2015 IL App (4th) 130319-U

NO. 4-13-0319

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 6, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
JAMES P. HUGHES,	)	No. 10CF641
Defendant-Appellant.	)	
	)	Honorable
	)	John W. Belz,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence is sufficient to support an inference that defendant intended to kill the victim by stabbing her in the chest, and therefore the conviction of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)) is affirmed.

(2) Because defendant raised no affirmative defense of justification, it was unnecessary for the trial court to include the statutory phrase "without lawful justification" (720 ILCS 5/9-1(a)(1) (West 2010)) in its jury instructions on attempt (first degree murder): it was unnecessary for the court to inform the jury that, to commit that offense, defendant had to intend to kill the victim "without lawful justification."

¶ 2 Defendant, James P. Hughes, is serving a sentence of 28 years' imprisonment for attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)).

¶ 3 For two reasons, he appeals. First, he argues that his alleged intent to kill Elizabeth McDaniel is unproved and therefore the evidence is insufficient to sustain his conviction of attempt (first degree murder). We are unconvinced by this argument. Defendant

stabbed McDaniel in the chest with a knife. When we look at the evidence in the light most favorable to the prosecution, we conclude that a rational jury could find, beyond a reasonable doubt, that defendant thereby intended to kill McDaniel.

¶ 4 Second, defendant argues that when instructing the jury on the offense of attempt (first degree murder), the trial court committed plain error by omitting the phrase "without lawful justification" in the instruction. To commit attempt (first degree murder), he argues, he not only had to intend to kill McDaniel, but he had to intend to kill her "without lawful justification," as the murder statute says. 720 ILCS 5/9-1(a) (West 2010). Actually, the statutory phrase "without lawful justification" belonged in the jury instructions only if defendant raised an affirmative defense of justification, that is, only if he claimed he was justified in stabbing McDaniel. See 720 ILCS 5/7-1 to 7-14 (West 2010). Because defendant made no such claim, we find no plain error in the omission of the phrase "without lawful justification" in the jury instruction on attempt (first degree murder).

¶ 5 Therefore, we affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 The jury trial was held in December 2012, and the evidence tended to show the following.

¶ 8 On August 27, 2010, defendant told a triage nurse at the emergency desk of St. John's Hospital in Springfield that he needed psychiatric help because he was hearing voices and was having suicidal thoughts. He was admitted into the emergency unit. On his way to examination room G, in the east hall, he noticed that a doctor he liked, Samuel Gaines, was at the nurse's station.

¶ 9 In the examination room, a nurse, Cinda Carrigan, performed a mental health assessment of defendant and found him to be angry, homicidal, and agitated. He expressed a desire to see Gaines.

¶ 10 Gaines, however, was not the doctor assigned to the east hall that evening. Another doctor, McDaniel, was. Defendant did not like McDaniel because she did not believe what he told her during one of his previous visits to the emergency unit of St. John's Hospital. So, he objected to seeing her again. He referred to her as " [']the red-headed bitch['] " (we quote Carrigan quoting defendant). As for McDaniel, she regarded defendant as a drug-seeker. Evidently, he had picked up on that.

¶ 11 McDaniel entered the examination room and looked at the chart. Defendant was lying down on a gurney, and she was standing between him and the door. He had refused to change into a hospital gown. McDaniel began asking him what had brought him there that evening: "just rattling and rattling and rattling," as he put it. Again and again, he told her he did not want to see her. McDaniel replied that she was the doctor assigned to the east hall and that consequently he " 'was kind of stuck with [her]' " (we quote McDaniel's testimony).

¶ 12 Defendant got off the gurney and approached McDaniel. Carrigan was sitting at the computer in the examination room. Just as soon as Carrigan saw the change in defendant's demeanor, she gestured to a security guard, Ryan Harmon, who was standing just outside the door of the examination room. The witnesses differ as to what exactly defendant said next. According to McDaniel, he said, " 'You think I'm stuck with you, [bitch]." According to Carrigan, he said, "Oh, I've got you, bitch. I've got you.' " In any event, before Harmon rounded the threshold, defendant removed a knife from the pocket of his khaki shorts, drew back, and

with a punching motion stabbed McDaniel in the chest. Carrigan, still looking at Harmon, heard the thud of the impact, and then she heard a thump as McDaniel hit the floor.

¶ 13 At first, Carrigan thought defendant merely had hit McDaniel with his fist. That is what McDaniel thought at first, too: she thought he merely had drawn back and punched her "really hard" in the chest. But then, as security guards and police officers converged on defendant, McDaniel saw blood flowing from her chest, and she saw the knife on the floor, filmed with blood all the way to the handle.

