2018 IL App (4th) 160228-U

NO. 4-16-0228

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 5, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
TRACY TERRELL NEWSON,	)	No. 14CF1391
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in declining defendant's tendered instruction on second degree murder based upon the mitigating factor of provocation where the evidence did not support giving the instruction.

¶ 2 Following a jury trial, defendant, Tracy Terrell Newson, was found guilty of three counts of first degree murder. The trial court sentenced him to 55 years in prison. Defendant files this direct appeal, claiming the court erred by declining defendant's proposed jury instruction on the lesser-included defense of second degree murder based upon the theory of provocation. Defendant claims sufficient evidence was presented at trial to support the instruction. After our review of the record, we disagree, finding the court did not abuse its discretion. We affirm defendant's conviction and sentence.

¶ 3 I. BACKGROUND

¶ 4 In January 2016, a jury convicted defendant of three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2014)) for the shooting death of Carlton Jordan. In March 2016, the trial court sentenced him to 55 years in prison.

¶ 5 Because defendant does not challenge the sufficiency of the evidence, we limit our recitation of the facts to only those necessary to resolve defendant's claim. Cynthia Jordan testified that on November 15, 2014, she and her husband Carlton Jordan (we will refer to each Jordan by his or her first name for ease and clarity) entertained defendant and his long-time girlfriend Juanita Ware at their apartment. The couples had known each other for approximately five months. Also at the apartment that evening was Cynthia's sister, Stephanie Smith, and Cynthia's friend, Troy Whitaker. Defendant brought beer, tequila, and brandy when he and Juanita arrived at approximately 10:30 p.m. They all consumed the alcohol on a fairly equal basis. Defendant, Troy, and Carlton played dominoes while Cynthia and Juanita watched. After the men finished their game, Carlton left the room and went into his bedroom. The women played next.

¶ 6 During the early morning hours, at approximately 2:45 a.m. on November 16, 2014, defendant began making derogatory comments to and about Juanita. He insinuated that Juanita had been flirting with Carlton and vice versa. As the tension in the room escalated, defendant threatened to hit Juanita. The group ordered defendant to leave, but he refused until Juanita gave him his keys. Hearing the commotion, Carlton appeared from the bedroom. Carlton, Cynthia, and Troy grabbed defendant intending to force him to leave. Defendant, Cynthia, and Carlton were "scuffling." Cynthia said they "were all on the ground and fists were flaying [*sic*],

punches were being thrown." Eventually, they were able to push defendant out the door. Juanita stayed inside the apartment.

¶ 7 Approximately 20 minutes later, defendant returned to the apartment and knocked on the door. Carlton and Cynthia stepped out of the apartment into the hallway. They saw defendant had a gun in his right hand. Defendant raised his right hand and Carlton grabbed him. They struggled over the gun. A shot was fired into the ceiling. Cynthia said she wrapped her arm around defendant's neck and defendant hit her in the forehead with the handle or grip of the gun. Carlton and defendant continued to struggle. Cynthia said Carlton was not able to punch defendant because he "was up against the wall." Cynthia saw defendant's arm rise again and defendant fired a shot into Carlton's chest at "close range." She said defendant stood over Carlton and shot the gun twice more. Defendant fled. Cynthia testified that Carlton did not threaten to kill or harm defendant.

¶ 8 Juanita denied knowing that defendant was angry until the confrontation with Carlton and Cynthia began. She denied taking part in the confrontation. She was not certain whether Cynthia or defendant fired the gun, but she admitted it was defendant's gun. She claimed Carlton had something in his hand when defendant came back to the apartment, but she could not recall what it was.

¶ 9 The State published to the jury two recorded police interviews of defendant. The first, marked as People's exhibit No. 14, consisted of Detective Mike Fazio's interview of defendant at 6 a.m. on November 16, 2014, while defendant was in the hospital being treated for a gunshot wound to his arm. Before the interview, Fazio read defendant his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), and defendant agreed to talk. Defendant started the conversation by asking Fazio if Carlton was alive because he "really didn't try to kill him." He

"was just trying to threaten him." When asked to explain how the incident happened, defendant said Carlton told him to leave, so he got up to leave when Carlton knocked him to the floor and "beat the shit out of [him]." Defendant said Carlton threatened to kill him. Defendant was not sure how he was able to get Carlton off him, but when he was able to, he got up and left.

¶ 10 Defendant said he went home, got his gun, and returned to Carlton's apartment because Juanita was still there. He said Carlton again threatened to kill him, so defendant displayed his gun and warned Carlton that he would shoot him. Defendant said Carlton hit him, so he "shot his ass." Defendant explained:

> "And after that, it was like I really didn't mean to do it. I just, I really don't even know what happened, I just—. When he charged me, that's what made me shoot myself, sorry, shoot myself in the arm cause I was trying to scare him, he charged me. Told me, he told me he was going to kill me and I just ended up shooting him and I just went out, got in the vehicle, and drove to the hospital, and that's pretty much it. Like I said, he had me on the floor, he kept beating me, beating me, no one would get him off and he said I told you I'd kill ya, I kill ya."

