2019 IL App (1st) 153214-U

No. 1-15-3214

Order filed February 6, 2019

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 19303
	)	
THOMAS DOMINGUEZ,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for attempted first degree murder affirmed over contention that evidence was insufficient to prove intent to kill. Defense counsel was not ineffective for failing to argue at sentencing that defendant acted in response to serious provocation.

¶ 2 Following a bench trial, defendant Thomas Dominguez was found guilty of, among other offenses, attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)) and sentenced to 38 years' imprisonment. On appeal, defendant argues that (1) the State produced

insufficient evidence to prove beyond a reasonable doubt that he intended to kill his victim and (2) he received ineffective assistance of counsel at sentencing due to defense counsel's failure to argue in mitigation that defendant acted under a sudden and intense passion resulting from a serious provocation. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by information with six counts of attempted first degree murder and one count of aggravated battery stemming from a July 7, 2012 shooting in Chicago. The following evidence was presented at defendant's trial.

¶ 5 Felix Rosado testified that on the evening of July 6, 2012, he came from Detroit to Chicago to attend a family reunion. Rosado arrived around 11 p.m. and decided to go out for a drink with his brothers, Elberto and Alfredo Rosado, and brother in-law, "Jose." The group arrived at a bar near Division Street and Rockwell Street around 11:30 p.m. and had a few drinks. Felix testified that when he was younger, and prior to being incarcerated for a drug offense, he was a member of the Spanish Cobras.

¶ 6 After about an hour, some young men entered the bar and said that Maniac Latin Disciples were outside the bar chasing them with guns. Felix "was not into that kind of stuff" anymore and told Elberto that they should leave the bar, which they did.

¶ 7 Outside the bar, Felix saw defendant standing 10 to 15 feet away holding a gun. Defendant approached Felix and Elberto and told them he was a Maniac. After defendant asked Felix "what do you be about," Felix responded, "I'm from Detroit, Michigan. I don't know shit." Defendant pointed the gun at Felix and said "there's Cobras in Detroit." Felix was looking at

defendant's face and saw defendant "was ready to kill [him]" and "pull the trigger," so Felix rushed defendant, "grabbed him," and tried to grab the gun.

¶ 8 Felix pushed defendant into a truck parked on the street and began fighting defendant for the gun. He guessed defendant "was trying to reach to point the gun towards [Felix's] head." Instead, defendant shot Felix in the shoulder during the struggle. Felix grabbed defendant, pushed him aside, and "started running" behind the truck towards his own vehicle. Felix heard gunshots from behind him and felt his pants "jump." He then realized he'd been shot in the back. Alfredo drove him to the hospital, where he underwent surgery for the shot that hit him in the back, which had exited through his genitalia. At the time of trial, the bullet that hit his shoulder was still inside his body.

¶ 9 Elberto testified that, after the group left the bar, defendant approached with a gun and asked Elberto if he was a Cobra. Defendant stated that he was a Maniac Latin Disciple. Felix informed him that he was from Detroit. Defendant then responded that there are Cobras in Detroit and pointed the gun at Felix.

¶ 10 According to Elberto, Felix tried to move away from defendant, but defendant followed him. Felix then grabbed defendant and tried to take the gun away. The two men struggled towards a truck, and Elberto heard a gunshot. Elberto ran away but saw defendant chasing Felix around the truck and into the street. Elberto heard two more gunshots and saw defendant running away westward on Division. Prior to the incident, Elberto did not know defendant but believed he knew his family. On cross-examination, Elberto acknowledged to being a "retired" member of the Spanish Cobras.

¶ 11 The trial court found defendant guilty on all counts, finding that it "had no difficulty with the testimony of the two witnesses in this case who are victims in this matter." The court denied defendant's motion for a new trial.

¶ 12 At the sentencing hearing, the State offered a victim statement from Felix and argued that, because of defendant's criminal history, defendant should receive an "appropriate sentence." In mitigation, defense counsel argued that defendant had "quite some" support from his family, who also rely on defendant to help around the house and care for children. Counsel pointed out that defendant's mother, father, and sister were frequently present in court, and that defendant had family currently present in court for sentencing. Counsel acknowledged the gruesome nature of Felix's injury but argued that defendant did not intend to inflict it. Counsel noted that the longest previous prison sentence defendant received was 6 years and asked for the minimum of 31 years' imprisonment.

