

FOURTH DIVISION
September 12, 2013

No. 1-11-2462

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 09 CR 16997
DARNELL POLK,	)	
	)	Honorable
Defendant-Appellant.	)	Stanley J. Sacks,
	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the
judgment.

ORDER

¶ 1 *HELD:* The trial court did not abuse its discretion when it refused to read the "imperfect self defense" second degree murder instruction to the jury. The trial court did not abuse its discretion when it declined to reread Illinois Pattern Criminal Instruction 7.03 in response to a jury's question regarding the meaning of "provocation." Therefore, defendant's conviction is affirmed.

¶ 2 Defendant-appellant Darnell Polk was convicted of first

degree murder by a jury and sentenced to 50 years in prison. Defendant now appeals his conviction claiming that the trial court erred in (1) refusing to read the "imperfect self defense" instruction to the jury, and (2) by not rereading Illinois Pattern Jury Instructions, Criminal, No. 7.03 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 7.03) in response to a jury's question regarding the meaning of "provocation." For the reasons that follow, we affirm the trial court's rulings.

¶ 3 BACKGROUND

¶ 4 Defendant-appellant Darnell Polk was convicted of first degree murder by a jury and subsequently sentenced to 50 years in prison. The case arose out of the fatal shooting of Dejuan Echols on August 7, 2009. The evidence at trial was as follows.

¶ 5 Ieshia Burnett, Echols' girlfriend, testified that at approximately 10:00 p.m. on August 7, 2009 she and Echols walked to a liquor store on the corner of 71st Street and Artesian Avenue in Chicago, Illinois. Before they made it into the liquor store, they were confronted by defendant. Defendant began shouting at Echols, calling him a "bitch," mentioning a robbery and informing Echols that he had a gun. This verbal fight soon escalated into a fistfight. Burnett testified that during the fight, she saw defendant pull out a gun. She did not at any time during the fight see Echols pull a knife.

¶ 6 During the fight, Burnett observed Echols throw defendant to the ground, at which time bullets fell to the ground. Defendant

1-11-2462

picked up the bullets and ran around the corner. Echols then bent over and began to pick up his belongings, which included some money, house keys and car keys. Burnett observed a trail of blood droplets that led around the corner where defendant had gone.

¶ 7 About 20 seconds after running around the corner, defendant returned and shot Echols in the head while he was still bent over picking up his belongings. Defendant immediately ran away towards 71st and Western. At that point, Echols did not talk or move and Burnett tried to stop the bleeding from his head with a shirt she had in her purse.

¶ 8 When the police arrived, Burnett told them what had happened and what she observed. She informed the detective that defendant had stated early on in the confrontation that he had a gun.

¶ 9 Burnett further testified that she had seen a kitchen knife at Echols' mother's house earlier that evening, but she did not see a knife during the fight and was not aware that Echols was carrying any knife that night.

¶ 10 On August 26, 2009, Burnett testified that she went to Area 1 police headquarters and identified defendant as the person who shot Echols in a photo array and a line-up.

¶ 11 Jerome Barker, a neighborhood resident, testified that he did not know defendant or Echols. On August 7, 2009 at about 10:00 p.m., Barker was at the liquor store at 71st and Western. Barker had seen Echols with a woman at the door of the liquor

1-11-2462

store and observed defendant approach them before they were able to enter the store. After an argument arose between Echols and defendant, defendant went east on 71st Street towards Western and ran into an alley. Barker then saw defendant come running back out of the alley and head towards Echols and the woman. Barker heard something about "a robbery that went bad." Echols and defendant then began to physically fight. Barker heard someone say "you tried to stab me" and then saw Echols throw defendant on the ground. Defendant got up, pulled a gun from his waist and tried to shoot Echols, but the gun did not fire. Defendant then ran around the corner and into an alley, where it appeared to Barker that he was trying to fix his gun. Echols was picking his stuff off the ground when defendant ran out of the alley and shot him in the head. Defendant then ran away. Barker spoke with the police on the night of the shooting and identified defendant in court as the person who shot Echols.

¶ 12 Desmond Hinton, a liquor store employee, testified that he was working on the night of August 7, 2009. He knew defendant from the neighborhood, and he knew Echols from being a customer at the store. Hinton testified that he observed the fight between defendant and Echols on the night of August 7, 2009. He testified that he saw defendant fall to the ground and then run a few feet around the corner where he appeared to be fixing a gun. After about 10-15 seconds, defendant ran out of the alley and shot Echols in the head while Echols was bent over in a baseball-

1-11-2462

catcher's position picking some things off the ground. Echols did not lunge at defendant or make any aggressive movements toward defendant just prior to being shot. Defendant ran into an alley after shooting Echols.

