

No. 1-09-2832

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 05 CR 22705
)	
SENAQU THOMAS,)	
)	Honorable
Defendant-Appellant.)	Clayton J. Crane,
)	Judge Presiding.
)	

JUSTICE MURPHY delivered the judgment of the court.
Neville, J., and Steele, J., concurred in the judgment.

ORDER

HELD: Where the evidence showed defendant intentionally discharged his firearm toward the victim, defendant was the aggressor, and there was little evidence to support that defendant acted under provocation, a finding of first degree murder was proper.

After a bench trial, defendant was convicted of first degree murder and aggravated battery with a firearm and sentenced to consecutive prison terms of 49 and 6 years, respectively. On appeal, defendant contends that the State failed to prove him guilty of first degree murder beyond

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a reasonable doubt and that the evidence only supported the lesser conviction of either involuntary manslaughter or second degree murder. We affirm.

BACKGROUND

The evidence at trial established that around 12 a.m. on August 1, 2005, defendant shot Renard McGee twice. McGee died as a result of the gunshot wounds.

At the time, McGee lived at 1037 North Monticello (1037). Several of the State's witnesses also lived at 1037, including Pedro DeJesus, Janice Tate, Shirl Hampton, Cachana Tate, Tequila Tate, Chiquita Hampton and Kevin Tate. In essence, the testimony from the State's witnesses revealed that on the night in question, McGee fought with a man named Will Counsel in front of 1037. Sometime after Counsel left, defendant returned and approached McGee. They began arguing and McGee told defendant he "didn't want to talk no more" then started walking away. Defendant grabbed McGee from behind, punched him in the face, and they began "tussling." Kevin Tate came from the neighbor's front porch and hit defendant with a stick that broke from the impact. Defendant pulled a gun out of his pocket. Kevin and McGee ran toward the porch of 1037 with their backs to defendant, Kevin running in front of McGee. Defendant shot McGee twice, hitting him in the leg and the back. Kevin ran inside 1037, then went back on the front porch and used a black metal chair as a shield. Defendant shot at Kevin and hit the chair, then turned and shot Pedro DeJesus twice. McGee and DeJesus were unarmed and Kevin had no weapon other than the stick. Defendant had the only gun.

Pedro DeJesus testified that on July 31, 2005, he was told McGee and Counsel were arguing because McGee owed Counsel \$30. Counsel left without any physical altercation

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occurring. About 15 or 20 minutes later, defendant approached McGee alone. DeJesus saw defendant hit McGee, then grab him in a "bear hug." McGee fell to the ground and defendant was on top of him. DeJesus saw Kevin hit defendant with the stick, but could not recall if it was in the head or across the back and whether it was once or twice. However, Shirl saw Kevin hit defendant in the back with the stick and was corroborated by Cachana, Tequila, Chiquita, and Kevin. DeJesus described the stick as long, skinny and "like a broomstick." Later, when asked "you said you saw Kevin Tate come off of the porch with a broomstick, correct?" DeJesus replied "[c]orrect." When defendant pulled out the gun, DeJesus was standing about two feet away from him and identified defendant's gun as a revolver, not an automatic weapon, because revolvers have a barrel. He saw defendant "shoot twice at [McGee]." When defendant shot DeJesus, one bullet skinned him and the second one hit him in the back of his right leg. DeJesus approximated McGee as being 5'5" and 140 pounds. He remembered beer bottles on the porch and people drinking that night. DeJesus testified Kevin did not throw chairs but did throw bottles at defendant. Janice, Cachana, and Chiquita all testified Kevin threw neither a chair nor bottles at defendant.

Janice Tate testified that she and her sister, Shirl Hampton, broke up the fight between McGee and Counsel around 11:35 p.m. on July 31, 2005. About 30 or 40 minutes later, defendant came to 1037 with Counsel and another man. Janice was standing next to DeJesus and said the stick Kevin used was long and "thin enough to break." Defendant was pointing the gun "at the porch like" when he started shooting. Janice said DeJesus had his hands in the air when he was shot, and was corroborated by Shirl, Cachana, Tequila, and Chiquita. Kevin threw a glass

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at defendant after defendant shot at him.

