2011 IL App (1st) 091350-U
No. 1-09-1350

SECOND DIVISION
June 28, 2011

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 5219
	)	
VYTATLUS VAN,	)	Honorable
	)	Douglas J. Simpson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

HELD: Felony murder judgment affirmed where court did not abuse its discretion in refusing separate jury instructions for general intent, specific intent, and felony murder; the court did not abuse its discretion in refusing a requested second degree murder instruction; and evidence was sufficient to prove defendant guilty of the predicate offense of home invasion.

¶ 1 Following a jury trial, defendant Vytaltus Van was found guilty of first degree murder and home invasion, then sentenced

solely on the felony murder conviction to 40 years' imprisonment. On appeal, defendant contends that the circuit court erred when it refused his request for separate jury instructions for the three murder charges, and a second degree murder instruction based on serious provocation. He also contends that his conviction for felony murder should be reversed because the State did not prove him guilty beyond a reasonable doubt of the predicate offense of home invasion.

¶ 2 At trial, the State's evidence showed that about 3 a.m. on October 4, 2004, defendant stabbed and killed the victim, Shannon Long. The victim had been dating Kachea Thomas, defendant's ex-girlfriend and the mother of three of defendant's children. Kachea had rented an apartment in Calumet City, and was living there with the victim and her children. On occasion, her sister Shontae Thomas, spent the night and watched the children. The State's evidence further showed that while the aforesaid occupants, save Shontae, were sleeping that morning, defendant entered the apartment through a second story window, and stabbed the victim in the bedroom where the victim and Kachea had been sleeping.

¶ 3 Kachea testified that defendant had, at times, lived with her and their children until earlier that year when they broke up. She changed the locks without giving him a key after he threatened her. On the morning of the stabbing, Kachea was

dating the victim and was pregnant with his child. She and her children returned home about 9:30 p.m., and she and the victim parked their cars on the street outside of their apartment building. Before going to sleep, Kachea left a light on in the kitchen over the stove. By 10:30 p.m., her children were asleep in one bedroom, and by 1 a.m., she and the victim were asleep in another bedroom.

¶ 4 Kachea further testified that she awoke when her bedroom light was turned on and saw defendant standing over her and the victim. She yelled at defendant and pulled the covers over her head, then felt a "poking" on the blanket, and saw defendant stabbing the victim through the blanket. The victim and defendant chased each other out of the bedroom and around the apartment. Moments later, the victim returned to the bedroom and attempted to block defendant from re-entering. Defendant, however, kicked at the door, reached through a crack in it, and made stabbing motions with his hand. The victim fell bleeding, and slid down the door frame, telling Kachea "I've been stabbed get help."

¶ 5 Kachea ran from the apartment and, once outside, encountered her uncle DeJuan Thomas, who was driving Shontae to the apartment. DeJuan helped calm Kachea and brought her back up to the apartment, where she called 911. At one point in the morning, Kachea saw a pair of chrome scissors in defendant's

hand, which she recognized from a barber set that he owned; however, she was not certain if defendant had the scissors when he was on the bed because she was focused on his face at that time.

¶ 6 Kachea further testified that on July 30, 2004, defendant entered her apartment around midnight while she was sleeping. He picked her up from her bed by the stomach, yelled at her, and tried to punch her in the stomach. She fought him off and called the police, then later changed the locks on the apartment, and had not seen defendant since that night.

¶ 7 Defendant and Kachea's 16-year-old son, Vytaltus Van, Jr. (Billy), testified that his father was not living with them at the time of the stabbing and that he had not seen his father since the summer. On the morning of the stabbing, Billy woke up and heard noises in the kitchen, including footsteps, doors slamming, and bumping. When he looked into the hallway, he saw his father kicking at the bedroom door, then saw him enter the bedroom and crouch down near Kachea. Billy's sister yelled out "stop" and his father fled. Billy saw the victim lying on the floor breathing hard and blood on the wall beside him.

¶ 8 DeJuan Thomas testified that he had driven to Kachea's apartment building to drop Shontae off about 3 a.m. As he walked to the building, he saw a window screen on the sidewalk that had not been there the previous evening when he had picked up

Shontae. He saw Kachea in a neighboring yard and took her back to the apartment, where he saw blood on the wall, the victim lying on the floor gasping for air, and the damaged bedroom door.

¶ 9 A Calumet City police officer who responded to the 911 call and an investigator from the department both testified and corroborated the testimony as to the damaged bedroom door and the victim's condition that morning. The investigator further testified that he observed that a screen had been removed from a second-story window and was on the ground near a sidewalk. He had the window dusted for fingerprints and found two fingerprints near the sill, which he recovered and submitted for forensic analysis. A forensic scientist testified that those fingerprints matched defendant's.

¶ 10 A medical examiner testified that the victim's injuries were consistent with being stabbed by a scissors and that he died of stab wounds that severed two major arteries.

¶ 11 Defendant testified that he went to Kachea's apartment about 3 a.m. to talk to her about their relationship and their children, and to retrieve the title for his automobile. As defendant approached her apartment building, he saw that the light inside the doorway leading up the stairs was not on. He understood this to mean that no one was home, because he knew that Kachea was usually awake at that time and left that light on when she was home. Defendant decided that he would not be able

to talk to Kachea that morning, but that he would still retrieve the vehicle title.