¶ 13 Bradis Murphy, Echols' cousin, testified that two days before the shooting, on August 5, 2009, she and Echols were walking to the liquor store when they were robbed by defendant. Defendant and another man, who she knew as Tywoo, held up a gun and told them both to lie down. Echols took off running, but Murphy got down on the ground and gave the men her phone, money, debit card and house keys.

¶ 14 A few hours later, on the morning of August 6, 2009, defendant and Tywoo threw rocks or bricks at Murphy's window and broke into her house. Murphy ran out the back door. On August 7, 2009, Murphy went to the police station to file a police report regarding the armed robbery and break in.

¶ 15 Chicago Police Department Evidence Technician Nick Ribauda testified that he recovered four live .38 caliber bullets, two halves of a steak knife, a cigarette, bloody clothing and some blood from the scene of the shooting. He observed three to four different locations of blood droplets on the sidewalk pavement near the scene of the shooting. A stipulation was entered that the blood on the steak knife that was found at the scene of the shooting matched defendant's DNA.

¶ 16 Cook County Medical Examiner Lauren Moser testified that she

1-11-2462

performed an autopsy on Echols. She testified that Echols' gunshot wound showed that the entrance of the bullet was on the left side of his head, and that the course of the bullet would be consistent with Echols being crouched on the ground and the shooter standing taller than him, shooting downwards. She also testified that the cause of death was a gunshot wound to the head and the manner of death was homicide.

¶ 17 Detective John Murray testified that he was assigned to investigate the August 7, 2009 shooting. On the night of the shooting, Murray and his partner spoke to Burnett and Barker. After speaking with each of them, Murray and his partner began looking for defendant. A few days later, they spoke with Hinton who identified defendant from a photo array. At that point, an investigative alert was put out for defendant. Murray and his partner went to the areas that defendant was known to frequent, but could not find him. They reviewed images from the camera at 71st and Artesian, but the video did not capture the shooting due to the sporadic nature of the camera's filming and the clarity of the video was not good. The video images were published to the jury and they showed a man with a backpack standing outside the liquor store at 10:02 p.m. and a man lying on the ground with a woman sitting over him at 10:05 p.m.

¶ 18 Murray also testified that once arrested and placed in an interrogation room, defendant made a statement. The statement was videotaped and played for the jury. During the interview,

1-11-2462

defendant initially stated that as he was walking to the liquor store from the barber shop, Echols approached him and started taunting him. Defendant claimed that he was not interested in what Echols was saying and had begun walking back to the barber shop when Echols began taunting him about his kids and "disrespecting" him. Defendant testified that an argument arose and Echols asked him if he "wanted to shoot it out." The two men then met at the corner and after Echols grabbed defendant, they began fighting.

¶ 19 Defendant stated that he did not have his gun in hand when the fight began. He stated that Echols was pounding him and then he felt himself being stabbed. While stabbing defendant, Echols knocked the bullets out of defendant's gun, which defendant stated he had been "fitting to pull." When defendant was asked when he first pulled out his gun, defendant initially responded that he was pulling it out when he got to the corner and later stated that he was trying to pull out the gun when Echols hit him in the arm, making his arm go numb.

¶ 20 Defendant stated that he was able to make it around the corner and fix the barrel of his gun, which was "real loose." At that point, defendant saw that he still had one shell left in his gun. Although he saw that Echols was busy picking stuff off the ground, he thought about what he was "supposed to do" and concluded that it was "self-defense" and he was "scared" so he turned around and shot Echols through the back of the head.

1-11-2462

¶ 21 When the detectives asked defendant why he did not just keep running or call the police, defendant stated: "You gotta look at it too man. I'm young. My adrenaline was rushing. All I was thinking about was he stabbed me." When Murray pointed out the fact that he was already away from Echols, defendant responded: "You're right, but I was so mad, I was, ya know, my head was gone. All I was thinking about this-this nigger could tried to kill me, he stabbed me in the head three times." Defendant stated that he threw the gun in the alley as he fled and that he had been living on the streets from the date of the shooting to the date of his arrest.

¶ 22 Murray testified that while questioning defendant, he observed scabs on defendant's left shoulder and a mark on the back of his head. Murray stated he did not see any cut on defendant's right shoulder that would have been deep enough to prevent him from using that shoulder.