Shirl Hampton corroborated Janice's testimony that they helped break up the fight, and testified that when defendant pulled out the gun, everyone started running. She saw Kevin throw a jar at defendant before defendant shot at him, an observation corroborated by Cachana, Tequila, Chiquita, and Kevin. Defendant shot at Kevin more than once. Shirl did not recall people drinking that night or beer bottles being on the porch, and was corroborated by Cachana, Tequila and Chiquita.

Cachana Tate testified that defendant appeared when the fight between McGee and Counsel was breaking up, but left with Counsel after the fight. About 20 or 30 minutes later, defendant returned with Counsel, Keith Brown, and one other man. Cachana said the stick Kevin used was a "little thin wooden" stick.

Tequila Tate described the stick Kevin used as "a long, little skinny stick that would come off of a door or something." She said defendant began shooting after McGee made it to the porch steps.

Chiquita Hampton testified that she went outside of 1037 around 11:35 p.m. on July 31, 2005, as the altercation was breaking up. She remained on the front porch and about 20 or 30 minutes later, defendant was talking to Counsel and Keith Brown before approaching McGee. The stick Kevin used was not a broomstick. Everyone started running when defendant pulled out the gun.

Kevin Tate testified that the fight between defendant and McGee occurred around 1 a.m. on August 1, 2005. He described the stick he used as a "thin stick" and "[l]ike a door frame

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stick." Kevin hit defendant because he was trying to help McGee, who he described as "little." When defendant pulled out the gun, everyone started backing up and running. Kevin threw the chair at defendant after being shot at but maintained that he never told a detective that he hit defendant with a broomstick. He also denied ever telling a detective he threw chairs or bottles at defendant and stated that he did not accompany the police to 1037 in order to recover the chair.

Doctor Nancy Jones, a medical examiner, testified that she performed a post-mortem examination on McGee. McGee was 5'8" tall and 120 pounds. He had two gunshot wounds - one in his right back and one in the back of his right thigh. The bullet recovered from McGee's back was brass jacketed, and the bullet from his thigh was a flattened lead bullet without a casing. McGee tested positive for ecstasy. The cause of McGee's death was multiple gunshot wounds.

Julie Steele testified, as a firearms expert, that she examined the bullet and bullet fragment recovered from McGee and found that both most likely came from a revolver, though she could not say whether they came from the same revolver. She also testified that a revolver can fire between five and nine shots without reloading, depending on the gun. No gun was recovered.

Officer Bradley Ruzak testified that he and his partner, Officer John Ebbit, arrived at 1037 at 1:23 a.m. on August 1, 2005. He did not recall whether there were chairs, bullets, or casings lying around when he arrived. He could not recall whether he recovered any broken jars or bottles.

Officer John Ebbit testified that he and Ruzak together spoke to three witnesses: DeJesus,

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Shirl and Chiquita. The officers were told that there were two offenders, defendant and Keith Brown. They identified defendant as the shooter. However, both Shirl and Chiquita told Ebbitt that Keith Brown handed the gun to defendant, not that defendant had the gun in his pocket.

Detective Greg Jacobson testified that he recovered the black metal folding chair Kevin used as a shield either on his own or with Detective Michael Hammond. Jacobson did not go to 1037 with Kevin and did not believe he told Hammond or Detective Michael Pietryla that he relocated to 1037 with Kevin. He also never told Hammond or Pietryla that Kevin informed him that the chair was still in his possession and had agreed to retrieve it.

Detective Michael Pietryla testified that he never interviewed Kevin pursuant to the McGee homicide investigation, but he prepared two or three Detective Supplementary Reports. In one report, Pietryla wrote that Kevin said the chair was still in his possession and agreed to turn the chair over to the police. It also said "Tate was relocated to 1037 North Monticello whereupon he turned over the metal chair to P.O. Jacobson" but Pietryla testified the report was wrong and Kevin never left the area.