¶ 14 The blade of the knife was 5 1/4 inches long. Instead of penetrating McDaniel's chest wall and causing a life-threatening injury, the blade hit a rib and was deflected to the side. The blade chipped the rib and swerved into a pectoral muscle and the fatty tissue of a breast.

¶ 15 A Springfield police officer, Timothy Ealey, testified that, immediately after the attack, as defendant was being tied down, hand and foot, onto the gurney, defendant said, " 'I told them I needed some help. I told them not to send in Dr. McDaniel. So, I stabbed that bitch.' " Ealey also remembered that as defendant was being transported to the police station, he requested to be put in a cell by himself, warning that he "would kill someone" if someone were placed in a cell with him.

¶ 16 In the trial, defendant admitted stabbing McDaniel, but he denied intending to kill her. He testified that, instead, in his urgent desire to leave the examination room, he merely lashed out at her for the purpose of getting her out of his way. He remarked that, having been a soldier in the United States Army, he knew how to kill and that if he really had intended to kill McDaniel, he would have succeeded.

¶ 17 At the conclusion of the evidence, the trial court instructed the jury. With respect to the charge of attempt (first degree murder), the court used Illinois Pattern Jury Instructions,

Criminal, Nos. 6.05X and 6.07X (4th ed. 2000) (IPI Criminal 4th Nos. 6.05X, 6.07X). IPI Criminal 4th No. 6.05X said: "A person commits the offense of attempt first degree murder when he, with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual." IPI Criminal 4th No. 6.07X said that, to sustain the charge of attempt (first degree murder), the State had to prove two propositions beyond a reasonable doubt: (1) "the defendant performed an act which constituted a substantial step toward the killing of an individual," and (2) "the defendant did so with the intent to kill an individual." Defense counsel never objected to these instructions.

¶ 18 The jury found defendant guilty of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), two counts of aggravated battery (720 ILCS 5/12-4(a), (b)(1) (West 2010)), and one count of armed violence (720 ILCS 5/33A-2 (West 2010)).

¶ 19 The trial court sentenced defendant to 28 years' imprisonment for attempt (first degree murder), giving him credit for 941 days previously served, and the court vacated the remaining convictions.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. The Sufficiency of the Evidence
That Defendant Intended To Kill McDaniel

¶ 23 Defendant argues the evidence is insufficient to support an inference that he intended to kill McDaniel. A specific intent to kill is an element of attempt (first degree murder). An intent to inflict great bodily harm will not suffice. *People v. Jeter*, 247 Ill. App. 3d 120, 125 (1993); *People v. Wagner*, 189 Ill. App. 3d 1041, 1045 (1989). Defendant compares his own case to three cases in which, for purposes of attempt (first degree murder), the reviewing court found insufficient evidence of an intent to kill: *People v. Mitchell*, 105 Ill. 2d 1 (1984); *People v.*

Jones, 184 Ill. App. 3d 412 (1989); and *People v. Thomas*, 127 Ill. App. 2d 444 (1970). As we will explain, those cases are distinguishable.

¶ 24 1. *Mitchell*

¶ 25 In *Mitchell*, the defendant got in an argument with her boyfriend one afternoon, and she took her anger and frustration out on her 16-month-old child by "hitting [her] several times with her hand, fist[,] and a belt." *Mitchell*, 105 Ill. 2d at 7. Later, in the evening, she put the child to bed. *Id.* at 7-8. The next morning, the child displeased the defendant by not minding her and by rummaging around in cupboards, and out of " 'nervous[ness]' " the defendant struck her repeatedly with her open hand. *Id.* at 8. After administering this beating, the defendant put the child in a high chair, and shortly afterward the child had a seizure and passed out. *Id.* The defendant placed a cool cloth on the child's forehead, and 15 minutes later, when the child did not regain consciousness, she took the child to the hospital. *Id.*

¶ 26 Even though the child suffered severe brain damage and had to be put in a pediatric nursing home (*id.* at 6-7), the appellate court overturned the convictions of attempt (first degree murder), finding insufficient evidence that the defendant had intended to kill the child (*id.* at 9).

¶ 27 The supreme court agreed with the appellate court in this respect. *Id.* at 10. The supreme court reasoned:

> "While she undoubtedly repeatedly struck her child, we do not believe that the circumstances of this striking, without more, are sufficient to establish the required intent, particularly in view of defendant's explanations for her behavior. There was ample opportunity for her to complete her crime if, in fact, she intended

> to kill the child. Further, following Shannon's loss of consciousness, [the] defendant applied a cool cloth and ultimately took her to the hospital for emergency medical attention, actions which are not consistent with an intent to murder." *Id.* at 9-10.