¶ 23 After the State rested, the defense put on his case, which consisted of two stipulations. The first stipulation was that Hinton testified before the grand jury that defendant ran around the corner for about four or five seconds before shooting Echols. The second stipulation was that Officer Fanny Arguello testified that she took a report from Brandis Murphy on August 7, 2009 in which Murphy stated that Darnell Pope (Polk) and Tyrone (Tywoo) Roberts came to her house and broke her windows.

¶ 24 During the jury instruction conference, defendant argued for

1-11-2462

a second degree murder instruction on both provocation and justification; he also requested an involuntary manslaughter instruction. The trial court found that there was no evidence to support the involuntary manslaughter instruction, stating: "[I]n the instant case, the only evidence this jury has heard is that the defendant, Darnell Polk, shot the man as he is kneeling on the ground picking up his property that fell out during the course of the fight with Darnell Polk. There's no way any rational person at all could determine the incident was involuntary manslaughter under those circumstances." The trial court also found that there was no evidence of self-defense. Specifically, the trial court found:

"The only evidence before me and the same jury is basically that something happened between Darnel Polk [sic] and Dejuan Echols that for whatever period of time the defendant left. There's a difference of it being four seconds, ten seconds, twenty seconds with various witnesses. And he did something with the gun according to some of the witnesses. He then comes back, whatever time he was gone, he comes back and at that point Dejuan Echols is kneeling down picking up stuff off the ground. So at that point there is no threat to the defendant

whatsoever at that point when he comes back around the corner with the gun. None. He then determines he's going to shoot Dejuan Echols, which he does in fact shoot Dejuan Echols at that point. As far as any self-defense, I don't see it at all. If there is a shooting during the course of jumping off of the fight and so-called stabbing or whatever, maybe then there might be some issue about self-defense. In this case, he leaves, comes back, and when he comes back, there's no threat to the defendant whatsoever at that point. All the guy is doing, all of the evidence in the case is, he is kneeling down picking up stuff. *** I don't see any evidence in this case whatsoever of self-defense. I do however think the Defense can make the argument that the fight, the struggle, whatever it was, might be sufficient under the sudden intense passion aspect of the mitigating circumstances. So I would give that portion, Murder in the first degree, mitigating circumstances based on subparagraph 720 ILCS 5/9-21, sudden intense passion. The jurors can determine maybe it

occurred like that therefore it's under sudden intense passion. Fight, stab, comes back shortly thereafter, according to his version of events, shoots the guy. But as far as self-defense, I don't see that at all."

Accordingly, the trial court allowed the sudden and intense passion resulting from serious provocation instruction to be read to the jurors, but refused to allow the instruction based on the unreasonable belief that circumstances existed justifying the use of deadly force. Defendant then rested his case.

¶ 25 While the jury was deliberating, the judge received the following question from a juror: "Is the physical evidence of a stabbing considered provocation, or is the reason behind the stabbing considered provocation?" Based on that question, the State requested that an additional jury instruction, the initial aggressor instruction (IPI Criminal 4th No. 24-25.11), be read to the jurors in response to the question, but defendant objected and requested that IPI Criminal 4th No. 7.03, which had already been given to the jurors, be reread to the jurors instead.¹ Specifically, with respect to the jury's question on provocation

¹ IPI Criminal 4th No. 7.03 states: "A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if, at the time of the killing, the defendant acts under a sudden and intense passion resulting from serious provocation by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person."

1-11-2462

and IPI Criminal 4th No. 7.03, defense counsel conceded that IPI Criminal 4th No. 7.03 sufficiently answered the jury's question and stated: "I think the law governing the case has been given to [the jurors] and the instructions adequately cover the question." Ultimately, the trial court found that the question presented by the juror was a factual question and that IPI Criminal 4th No. 7.03, which had already been given to the jurors, was sufficient in answering the jury's question. Accordingly, the court responded to the jury's question by stating the following: "[You] have received all the evidence, all the exhibits, and stipulations and the instructions. Please continue to deliberate."

¶ 26 The jury returned a verdict of guilty of first degree murder. Defendant was subsequently sentenced to 50 years in the Illinois Department of Corrections. Defendant now appeals his conviction claiming that the trial court erred in (1) refusing to read the "imperfect self defense" instruction to the jury, and (2) by not responding to a jury's question regarding the meaning of "provocation." For the reasons that follow, we affirm the trial court's rulings.