Detective Antonio Allen testified that he interviewed Kevin on August 17, 2005. Allen's notes indicated that Kevin told Allen he had hit defendant with a broomstick. Kevin also told Allen he threw chairs and bottles at defendant that night.

Shelly Wright testified that on August 1, 2005, she was working for the fire department and was dispatched around 1:28 a.m. Wright could not independently recall the details of her run and testified from the report she filled out at the time. She arrived at "1027" North Monticello at 1:29 a.m., and came in contact with "Bernard" also known as "Smokey" sitting on the floor. He

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had gunshot wounds to his right middle back and right thigh. She transported "Bernard" to the hospital.

Danielle Cortes DeVito testified that in August 2005 she was an emergency medical technician paramedic. She responded to the 1037 call with Shelly Wright but had no recollection of the events and therefore testified from the same report as Wright.

Defendant testified that between 11:15 and 11:30 p.m. on July 31, 2005, he was in his car with his girlfriend, Cornelias Foster, and her sister. They were planning on driving to defendant's grandmother's house, where he was living at the time. Foster lived at 1037 along with her children. Defendant described 1037 as "kind of like a drug house," and knew guns were in the house. Defendant was carrying a revolver that held six shots, loaded with six lead bullets. He went to check on Foster's daughters because there was a "big altercation going on" in front of 1037 and he was concerned for them. Counsel and Keith Brown were there. He walked up to McGee around 11:35 p.m. and asked what was going on. Defendant was not angry even though McGee responded to him unreasonably and was "over aggressive." After defendant said something to McGee, McGee pushed defendant over a chain gate. Defendant stumbled and McGee stumbled on top of him. As defendant and McGee were tussling, defendant was hit four times across his head, neck, and back, with something sharp and hard. The whole time he was being hit, McGee was standing over him and defendant did not see who was hitting him. Defendant was on the ground surrounded by at least 10 adults that were not on his side. He pulled out his gun. When describing what happened next, he said:

"A. I shoot [McGee] in his leg.

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Q. Why did you shoot [McGee] in his leg?

A. So they can back up off me and I can get away."

Defendant saw McGee go into 1037 while holding his leg and limping. DeJesus then grabbed defendant and Kevin was on the porch with a chair in one hand, pointing something silver at defendant. Defendant was trying to get away because he was afraid of everyone. Defendant shot DeJesus once in the leg, but DeJesus did not let go, so he shot DeJesus in the leg once more. Defendant was not trying to kill McGee or DeJesus, he just wanted to get away. He shot at the chair Kevin was holding three times and hit the chair each time. At some point, someone defendant did not see threw bottles and chairs at him. Defendant then turned and went to his car. When asked if he was angry at any time during the night, he responded:

"A. No. After I was beaten with the stick I was kind of like dazed because I shouldn't have been right there. *** I was being beaten up for no reason. I was kind of like disappointed.

Q. But you weren't angry?

A. No."

Defendant drove to a motel because he was still scared and his head, neck, and back were hurting. Defendant threw the gun away.

The trial court found that the people living at 1037 did not conspire against defendant or put their story together. It stated:

"After having listened to the testimony of the State's witnesses and after having listened to the testimony of the

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defendant in this case, I am convinced beyond a reasonable doubt as to each and every count in this. He was randomly shooting that weapon. He was angry. He shot people."

The court found defendant not guilty of the attempted murder of Kevin Tate and Pedro DeJesus because it could not "find that's what [defendant] intended to do with those people." The court found defendant guilty of first degree murder and aggravated battery with a firearm. The trial court sentenced defendant to 49 years in prison for the murder and 6 years for the battery, to be served consecutively.

ANALYSIS

On appeal, defendant contends that the evidence was insufficient to prove him guilty of first degree murder beyond a reasonable doubt. Defendant asserts that, at best, the evidence proved him guilty of involuntary manslaughter because he acted recklessly in shooting McGee. Alternatively, defendant contends that the evidence only proved him guilty of second degree murder because he acted under a sudden, intense passion as a result of serious provocation.