When again recapping the events, defendant explained:

> "Cause I pulled the gun up just trying to bluff him and scare him and when he charged me, I guess the gun went off and hit me in the arm. When he did that, I felt like my life was really threatened. You really are trying to kill me and fight me instead of leaving this alone, so I just shot him and went to my truck and came to the hospital."

¶ 11 Defendant eventually admitted "bluff" was not exactly accurate. He took the gun to Carlton's apartment thinking Carlton would back down if defendant showed him he had a gun.

Defendant said: "I'm not doubtin nothing you sayin. But sometime shit happens and you don't think. And I just fucked up my whole life by not thinkin shit through before I reacted, and he pushed me and I just it, it's fucked." Again, he said: "It was to bluff him off so he wouldn't fuck with me. I never really had any intentions on shooting him til he charged me."

¶ 12 The second recorded interview, marked as People's exhibit No. 19, consisted of Detectives Matthew Dick's and John Atteberry's interview of defendant at approximately 7:30 a.m. on November 16, 2014, at the hospital. Defendant was again advised of his *Miranda* rights and again agreed to answer the detectives' questions. When recounting his version of the events, defendant said, when he got home, he thought "damn, [I] left [my] wife, so I got my gun, I went back." He stated:

> "So I pull the gun up and he just like came at me anyway. He hit me or whatever and, when he hit me, I guess me pulling the gun up, the gun just automatically went off and shot me through the arm. And then he charged me again like he was grabbing me to beat me and I just shot the gun. I don't know where I hit him, how I hit him, whatever. He fell to the floor; I walked out the door, went home, put the gun on the tote, and came to the hospital."

Defendant was certain Carlton was not armed with a gun, but he was not certain whether he had any other type of weapon in his hand. Defendant again stated he took his gun to "bluff him off." He said when Carlton advanced toward him, he "pull[ed] the gun out *** like 'don't come near me.' " He said Carlton "was coming at [him]" when he pulled the trigger. He said: "I really didn't have no intentions on shooting him. *** It was a bluff game." When the gun fired the first time, Carlton "kept coming." Defendant told the detectives the following: Carlton said " 'I'ma

kill you' and when he did, said that again and when he went to grab me again I don't even know if I shot him in the hand, the leg, I just pulled the trigger and he just fell to the floor."

¶ 13 The jury found defendant guilty of three counts of first degree murder, and the trial court sentenced him to 55 years in prison. Although defendant filed a posttrial motion, he did not include the issue he now raises in this appeal. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Conceding he forfeited the issue, defendant urges us to review his claim under alternate theories. First, he argues the trial court committed plain error when it denied his request for a jury instruction on the theory of provocation. He claims there was sufficient evidence to support the instruction. Second, assuming *arguendo* we find no plain error, defendant claims his trial counsel provided ineffective assistance by failing to include the issue in his posttrial motion.

¶ 16 A. Plain Error

¶ 17 "The plain-error doctrine is a limited and narrow exception to the general rule of procedural default ***." *People v. Walker*, 232 Ill. 2d 113, 124 (2009). "Under the plain-error doctrine, this court will review forfeited challenges when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30. As a matter of convention, reviewing courts typically undertake plain-error analysis by first determining whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). "If error is found, the court then proceeds to consider whether either of the [aforementioned] two prongs of the plain-error doctrine have been satisfied." *Id.* at 189-90. However, when a record clearly shows

that plain error did not occur, we can reject that contention without further analysis. *People v. Bowens*, 407 Ill. App. 3d 1094, 1108 (2011). We first address whether any error occurred at all.

¶ 18 B. Second Degree Murder

¶ 19 Defendant claims the trial court committed reversible error by refusing his request to instruct the jury on the serious provocation theory of second degree murder. We will reverse the trial court's decision to decline a jury instruction based upon insufficient evidence only if there was an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 42.

¶ 20 A person commits second degree murder if one of two mitigating circumstances exists at the time of the killing: (1) he is acting under a sudden or intense passion resulting from serious provocation by the victim but negligently or accidentally causes the victim's death or (2) he believes the circumstances justify his killing of the victim but his belief is unreasonable. 720 ILCS 5/9-2(a) (West 2014). In this case, the jury was instructed on the latter theory but not the former.

¶ 21 Serious provocation is defined as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2014). The categories of provocation that courts have recognized as sufficient to warrant a second degree murder instruction based on serious provocation are: (1) mutual quarrel or combat; (2) substantial physical injury or assault; (3) illegal arrest; and (4) adultery with the offender's spouse. *People v. Page*, 193 Ill. 2d 120, 133 (2000). Defendant argues that sufficient evidence was presented of the first two categories, citing evidence that Carlton charged at and pushed defendant (a substantial assault), which initiated the physical struggle in the hallway (the mutual quarrel or combat).