¶ 28 The facts of this case bear little resemblance to those of *Mitchell*. Defendant did not have as much opportunity to kill McDaniel as the mother had to kill her child. Defendant had time to strike one blow, and then Harmon grabbed him. Nor did defendant seek medical attention for McDaniel after stabbing her in the chest. An intent to kill is more readily inferable from a knife stab to the chest than from blows with a bare hand or with a belt—although, obviously, a slap to the head can be mortally dangerous to a 16-month-old child.

¶ 29 2. *Jones*

¶ 30 In *Jones*, the three defendants—Charles Jones, Kenneth Henson, and Charles Martin—broke into the apartment of Mr. and Mrs. L. and their 9-year-old daughter while they were home. *Jones*, 184 Ill. App. 3d at 415. "Upon entering the apartment, Martin hit Mr. L. in the head with the gun and Mr. L's hands were tied behind his back while he was lying in the hallway. Martin asked Mr. L. for his money. He was told if he did not cooperate, he and his family would be killed." *Id.* at 416. While Mrs. L. was being raped, "Mr. L. was hit several times in the head with the gun and one of the men stomped on his head. He was repeatedly kicked and hit with the gun. Mr. L. testified that [the] defendants repeatedly stated, 'I don't believe you only have this much money in the house. You have to have more.' He was dragged into the bathroom * * *." *Id.* While in the bathroom, Mr. L. heard two of the defendants arguing in the hallway. *Id.* "One stated they should kill the family and the other disagreed." *Id.* One of the defendants pointed a gun at the daughter's head and threatened to shoot her unless Mr. L.

revealed the location of his car keys. *Id.* Mr. L. showed the defendants where the car keys were, and the defendants drove off in the L.s' car. *Id.*

¶ 31 Mr. L. received treatment as an outpatient. *Id.* at 430. He had a broken nose and several lacerations to the head, requiring 25 stitches. *Id.*

¶ 32 The three defendants were convicted of attempting to murder Mr. L. (among other offenses). *Id.* at 415. On direct appeal, they argued their intent to kill Mr. L. was not proved beyond a reasonable doubt. *Id.* at 429. The appellate court agreed. *Id.* It said:

> "Although Mr. L. suffered serious injuries and defendants threatened his life, we do not believe that any rational trier of fact could have found the evidence presented at trial established [the] defendants intended to kill him. [The] [d]efendants had a gun and knife in their possession but did not use the knife in their attack on Mr. L. [The] [d]efendants did not fire the gun but used it to beat Mr. L. The character of the attack on Mr. L. was not of the type that justifies an inference of an intent to kill. Although his injuries were serious, there was no evidence presented that they were life-threatening." *Id* at 430.

¶ 33 In the quoted passage, the appellate court surely did not mean to suggest that, regardless of the circumstances, an intent to kill can be reasonably inferred only from the infliction of a life-threatening wound. That suggestion would have been absurd. If the infliction of a life-threatening wound were the *sine qua non* of attempt (first degree murder), then A could put poison in B's cup and A would be subject to liability for attempt (first degree murder) only if B actually drank from the cup and almost died. Requiring that B actually take the poison would

make no sense. Even if B got wise to A and did not drink from the cup, A intended to kill B and, so intending, took a substantial step toward the accomplishment of that intent. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39.

¶ 34 By observing that Mr. L.'s injuries were not life-threatening, all the appellate court was saying was this. From the mere fact that defendants beat up Mr. L., making it necessary for him to receive outpatient treatment, a jury could not reasonably infer that they intended to kill him. If the defendants had beaten Mr. L. almost to death, it might have been a different matter. But a beating, without more, was not indicative of an intent to kill. That was all the appellate court was getting at by mentining the lack of any life-threatening wounds on Mr. L.: whether a beating evinced an intent to kill depended on how bad the beating was. Just because the lack of a life-threatening wound is relevant to the discussion of a beating, it would not necessarily be relevant to the discussion of a more dangerous act of violence, an act that tends to be *inherently* death-dealing, such as stabbing someone in the chest.

¶ 35 Like Mr. L., McDaniel suffered no life-threatening injury, but apparently that was only because of the fortuitous fact that a rib deflected the blade. Whereas the defendants in *Jones* did not use their knife at all on Mr. L., defendant used his knife on McDaniel—and used it in a manner in which one uses a knife when intending to kill: he forcefully drove it into her chest. Another difference is that the defendants in *Jones* had ample opportunity to kill Mr. L.—he was their prisoner—and in fact they explicitly considered and decided against killing him and his family, whereas defendant in the present case had only a fleeting opportunity to strike a fatal blow against McDaniel, and he seized that opportunity and failed. For all these reasons, *Jones* is distinguishable.