¶ 12 Defendant further testified that he entered the apartment through the front door using his key. He went to the kitchen and looked on top of the refrigerator for his papers, then walked to a hallway closet to continue his search. Kachea's bedroom door had been closed, but defendant then heard a voice and saw that the light in that bedroom had been turned on. The victim chased him and hit him twice on top of his head with an object. The two fought throughout the apartment, and at some point, Billy yelled for the men to stop fighting. Defendant then ran out through the door. He testified that he did not stab the victim.

¶ 13 On cross-examination, defendant reiterated that he had keys to the apartment, including those for the new locks. He denied being in Kachea's bedroom and did not see any damage to the bedroom door.

¶ 14 At the close of evidence, a jury instruction conference was held and defense counsel requested that the jury be instructed separately as to general intent murder, specific intent murder, and felony murder. The State responded that separate instructions could cause confusion and result in a hung jury. In the interest of keeping a single general verdict form, the State conceded consecutive sentencing, which is unavailable for a felony murder conviction. Based upon the State's representation

about consecutive sentencing, and a review of relevant caselaw, the court denied defendant's requested instruction.

¶ 15 Defense counsel also requested instructions on self-defense, serious provocation, and mutual combat. In its ruling, the circuit court reviewed defendant's testimony that the victim came "barging" out of the bedroom and hit defendant on the head. Defendant testified that he had no weapon of his own, and merely tried to get the object that the victim held. The court also noted defendant's testimony that the fight between them never reached the back of the bedroom where the evidence showed the victim had been stabbed. Finally, defendant denied stabbing the victim. The court found it "clear that a person seeking a self-defense instruction must have admitted to the killing, and, as a basis for the reasonable belief that the force exerted was necessary." The court also denied defendant's request for a serious provocation and mutual combat instruction, citing *People v. Lahori*, 13 Ill. App. 3d 572 (1973) and *People v. Chatman*, 383 Ill. App. 3d 890 (2008), for the proposition that "there must be an admission by defendant that he was at least the perpetrator in the murder."

¶ 16 Following deliberations, the jury found defendant guilty of first degree murder and home invasion. The circuit court subsequently "merged" the home invasion charge into the first degree murder charge and sentenced defendant to 40 years'

imprisonment for his conviction of felony murder.

¶ 17 On appeal, defendant first contends that the trial court erred in refusing his requests for separate jury instructions for general intent, specific intent, felony murder, and second degree murder. Given the uncertainty of the general verdict returned by the jury, defendant posits that it cannot be presumed that he was found guilty merely of felony murder. Our review of the court's decision on defendant's request for separate verdict forms presents a legal question, which we review *de novo*. *People v. Smith*, 233 Ill. 2d 1, 15 (2009).

¶ 18 We initially observe that, although three types of murder are described in the first degree murder statute (720 ILCS 5/9-1(a) (West 2006)), first degree murder is a single offense. *Smith*, 233 Ill. 2d at 16. Because it is a single offense, it is constitutionally possible for a jury to return a general verdict of guilty without a unanimous finding on a particular theory. *Smith*, 233 Ill. 2d at 16-17. However, there may be different sentencing consequences based on the specific murder theory proven; and, as relevant here, defendant could not simultaneously be convicted of both home invasion and felony murder because the predicate felony underlying a felony murder charge is a lesser-included offense of felony murder. *Smith*, 233 Ill. 2d at 17.

¶ 19 In refusing defendant's request for separate verdict forms, the court cited, in part, the State's representation that it

would not seek consecutive sentences. Thus, after the jury returned the general verdict form, finding defendant guilty of murder and home invasion, the circuit court merged them into the first degree murder charge, and imposed a single 40-year sentence for felony murder.

¶ 20 Defendant maintains that the State's sentencing concession was irrelevant because the mandatory sentencing requirement (730 ILCS 5/5-8-4 (West 2008) cannot be waived. For example, defendant points out, that consecutive, rather than concurrent, sentences must be imposed if one offense was first degree murder and defendant inflicted severe bodily injury. 730 ILCS 5/5-8-4(a)(I) (West 2004). Therefore, defendant claims, where specific findings by the jury could result in different sentencing consequences, favorable to defendant, specific verdict forms must be provided upon request, and the failure to provide them is an abuse of discretion. *Smith*, 233 Ill. 2d at 23.

¶ 21 Although the court in *Smith* so found, it went on to consider and reject the State's harmless error argument where defendants were sentenced on the *presumption* that they were found guilty of intentional murder and thus prejudiced by the court's refusal to tender separate verdict forms. *Smith*, 233 Ill. 2d at 27-8. Here, by contrast, the court employed the remedy outlined in *Smith*, when it interpreted the general verdict as a finding on felony murder, and sentenced defendant solely on that conviction.

Smith, 233 Ill. 2d at 28. Defendant, therefore, was not prejudiced by the court's refusal to tender the proposed verdict forms, and we affirm the judgment of conviction entered on felony murder.

