20114 IL App (1st) 123138-U

THIRD DIVISION
October 29, 2014

No. 1-12-3138

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 21618
	)	
CRAIGORY GREEN,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurredin the judgment.

ORDER

¶ 1 *Held:* Trial court was not obligated, *sua sponte* and over defendant's objection, to instruct the jury on second degree murder. Prosecutor's comments during rebuttal closing argument, while sarcastic, did not warrant new trial.

¶ 2 After a second jury trial, defendant Craigory Green was convicted of the first degree murder of Terrin Harris and sentenced to 50 years in prison. Green appeals contending that the trial court erred in failing to give a second degree murder instruction (which he objected to against the advice of his trial counsel) and that he was denied a fair trial due to improper comments during the prosecutor's closing argument. There is no dispute that Green shot the

victim, that he fled the scene or that he left Illinois that day. We find neither of Green's arguments warrants a new trial and therefore affirm.

¶ 3 Green was charged with first degree murder following the shooting death of Harris in the early morning hours of November 23, 2008. On November 22, 2008, Green and Harris both attended a party thrown by Tequila Wilson in a second floor apartment at 120 N. Karlov in Chicago. That evening, between 10:00 and 11:00 p.m., Marlisha Reed and her half-sister Shantavia Russell arrived at the party. As guests arrived, they were searched for weapons and charged an entrance fee. The party was crowded and those in attendance danced to loud music played by a DJ.

¶ 4 Green arrived at the party around midnight. Russell testified that when Green arrived, he was searched and a gun was found in his coat pocket. Green was turned away from the party and, according to Russell, Green said "GD," referencing the Gangster Disciple street gang and made a Gangster Disciple "pitchfork" sign with his hands before walking away. Sometime later, Green was admitted to the party.

¶ 5 Around 2:30 a.m., Reed and Russell were dancing with Harris. Both denied that anyone was throwing money in the air while dancing. Reed testified that Green was close to them and that he made the same pitchfork sign prior to shooting Harris. Russell recalled that Green walked over to them and shot Harris. After the shooting, Green fled, tucking his gun in the waistband of his pants. Reed testified that as Green fled, no one ran after or shot at him and she did not hear any additional gunshots.

¶ 6 Both Reed and Russell later identified Green as the shooter from a photo array. Reed denied telling detectives that two people were shot, although the detective to whom she spoke testified that she did.

¶ 7 Harris had a tattoo on his right arm—"2-4"—representing the letters "B" and "D," a symbol used by the Black Disciples. Harris also had a tattoo that read "MOB" standing for "Money Over Bitches," a phrase signifying the importance of money over anything else. The Black Disciples and Gangster Disciples are rival street gangs.

¶ 8 Green's version of events was very different. He claimed he shot Harris in self-defense during an altercation at the party.

¶ 9 Green testified that he was picked up that night by a friend and that they were driving around when they came upon the party by chance. As he was waiting to enter the party, Green saw that people were being searched and so removed the gun he was carrying in his pocket and put it in his high top shoes. Green, who had previously worked as a security guard, had purchased the gun illegally about a month and a half earlier because he had been robbed several times. Green denied that he was initially refused entrance to the party, that he was a member of a gang or that he made any reference to the Gangster Disciples or threw a gang sign at the party. After Green entered the party, he moved the gun back to his pocket. During the party, the friend that had driven Green to the party gave Green the keys to his car because the friend was intoxicated.

¶ 10 Green brought $500-600 in cash with him to the party and he kept the cash in his pocket. At the time, Green was a seasonal employee whose job had either just ended or was about to end. In the early morning hours of November 23, Green was dancing and "making it rain" by throwing dollar bills in the air from his wad of cash, which he had seen done in rap videos. Around 2:30 a.m., a man Green did not know approached him and asked for change for a $20. Green pulled out his cash and gave the man change. A short time later, the same man, this time accompanied by Harris, approached Green and again asked for change, which Green thought was

strange. Green obliged and then saw the man and Harris talking in another part of the room and turning back to look at him. Green thought they intended to rob him. Green did not leave the party at that point.

¶ 11 Green and Harris were later on the dance floor when, according to Green, Harris fell into him. After Green helped Harris up, Harris became angry with Green, accusing Green of pushing him. Harris starting shouting expletives at Green and threatened to beat and rob him. Believing that he was in danger, Green attempted to leave, but was stopped by Harris and his friends who cornered him. Harris took out a gun and pointed it at Green. As Harris pointed the gun at him and another man with Harris pulled Green by the collar, Green testified that he was able to reach around and pull the gun from his back pocket and shoot Harris. Green then fell to the floor and during a struggle with Harris' friends, someone tried to take the gun and it discharged again.

¶ 12 Green then ran out of the party and claimed he heard someone running behind him and then heard shots fired. He ran to his friend's car parked on the street and got inside. One of the shots shattered a back window of the car and another penetrated the driver's side door. At a pause in the shooting Green used the key to drive off. A pod camera video played for the jury showed an individual running in the street and firing a gun around the time of the shooting. Based on the clothes he was wearing, Green told the jury that the man in the video was also at the party and was part of the group with Harris.