¶ 36 3. *Thomas*

¶ 37 In *Thomas*, the defendant entered a woman's apartment without her permission, banged her head against a chest of drawers, hit her on the head, and picked at her face with a knife, all the while telling her, " 'Shut up. I will kill you.' " *Thomas*, 127 Ill. App. 2d at 446-47. He asked her if she had a gun or any money. *Id.* at 447. She answered no, whereupon he dragged her to her bedroom, where he compelled her to undress. *Id.* He struck her shoulder with his knife, and then he unzipped his pants and raped her. *Id.* Afterward, he ransacked a dresser, removing some money from it. *Id.* Before leaving, he told her he wanted to kill her and that she would see him again. *Id.* Her injuries were cuts on her fingers, right shoulder, and left side, and slashes and abrasions on her face. *Id.*

¶ 38 On direct appeal, the appellate court reversed the conviction of attempt (first degree murder), stating: "We believe *** that the opportunity for murder was such that there was insufficient proof that defendant intended or attempted to commit that crime." *Id.* at 456.

¶ 39 *Thomas* is distinguishable for two reasons. First, the defendant in *Thomas* had the victim all to himself, under his physical domination, and he had ample time and opportunity to kill her if he had so intended. That he did not do so suggested he had no such intent. Defendant, by contrast, was never alone with McDaniel, and he did not have much time and opportunity to kill her, because Carrigan also was in the room and Harmon was standing right outside the door. Defendant did not forgo an ample opportunity to use potentially deadly force. What opportunity he had, he seized. Second, it does not appear that the defendant in *Thomas* used his knife in a way calculated to inflict a fatal injury upon his victim: he "pick[ed] at her face," for instance. *Id.* at 447. In the present case, by contrast, defendant drove his knife into McDaniel's chest.

¶ 40 Defendant argues that "[t]he sudden attack was an unfortunate result of [his] mental illness," and he cites the testimony of a psychiatrist, Terry Killian, who, after performing

a fitness examination of defendant, opined that he had a severe case of post-traumatic stress disorder and that this condition, to quote Killian's testimony, "played a major role in what happened in the emergency room."

¶ 41 Killian also testified, however: "[Defendant] doesn't have the type or severity of psychiatric symptoms that would have rendered him incapable of appreciating criminality." More to the point, Killian was a witness in the sentencing hearing, not in the trial, and as the State correctly says, we must confine ourselves to the evidence presented in the trial. See *People v. Blankenship*, 406 Ill. App. 3d 578, 590 (2010).

¶ 42 In sum, when we look at the evidence in the light most favorable to the prosecution, drawing inferences in favor of the prosecution whenever it is reasonably defensible to do so, we conclude that a rational jury could find, beyond a reasonable doubt, an intent by defendant to kill McDaniel. See *People v. Kathan*, 2014 IL App (2d) 121335, ¶ 17. His act of drawing back his arm and, with a forceful punching motion, stabbing McDaniel in the chest with a 5 1/4 inch blade evinced an intent to kill her. His subsequent remark, on his way to jail, that he would kill anyone placed in a cell with him tends to confirm he was in a murderous state of mind. Although he insisted to the jury that he had no intention to kill McDaniel, the jury did not have to believe him. See *People v. Wilburn*, 263 Ill. App. 3d 170, 179-80 (1994).

¶ 43 B. The Omission of the Phrase "Without Lawful Justification" in the Jury Instructions on Attempt (First Degree Murder)

¶ 44 Defendant argues that IPI Criminal 4th Nos. 6.05X and 6.07X were inaccurate and misleading in that they omitted the phrase "without lawful justification" in the context of his alleged intent to kill McDaniel. He committed attempt (first degree murder) only if he intended to kill McDaniel "without lawful justification" (720 ILCS 5/9-1(a)(1) (West 2010)). He admits that, because he made no objection to these instructions in the proceedings below and never

tendered any instructions as alternatives to them, this claim of error normally would be forfeited. See *People v. Rissley*, 165 Ill. 2d 364, 406 (1995). Nevertheless, he argues that the doctrine of plain error should avert the forfeiture because "[t]he failure correctly to inform the jury of the elements of the crime charged" made the trial fundamentally unfair. *People v. Ogunsola*, 87 Ill. 2d 216, 222 (1981).

¶ 45 We find no error at all, let alone plain error. The phrase "without lawful justification" should have been included in IPI Criminal 4th Nos. 6.05X and 6.07X only if defendant raised an affirmative defense of justification, such as self-defense. See *People v. Smith*, 149 Ill. App. 3d 145, 154 (1986). Defendant raised no affirmative defense of justification, and therefore the omission of the phrase "without lawful justification" in the instructions was correct.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs.

¶ 48 Affirmed.