¶ 22 Defendant next contends that the circuit court erred in refusing to instruct the jury and provide a verdict form for second degree murder based on a theory of serious provocation. We disagree.

¶ 23 We recognize that a defendant is entitled to argue alternative, and even inconsistent, theories of his case at trial. *People v. Davis*, 213 Ill. 2d 459, 478 (2004). However, the ability of a defendant to assert inconsistent theories is limited (*People v. Williams*, 96 Ill. App. 3d 8, 16 (1981)) and each theory must be supported by the trial record (*Davis*, 213 Ill. 2d at 478).

¶ 24 At trial, defendant requested instruction on second degree murder based on self-defense, serious provocation, and mutual combat. The court refused this request after reviewing defendant's testimony regarding the altercation and noting that he never admitted being the perpetrator. On appeal, defendant confines his argument to the court's failure to provide a second degree murder instruction based on serious provocation.

¶ 25 Whether to tender a jury instruction on second degree murder is within the discretion of the circuit court. *People v. Austin*,

133 Ill. 2d 118, 124 (1989). Defendant has the burden of proving there is at least "some evidence" of serious provocation to warrant the instruction (*Austin*, 133 Ill. 2d at 125), and the evidence upon which defendant relies must rise above the level of a mere factual reference or witness' comment (*People v. Bratcher*, 63 Ill. 2d 534, 539 (1976)).

¶ 26 In this case, defendant testified that he entered the apartment through the front door using his keys. He also testified that while he was looking for his paperwork, the victim hit him twice in the head with an unknown object, and after his son asked him to stop, he ran from the apartment. This testimony, however, is belied by the evidence at trial.

¶ 27 Two witnesses for the State testified that the second story window was missing a screen, which was found on the ground outside, and physical evidence proved that defendant left fingerprints on the sill of that same window, suggesting that as the point of his 3 a.m. entry. Kachea testified that defendant was the initial aggressor, that she awoke to find him standing over her bed, and saw him stabbing the victim through the blanket. Following that, defendant and the victim scuffled outside the bedroom, but returned, where the fatal blows were inflicted. Billy also testified that defendant was in the bedroom that morning, and the physical evidence provides further support for that testimony.

¶ 28 At best, defendant's testimony proves that he entered a home where he was not welcome at 3 a.m. (see *People v. Frisby*, 160 Ill. App. 3d 19, 30-31 (1987), stabbed his ex-girlfriend's paramour, who then tried to defend himself. It is thus apparent that defendant instigated the event and, thus, cannot rely on the victim's response to mitigate his conduct. *Austin*, 133 Ill. 2d at 126-27. Accordingly, we find no abuse of discretion by the court in denying defendant's request for a second degree murder instruction based on serious provocation. *Austin*, 133 Ill. 2d at 128.

¶ 29 Defendant finally contends that his conviction for felony murder should be reversed because the State did not prove him guilty beyond a reasonable doubt of the predicate felony of home invasion. He specifically maintains that there is insufficient evidence to prove that he knew that one or more persons were present in the apartment.

¶ 30 Where, as here, defendant challenges the sufficiency of the evidence to sustain a conviction, our inquiry is limited to whether, after reviewing the evidence in a 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. McNeal*, 405 Ill. App. 3d 647, 677 (2011), citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In order to prove home invasion in this case, the State was required to demonstrate

beyond a reasonable doubt that defendant knowingly entered the dwelling place of another when he knew or had reason to know that one or more persons were present and intentionally caused any injury to any person within the dwelling place. 720 ILCS 5/12-11(a)(2) (West 2008). The requisite knowledge may be proved by circumstantial evidence, so long as the State presents sufficient evidence from which an inference of knowledge can be made. *People v. Hickey*, 178 Ill. 2d 256, 292 (1997).

¶ 31 Viewing the evidence in the light most favorable to the State, we find that the record contains sufficient evidence to demonstrate that defendant knew or had reason to know that someone was in the apartment when he entered it. The State's evidence clearly established that entry to the home was made about 3 a.m., a time when it is reasonable to presume that most people are asleep (*Hickey*, 178 Ill. 2d at 292; *Frisby*, 160 Ill. App. 3d at 30-31; *People v. Tackett*, 150 Ill. App. 3d 406, 420 (1986)), particularly when children reside there. Although defendant testified that Kachea usually stayed awake until this time, and that there was no light on in the vestibule, which he considered a clue to that fact, Kachea testified that, on July 30, 2004, defendant had entered the apartment before midnight, found Kachea and the other family members inside the apartment asleep, and that she changed the locks and did not give him a key.

¶ 32 This evidence directly contradicts defendant's testimony that he walked in through the front door using a key in order to get some paperwork, and the reasonable inference from further evidence shows that entry was made through a second story window. In addition, automobiles belonging to Kachea and the victim were parked on the street near the apartment. *Hickey*, 178 Ill. 2d at 292-93. Taken together, these facts provide sufficient evidence to support the jury's finding that defendant knowingly and without authority entered the apartment where he had reason to know that one or more persons were present therein to establish his commission of the predicate felony of home invasion.

¶ 33 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.