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant; it is for the trier of fact to determine the credibility of witnesses, draw reasonable inferences and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228. On review, the State gets the

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benefit of all reasonable inferences. *People v. Wheeler*, 226 Ill. 2d 92, 116 (2007). A conviction will only be reversed if the evidence is "so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Siguenza-Brito*, 235 Ill. 2d at 224.

A defendant is guilty of first degree murder if he performs the act which causes the death of another without lawful justification, and either intends to kill or do great bodily harm to the victim or knows that his acts create a strong probability of death or great bodily harm to the victim. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2004); *People v. Leach*, 405 Ill. App. 3d 297, 311 (2010). A defendant commits involuntary manslaughter if he unintentionally kills another without lawful justification by recklessly performing an act that is likely to cause death or great bodily harm to the victim. 720 ILCS 5/9-3 (West 2004); *People v. Jones*, 404 Ill. App. 3d 734, 742 (2010).

The main difference between first degree murder and involuntary manslaughter is the mental state involved. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). Involuntary manslaughter requires recklessness, a less culpable mental state, while first degree murder requires knowledge. *Jones*, 404 Ill. App. 3d at 742. A defendant acts with knowledge when he is aware that his conduct is practically certain to cause a particular result. *Leach*, 405 Ill. App. 3d at 312. A defendant acts recklessly when he is aware his actions " 'might result in death or great bodily harm, although that result is not substantially certain to occur.' " *Jones*, 404 Ill. App. 3d at 742 (quoting *DiVincenzo*, 183 Ill. 2d at 250). Whether a defendant acted with intent, knowledge, or merely recklessly is generally a question of fact to be resolved for the trier of fact. *Jones*, 404 Ill. App. 3d at 744.

Here, we find there was sufficient evidence to find defendant guilty of first degree murder beyond a reasonable doubt. In finding defendant guilty of first degree murder, the trial court implicitly made a credibility finding accepting the State witnesses' version of events. Viewed in the light most favorable to the prosecution, the evidence shows that defendant punched McGee as McGee was trying to walk away. He then grabbed McGee and fell on top of McGee as they "tussled." Kevin hit defendant across the back or the head with a thin stick. Witnesses testified McGee was a small person and at the time of his autopsy he weighed 120 pounds. Defendant weighed 180 pounds at the time of his arrest. From these facts, it is reasonable to infer Kevin was trying to break up the fight, not escalate it. Then, despite no other weapons being used, defendant pulled out a gun. While Kevin and McGee ran away from him, he shot at them and hit McGee twice. When asked why he shot McGee, defendant responded "[s]o they can back up off me and I can get away." Based on these facts and defendant's own testimony, it is reasonable to infer that defendant aimed his gun toward McGee and intentionally fired his weapon, and that defendant knew shooting McGee created a strong probability of McGee suffering great bodily harm. See *People v. Garcia*, 407 Ill App. 3d 195, ___ (2011) (finding that though pointing a gun at someone can be considered reckless, where the defendant intended to discharge his weapon toward a car he had the required intent for first degree murder); *People v. Lemke*, 384 Ill. App. 3d 437, 446 (2008) (observing that "proof that a death resulted from a defendant's act of deliberately firing a gun in the general direction of his victim is sufficient to sustain a conviction for first degree murder").

Defendant also argues the trial court's findings that he was "randomly shooting" and that

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he did not intend to kill Kevin when Kevin was running to the porch right in front of McGee are inconsistent with his conviction of first degree murder and instead support a conviction of involuntary manslaughter. We disagree. The trial court is presumed to know the law. *People v. McCoy*, 207 Ill. 2d 352, 355 (2003). Moreover, defendant not only shot toward Kevin when Kevin was running with McGee, but also when Kevin was standing on the porch with a chair as a shield. Therefore, the trial court's determination that defendant did not intend to kill Kevin is not legally inconsistent with the determination that defendant intended or knew that his actions would cause McGee great bodily harm, and defendant cites to no case that suggests otherwise. Furthermore, after defendant shot McGee, he shot at Kevin three times while Kevin stood on the porch, and then turned and shot DeJesus twice. This sequence of events does not support a finding that defendant was "randomly shooting." Taken in consideration with the court's findings of guilt, we do not believe the court intended its mention of defendant "randomly shooting" to be an explicit finding. Under these circumstances, defendant's conviction of first degree murder was not so unreasonable or improbable as to create a reasonable doubt of his guilt.