¶ 13 Green eventually made it to his grandmother's house later that morning where he parked the car behind her house. He stayed only about five or 10 minutes and then left, taking nothing. He later broke his gun apart and discarded it in an alley. He went to the bus station and left for Tennessee, where he was eventually arrested on October 15, 2009.

¶ 14 Green was also permitted to introduce evidence of Harris' violent nature through the

testimony of a victim of an assault and robbery perpetrated by him. Meisha Brownlee (who could not be located at the time of the second trial and whose testimony was admitted by way of a transcript from Green's first trial) testified to being assaulted and robbed by Harris a few months before his murder. According to Brownlee, she was accosted on the street by Harris—a classmate of hers at Well High School—and several others who dragged her into a yard where Harris struck her on the head with a gun and ultimately shot her in the leg as she attempted to flee. She was able to escape only because Harris began arguing with another member of the group who was trying to persuade Harris not to kill Brownlee.

¶ 15 In rebuttal, Officer Christopher Nipcan testified that during a street encounter several years before trial, Green told him that he was a member of the Black Disciples. Nipcan admitted that the Black Disciples and the Gangster Disciples are two different gangs.

¶ 16 In closing argument, defense counsel stressed to the jury that their verdict rested on the credibility of the witnesses who testified at trial, including Green. Defense counsel did not dispute that Green shot Harris, fled the party and left town. But defense counsel argued that the jury should believe Green's testimony, particularly given Harris' violent nature and the video evidence of an individual firing a gun in the direction Green was running shortly after Harris' shooting.

¶ 17 In rebuttal closing argument, the prosecutor sarcastically referred to Green several times as "Mr. Seasonal Employee," "Mr. Security Guard," 'Mr. vulnerable" and "Mr. law abiding citizen." Defense counsel objected only to the last comment and the objection was overruled. Green's posttrial motion also referred only to the last comment as a basis for a new trial.

¶ 18 During the jury instruction conference, defense counsel asked that the jury be instructed on second degree murder based on Green's testimony that he acted in self-defense. Green

objected. Although his attorneys argued that the court could give the instruction over Green's objection, the court declined to do so after an extended colloquy with Green during which Green was adamant that he did not want the instruction given.

¶ 19 In connection with Green's first trial, the jury was instructed on both first and second degree murder, again based on Green's claim of self-defense. The trial resulted in a hung jury.

¶ 20 The jury found Green guilty of the first degree murder of Harris and he was later sentenced to 50 years in prison. Green timely appealed.

¶ 21 ANALYSIS

¶ 22 Green first argues that the trial court was required to give a second degree murder instruction even though he objected and urged the trial judge, contrary to his lawyers' advice, not to give it. Green's position on appeal is that when a jury is instructed on self-defense in a first degree murder case, a trial court is obligated, *sua sponte*, to instruct the jury on second degree murder, even over defendant's objection. We disagree.

¶ 23 "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 63 (1988); see also *People v. Davis*, 213 Ill. 2d 459, 478 (2004). The State does not dispute that had Green requested the second degree murder instruction, it would have been appropriate for the trial court to give it in light of his claim that he acted in self-defense. But the State argues that under the doctrine of invited error, having insisted that the second degree murder instruction *not* be given, Green cannot now urge the failure to give that instruction as a basis for reversal on appeal.

¶ 24 "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend that the course of action was in error." *People v. Carter*, 208 Ill.

2d 309, 319 (2003). For the doctrine to apply, the defendant must affirmatively request or agree to proceed in a certain way. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (distinguishing between defendant's failure to object and his active participation in the direction of proceedings). The rule of invited error or acquiescence is a procedural default sometimes described as estoppel. *In re Swope*, 213 Ill. 2d 210, 217 (2004). "Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented." *Id.* at 217. See also *People v. Averett*, 237 Ill. 2d 1, 23 (2010) (where the defendant acquiesces to a trial court's particular response to a jury's question, he cannot later complain on appeal that the trial court abused its discretion in so responding).

¶ 25 In *Carter*, our supreme court addressed an analogous claim. The defendant in *Carter*, charged with first degree murder, requested that the jury not be instructed on involuntary manslaughter even though (i) the evidence supported the instruction and (ii) defendant acted against his counsel's advice. 208 Ill. 2d at 319. After his conviction for first degree murder, defendant appealed and assigned error to the trial court's failure to give the involuntary manslaughter instruction. Affirming the trial court, the supreme court invoked the doctrine of invited error to find that defendant's knowing and voluntary waiver of his right to have the jury instructed on a lesser included offense precluded him from obtaining reversal on that ground. "Action taken at defendant's request precludes defendant from raising such course of action as error on appeal." *Id.* The court further found that the trial court was not required to give the instruction *sua sponte*. *Id*. at 322-24.