¶ 22 A defendant is entitled to the instruction only if there is "some evidence in the record that, if believed by the jury, will reduce the crime charged to a lesser offense[.]"

(Emphasis omitted.) *McDonald*, 2016 IL 118882, ¶ 25. Defendant contends that Carlton's actions of charging at him in the hallway and threatening to kill him when defendant returned to the apartment provided the necessary proof of provocation. According to defendant, he raised the gun only when Carlton did not stop. Carlton hit defendant, causing the gun to accidentally fire. Defendant was shot in the forearm. They continued to struggle until defendant shot Carlton in the chest.

¶ 23 Defendant's own account indicated his actions were indeed defensive and, as a result, supported the given self-defense instruction. However, whether his actions justified an instruction on second degree murder is, as the trial court stated, "a very different situation." Defendant claimed he was provoked and thus the jury should have been presented with a lesser-included instruction.

¶ 24 We first address the mutual-combat category. "Mutual combat is a fight or struggle that both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *McDonald*, 2016 IL 118882, ¶ 59. Defendant claims he and Carlton engaged in a mutual fight upon equal terms. He insists he brandished the weapon, which he took to the apartment as a "bluff," only in response to Carlton's act of shoving or hitting him. However, according to Cynthia, Carlton did not punch or hit defendant, as he was physically unable to do so because defendant had pushed Carlton against the wall. Even if the jury believed that Carlton initially shoved defendant in the hallway, there was no evidence that Carlton was armed so as to justify defendant brandishing his weapon. In fact, at one point in his interview, defendant blatantly said, Carlton hit him, so he "shot his ass."

¶ 25 Cynthia also testified that she and Carlton went into the hallway for the purpose of preventing defendant from entering the apartment. They did not want him to further harass Juanita. She said they informed defendant they would either be taking Juanita home or to her brother's house. Cynthia did not indicate her or Carlton's intent was to fight defendant. However, when they saw the gun in defendant's hand, they immediately tried to disarm him. Cynthia said Carlton informed defendant that he was " 'not coming in [his] house with a gun.' " According to Cynthia, neither she nor Carlton were armed.

¶ 26 Defendant attempted to justify his conduct of displaying the weapon by relaying his fear that Carlton threatened to kill him. Even assuming defendant was being truthful, "[t]he rule that mere words are insufficient provocation applies no matter how aggravated, abusive, opprobrious or indecent the language." *People v. Chevalier*, 131 Ill. 2d 66, 71-72 (1989).

¶ 27 According to the trial court, the totality of the evidence presented at trial did not rise to the level of serious provocation from Carlton to invoke a sudden and intense passion on defendant's part. Defendant may have experienced some form of passion but it was not engendered by sufficient provocation from Carlton. See *People v. Austin*, 133 Ill. 2d 118, 125 (1989) ("Passion on the part of the slayer, no matter how violent, will not relieve [him] from liability for murder unless it is engendered by a provocation which the law recognizes as being reasonable and adequate. If the provocation is insufficient, the crime is murder.")

¶ 28 We agree with the trial court that the evidence did not support a theory that mutual combat occurred. According to Cynthia, Carlton met defendant in the hallway to prevent his entry into the apartment initially to inform him they were taking care of Juanita but subsequently to prohibit him from entering the apartment with a gun. Based upon the evidence, it was reasonable for the trial court to believe Carlton did not "enter willingly" into mutual combat.

See *Id.* ("Mutual combat is a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat.")

¶ 29 However, even if the trial court believed Carlton, in fact, provoked defendant, the evidence still did not support a provocation instruction where defendant's retaliation to the provocation was disproportionate to the action. Defendant brandished a deadly weapon. See *Id.* at 127. The fact that defendant went home, armed himself, and returned to the apartment with a gun defeats any reasonable theory that defendant shot Carlton as a result of a sudden and intense provocation. For these same reasons, the evidence does not support a provocation instruction based on substantial injury or assault. See *People v. Pierce*, 52 Ill. 2d 7, 10-11 (1972) (for this theory to apply to reduce the offense, the killing must have resulted from "a violent irresistible passion incited by the deceased's attempt to inflict a serious personal injury on the person who kills.") Given the evidence presented at trial, we conclude the trial court did not abuse its discretion in denying the serious provocation instruction on second degree murder.

¶ 30 Accordingly, we find no error, plain or otherwise. Absent any error, defendant is unable to demonstrate prejudice sufficient to support a claim for ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (a claim of ineffective assistance of counsel is analyzed under a two-prong deficiency and prejudice standard); see also *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance); *People v. Evans*, 186 Ill. 2d 83, 94 (1999) ("[I]f the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient.")

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm defendant's conviction and sentence. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 33 Affirmed.