Alternatively, defendant maintains that his conviction should be reduced to second degree murder because the evidence showed he acted under a sudden and intense passion resulting from serious provocation. Specifically, defendant argues that he was provoked into shooting McGee when Kevin assaulted him.

A defendant commits second degree murder when he commits the offense of first degree murder but, at the time of the offense, he is "acting under a sudden and intense passion resulting from serious provocation by the individual killed." 720 ILCS 6/9-2(a)(1) (West 2004); *Leach*,

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405 Ill. App. 3d at 314. Once the State has proven the elements of first degree murder, the burden shifts to the defendant to show provocation by a preponderance of evidence. 720 ILCS 5/9-2(c) (West 2004); *People v. Romero*, 387 Ill. App. 3d 954, 967 (2009). The question of whether a defendant was acting under mitigating circumstances is a question of fact. *Romero*, 387 Ill. App. 3d at 967-68. When a defendant argues he provided sufficient evidence to prove a mitigating factor to reduce his conviction to second degree murder, the reviewing court considers whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the mitigating factors were not present. *People v. Thompson*, 354 Ill. App. 3d 579, 587 (2004) (citing *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996)).

To demonstrate adequate provocation, a defendant must show that it fits within one of the recognized categories of serious provocation such as mutual quarrel or combat, and substantial physical injury or substantial physical assault. *Thompson*, 354 Ill. App. 3d at 587.

Mutual combat has been defined as a struggle into 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.' " *Thompson*, 354 Ill. App. 3d at 588 (quoting *People v. Austin*, 133 Ill. 2d 118, 125 (1989)). A defendant who instigates a fight cannot rely on the victim's response as evidence of mutual combat. *People v. Lopez*, 371 Ill. App. 3d 920, 935 (2007). Additionally, mutual combat will not be found if the defendant retaliates out of proportion to the provocation, particularly if he uses a deadly weapon to kill the victim. *Id.*

Here, we find the evidence was not sufficient to show defendant was seriously provoked into a sudden, intense passion. The scuffle between defendant and McGee does not qualify as

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mutual combat. Defendant approached McGee, and when McGee began to walk away, defendant punched him in the face. Defendant then grabbed McGee in a "bear hug" and when McGee fell to the ground, fell on top of him and continued the fight. Defendant instigated the fight. Though Kevin came up behind defendant and hit him in the back or the head with a stick, pulling out a gun and shooting at McGee and Kevin as they ran away is not proportionate retaliation. From these facts, a rational trier of fact could have found that the provocation of mutual combat did not exist.

Defendant also argues that he was provoked by a serious physical assault because "it was only upon being hit by Tate *** that Thomas took out a gun and began firing in the direction of McGee and Tate." However, the evidence, viewed in the light most favorable to the State, shows that defendant was hit once or twice in the back or the head with a thin stick. The trial court could reasonably infer that the assault was not serious, and was meant to break up the fight, not continue it. Defendant did not go to the hospital after the attack, and only testified to his head, neck and back hurting. From this evidence a reasonable trier of fact could conclude that defendant was not seriously injured or seriously assaulted. Furthermore, defendant was the only person with a gun but nonetheless he shot McGee as McGee and Kevin were running away from him. Defendant argues that he was "dazed" and "felt threatened and surrounded." However, the State's witnesses testified that everyone began running as soon as he pulled out the gun. Additionally, defendant repeatedly testified that he was not angry. See *People v. Banks*, 227 Ill. App. 3d 462, 473 (1992) (the court found the defendant's testimony that she was not angry at the victims "destroyed her theory that she shot the victims out of intense and sudden passion"). We

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find that, under these circumstances, a rational trier of fact could have found that the mitigating factors were not present.

CONCLUSION

For the foregoing reasons we affirm the judgment of the trial court.

Affirmed.