voluntarily allowed victim into apartment, making defense-of-dwelling unavailable against charge that defendant committed second-degree murder by shooting victim, who had become abusive and belligerent); *People v. Barnard*, 208 Ill. App. 3d 342, 351-53 (1991) (involuntary-manslaughter defendant who acquiesced in victim's entry into his home but later told him to leave and shot him was not entitled to defense-of-dwelling instruction); *People v. Miles*, 188 Ill. App. 3d 471, 479-80 (1989) (defense-of-dwelling did not apply, as victim was welcome into apartment of others and did not threaten anybody there); *People v. Chapman*, 49 Ill. App. 3d 553, 556 (1977) (section 7-2 not available to defendant who fatally shot man with whom she shared apartment).

¶ 34 Although some sort of affirmative defense might arise out of events that occur in a dwelling between a lawful occupier and a lawful entrant, defense of dwelling is not one of them—surely not under the evidence in this case. Whatever justification defendant might have had for stabbing Johnson was outside section 7-2. No evidence supported giving the corresponding instruction. Thus, the trial court did not abuse its discretion in refusing to do so.

¶ 35 As part of our judgment, we grant the State's request that the defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 36 The judgment of the circuit court of Winnebago County is affirmed.

¶ 37 Affirmed.