¶ 13 The trial court merged the convictions and sentenced defendant to 38 years' imprisonment—which included a 25-year firearm enhancement—on one count of Class X attempted first-degree murder. The court stated it had taken "into consideration the allocution made by the attorneys, your allocution in this particular matter, the presentence investigation, and all the statutory factors required of this Court for purposes of the sentencing in this matter."[1] It denied defendant's motion to reconsider sentence.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant first argues the evidence was insufficient to prove his intent to kill beyond a reasonable doubt as required to sustain his conviction for attempted first degree

[1] Although the trial court stated it had considered defendant's "allocution in this particular matter," defendant did not speak in allocution at sentencing.

murder. He contends that, had he intended to kill Felix, he would have done so when he had a gun pointed at Felix's face. He says we should reduce his attempted murder conviction to the merged conviction for aggravated battery with a firearm and remand for resentencing.

¶ 16 When reviewing a challenge to the sufficiency of the evidence, the question is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements of the offense proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. We will not overturn a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that a reasonable doubt of defendant's guilt exists. *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 17 To sustain a conviction for attempted first-degree murder, the State had to prove that defendant (1) performed an act constituting a "substantial step" toward the commission of murder, and (2) intended to kill the victim. 720 ILCS 5/8-4(a), 9-1 (West 2012); *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39. Defendant only challenges the sufficiency of the evidence regarding his intent to kill Felix.

¶ 18 As the specific intent to take a life is a state of mind, it is rarely proven by direct evidence. *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 52. Intent to kill is usually inferred from the surrounding circumstances, including the character of the assault, the nature and extent of the victim's injuries, and the use of a deadly weapon. *People v. Teague*, 2013 IL App (1st) 110349, ¶ 24. And "[t]he very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill." *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001). The trier of fact must determine whether a specific intent to kill exists, and that

conclusion will not be reversed on appeal absent reasonable doubt as to the defendant's guilt. *Viramontes*, 2017 IL App (1st) 142085, ¶ 52.

¶ 19 Viewing the evidence in the light most favorable to the State, we find defendant's specific intent to kill Felix may be inferred from his conduct and the circumstances of the shooting. The evidence established that defendant—unprovoked—walked towards Felix with a gun and asked him about his gang affiliation. When Felix denied any gang involvement and stated that he was from Detroit, defendant pointed the gun at Felix. Believing defendant intended to kill him, Felix rushed and grabbed defendant. Defendant tried to point the gun towards Felix's head and, during the struggle, shot Felix in the shoulder. Then, when the now-wounded Felix tried to run away, defendant fired multiple shots at his back, one of which entered Felix's backside and exited his penis. A rational trier of fact could find that, by shooting Felix twice, including in the back as he tried to flee, defendant evinced a specific intent to kill Felix. See *People v. Harris*, 2016 IL App (1st) 141744, ¶ 27, *aff'd* 2018 IL 121932 ("A reasonable trier of fact could infer that shooting a defenseless person multiple times evinces a specific intent to kill that person.").

¶ 20 Defendant argues, relying on *People v. Mitchell*, 105 Ill. 2d 1 (1984), that the State failed to proved his intent to kill because he had ample opportunity to kill Felix if that was, in fact, his intent. In *Mitchell*, our supreme court found that the defendant did not have the intent to kill her child; there, the evidence showed that she repeatedly struck the child with an open hand and, when the child lost consciousness, the defendant applied a cool cloth and took her to the hospital. *Id*. at 7-10. Finding the defendant's actions to be inconsistent with an intent to kill, the court noted, "[t]here was ample opportunity to complete her crime if, in fact, she intended to kill the

child." *Id.* at 9-10. In contrast to *Mitchell*, defendant's actions here were not inconsistent with an intent to kill. He shot Felix twice, including once in the back as Felix ran away, before fleeing the scene without aiding Felix. Perhaps he didn't shoot Felix "when he first had the chance" because Felix sprung at him, attempting to disarm him, before he had the chance to do so. Regardless, even if we granted defendant the point as to the first shot, the second and third shots at Felix were entirely unprovoked, as Felix was attempting to flee and was shot in the back. The trier of fact would have been more than justified in determining, from those latter shots alone, an intent to kill Felix. The evidence was sufficient to support the conviction.