¶ 26 Despite Green's acknowledgement of his insistence that the second degree murder instruction not be given, he contends that our supreme court's decision in *People v. Washington* (2012 IL 110283) dictates that a jury must be instructed on second degree murder "as a

mandatory counterpart" to an instruction on self-defense. *Id.* at ¶ 56. Thus, Green reasons, the trial court was required to give the instruction *sua sponte* and had no discretion to refrain from doing so. But *Washington* cannot be read so broadly. In *Washington*, the trial court denied the defendant's request for second degree murder and involuntary manslaughter instructions and defendant was later convicted of first degree murder. *Id* at ¶ 14. Finding that the failure to give the second degree murder instruction constituted an abuse of discretion, our supreme court articulated the rule that when a defendant requests a second degree murder instruction and the evidence warrants a self-defense instruction, the instruction on second degree murder must be given. *Id.* at ¶ 56. But the court specifically limited its holding to cases where both conditions are met, *i.e.*, the evidence warrants a self-defense instruction *and* the defendant requests that a second degree murder instruction be given. *Id. Washington* thus does not support Green's position that the trial court here was obligated to give the second degree murder instruction over his objection. Although there is certainly authority that a trial court possesses the discretion to instruct on uncharged included offenses *sua sponte* (*People v. Sinnott*, 226 Ill. App. 3d 923, 932 (1992)), there is no case that requires a court to do so under the circumstances presented here.

¶ 27 Green certainly had a valid basis to decide that he did not want the jury instructed on second degree murder. Green's first jury, which received that instruction, was hung. Given his testimony regarding the events leading to Harris' shooting, Green clearly could have believed that his chances for acquittal were enhanced if the jury's only choice was to convict him of first degree murder. There is no basis to relieve Green of the consequences of that choice on appeal.

¶ 28 A trial court's decision to refrain from giving an instruction will not serve as a basis for reversal unless the decision constituted an abuse of discretion. *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 50. The trial court here carefully considered its decision to accede to Green's

request that the jury not be instructed on second degree murder and did not abuse its discretion in refraining from giving the instruction.

¶ 29 Green further contends that the prosecutor's rebuttal closing argument deprived him of a fair trial citing several sarcastic references the prosecutor made, including referring to Green as "Mr. Security Guard," "Mr. Seasonal Employee" and "Mr. law abiding citizen" and referring to Green's theory of self-defense as "ridiculous." Green acknowledges that a contemporaneous objection was made only to the "Mr. Law abiding citizen" comment, which was also the only comment cited in his posttrial motion, but asks us the review the issue under plain error.

¶ 30 Plain error allows a reviewing court to address forfeited errors if a clear or obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Plain error is often invoked by defendants on appeal, but has been recognized by our supreme court as a "narrow and limited exception to the general waiver rule." *People v. Herron*, 215 Ill. 2d 167, 177 (2005), citing *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). The first step in assessing whether the plain error doctrine applies is to determine whether any error has occurred in the first place. *Piatkowski*, 225 Ill. 2d at 565.

¶ 31 While the sarcastic tone of the prosecutor's remarks was unnecessary and inappropriate, the subject matter of the argument was warranted given the evidence presented at trial and thus we find no error. In order to accept Green's self-defense testimony, the jury would have been required to accept that (i) Green, as a seasonal employee whose work had just ended or was about to end, would carry around $500-600 in cash; (ii) despite the fact that Green acquired a

gun ostensibly because he had been robbed several times, he would repeatedly flash a large wad of cash at a party attended by people he claimed not to know; (iii) Green was able to reach into his back pocket while Harris was pointing a gun at him and another person with Harris was pulling him by the collar and shoot Harris before Harris shot him; (iv) Green was able to escape from the party with his gun after falling to the ground surrounded by Harris' friends; and (v) despite Green's belief that someone was running close behind him and shooting, he kept his gun in his waistband, putting it there after he shot Harris. Thus, because Green's defense depended on the jury's acceptance of a number of dubious propositions, the prosecutor properly focused on the weaknesses in Green's story. While the sarcasm employed did not enhance the presentation, it likewise did not deprive Green of a fair trial. Finding no error in the prosecutor's arguments, we need not engage in a plain error analysis. There being no other errors raised by Green as a basis for reversal, Green's conviction for the first degree murder of Terrin Harris is affirmed.

¶ 32 Finally, Green seeks credit for 1052 days in custody prior to sentencing, a request with which the State agrees. Accordingly, we direct that Green's mittimus be corrected to reflect credit for 1052 days of pre-sentence custody.

¶ 33 CONCLUSION

¶ 34 We hold that the trial court did not abuse its discretion in refraining from giving a second degree murder instruction where Green objected to the instruction and that the trial court was not required *sua sponte* to give the instruction over Green's objection. We further find no error in the prosecutor's rebuttal closing argument given that the substance of the argument was a fair comment on the weaknesses in Green's self-defense theory. Finally, we direct Green's mittimus to provide for the correct number of days of pre-sentence custody.

¶ 35 Affirmed; mittimus corrected.