¶ 21 We next consider defendant's claim that he received ineffective assistance of counsel due to defense counsel's failure to argue at sentencing that defendant should be sentenced as a Class 1 offender pursuant to section 8-4(c)(1)(E) of the Criminal Code of 2012 (Code) (720 ILCS 5/8-4(c)(1)(E) (West 2014)). This section provides that a defendant found guilty of attempted murder may be sentenced as a Class 1 offender, rather than as a Class X offender,

> "if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death ***." 720 ILCS 5/8-4(c)(1)(E) (West 2014).

Defendant contends he was acting under a sudden and intense passion resulting from serious provocation when he shot Felix.

¶ 22 To establish ineffective assistance of counsel in the sentencing context, a defendant must show (1) counsel's performance at the sentencing hearing fell below an objective standard of reasonableness and (2) this deficient performance so prejudiced the defendant as to deny him a fair sentencing hearing. See *People v. Perez*, 148 Ill. 2d 168, 186 (1992) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶ 23 Defendant's claim fails because he cannot show he suffered prejudice from counsel's failure to argue serious provocation at sentencing. *People v. Graham*, 206 Ill. 2d 465, 476 (2003) ("[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient."). This court has recognized that the phrase "serious provocation" has the same meaning in both section 8-4(c)(1)(E) of the Code and the second-degree murder statute (720 ILCS 5/9-2(a)(1) (West 2012)). See *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13. Within the context of the second-degree murder statute, serious provocation has been found to arise in situations involving (1) substantial physical injury or substantial assault, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery with the offender's spouse. *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶ 24. Defendant contends that a sentence reduction to Class 1 attempted first degree murder was warranted here, because the evidence showed the shooting occurred as a result of his mutual quarrel or combat with Felix. We disagree.

¶ 24 Mutual quarrel or combat involves situations where both parties willingly enter into a fight or struggle, or where two persons, "upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *People v. Austin*, 133 Ill. 2d 118, 125 (1989). Mutual quarrel or combat involves a shared intent among the parties to fight. *People*

v. Camacho, 2016 IL App (1st) 140604, ¶ 35. Further, slight provocation is not enough, as the provocation must be proportionate to the manner in which the defendant retaliated. *Lauderdale*, 2012 IL App (1st) 100939, ¶ 26.

¶ 25 Here, defendant cannot establish prejudice. Any argument by counsel to apply section 8-4(c)(1)(E) would have been rejected, because there was no evidence of mutual combat. See *People v Bowen*, 2015 IL App (1st) 132046, ¶ 28 (counsel need not make futile motions in order to provide effective assistance). Rather, the evidence showed defendant—by virtue of approaching Felix, accusing him of being in a gang, and pointing a gun at him—was the aggressor. While the evidence showed defendant had a gun, there was no evidence that Felix had a weapon of any kind. When Felix tried to protect himself by pushing defendant and trying to take his gun, defendant shot him in the shoulder. Then, when Felix was running away and any struggle was over, defendant shot him in the back. Defendant instigated an altercation which Felix was unwillingly drawn into, and the participants were not on equal terms. There was no mutual combat. See *Austin*, 133 Ill. 2d at 125 (no evidence of mutual combat where the victim did not enter the struggle willingly and the fight was not on equal terms); see also *People v. Randall*, 2016 IL App (1st) 143371, ¶ 48 (explaining that Illinois courts have repeatedly rejected mutual combat arguments "where a defendant responds with deadly force to a physical altercation with an unarmed victim").

¶ 26 Additionally, even if Felix's attempt to defend himself against defendant is seen as provocation, defendant's retaliation was wholly disproportionate to that provocation. During the struggle for defendant's gun, he shot the unarmed Felix in the shoulder. Then, as Felix ran away, defendant shot him again, in the back, resulting in a bullet entering Felix's backside and exiting

his penis. Defendant's actions in shooting Felix twice, including once in the back as Felix fled, were in no way proportionate to the alleged provocation, and any argument by counsel to the contrary would have been futile. See *Lauderdale*, 2012 IL App (1st) 100939, ¶ 29 (no mutual combat where the fight was not on equal terms, as only defendant was armed with deadly weapon, and the defendant's firing the gun was disproportionate to the victim's provocation). We find no merit in this argument, either.

¶ 27 CONCLUSION

¶ 28 For the reasons set forth above, we affirm defendant's conviction and sentence.

¶ 29 Affirmed.