¶ 27 ANALYSIS

¶ 28 I. "Imperfect self defense" Second Degree Murder Instruction

¶ 29 Defendant claims that the trial court committed reversible error when it refused to read the "imperfect self defense" instruction to the jurors. The "imperfect self defense" is a

mitigating factor to first degree murder when "at the time of the killing [the defendant] believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable." 720 ILCS 5/9-2 (West 2008). For the reasons that follow, we affirm the trial court's refusal to read the "imperfect self defense" instruction to the jury.

¶ 31 A court's decision to decline a particular instruction is subject to an abuse-of-discretion standard of review. *People v. Moore*, 343 Ill. App. 3d 331, 338 (2003); *People v. Mohr*, 228 Ill. 2d 53, 66 (2008); *People v. Jones*, 219 Ill. 2d 1, 31 (2006).² "A trial court abuses its discretion if jury instructions are not clear enough to avoid misleading the jury ***." *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015 (1998). Even if the trial court errs in denying a particular instruction, the decision is subject to a harmless error analysis and may be affirmed if evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt. *Moore*, 343 Ill. App. 3d at 339.

² While defendant argues that *de novo* review applies here based on *People v. Washington*, we note that the court in that case specifically stated: "Our holding applies only in cases, such as *Lockett* and the instant case, where the trial court has determined that the giving of an instruction on self-defense is warranted and the defendant requests the giving of a second degree murder instruction." *People v. Washington*, 2012 IL 110283 (2012). Accordingly, *de novo* review does not apply in the case at bar.

¶ 32 There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to determine which issues are raised by the evidence and whether an instruction should be given. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *Nassar v. County of Cook*, 333 Ill. App. 3d 289, 297 (2002). Instructions which are not supported by either the evidence or the law should not be given. *People v. Simester*, 287 Ill. App. 3d 420, 431 (1997). The task of a reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). If there is evidence that, if believed by the jury, would reduce a crime from first degree murder to some lesser degree of murder, defendant's requested instruction must be given; however, the defendant has the burden of proving that at least "some evidence" exists. *People v. Toney*, 337 Ill. App. 3d 122, 137 (2003).

¶ 33 Here, defendant claims that because he stated that he was scared in his statement to the police, there was at least "some" evidence to warrant reading the "imperfect self defense" instruction to the jury. However, by defendant's own statement, just before he decided to shoot Echols, he was "mad" about the fact that Echols had stabbed him, not scared. Further, every witness testified, including defendant, that after the fight, defendant ran around the corner, took time to fix his gun, and

then went back over to Echols who was bent over on the ground and shot him in the head. At that point, the fight was over, Echols posed no threat to defendant as he was bending over to pick up his belongings and, accordingly, the trial court found there was no evidence to support even an unreasonable belief of self defense. We do not find the trial court erred when it refused this instruction. As such, we affirm the trial court's judgment.

¶ 34 Nevertheless, even if this court were to find that the trial court erred in not giving the "imperfect self defense" instruction to the jurors, "any error in giving or refusing instructions will not justify a reversal when the evidence in support of the conviction is so clear and convincing that the jury's verdict would not have been different." *People v. Austin*, 133 Ill. 2d 118, 124 (1989); *People v. Bailey*, 141 Ill. App. 3d 1090, 1104 (1986); *People v. Ward*, 32 Ill. 2d 253, 256 (1965). A refusal to give an instruction will be held to be harmless and not a ground for reversal where it can be said that the result of the trial would not have been different if the instruction had been given. *People v. Moore*, 95 Ill. 2d 404, 410 (1983).

¶ 35 The evidence presented to the jury by the State in this case overwhelmingly supports the jury's conviction beyond a reasonable doubt. Defendant shot Echols in the head while Echols was defenseless and bent over picking items up off the ground and after the prior fight had ended. Several eye witnesses, including Burnett, Barker and Hinton, saw the shooting and they

1-11-2462

all testified that defendant shot Echols after the fight had ended and while Echols was bent over picking up items from the ground. Even defendant admits in his statement to the police that he shot Echols after he had separated himself from the fight and when Echols was bent over on the ground. Accordingly, even if we did find that the trial court erred in not reading the "imperfect self defense" instruction to the jurors, any hypothetical error would be harmless as the evidence clearly shows, beyond a reasonable doubt, that defendant was guilty of first degree murder.

¶ 36 II. Juror's request for clarification on "provocation"

¶ 37 Defendant argues that his conviction should be reversed because the trial court committed reversible error when it responded to the jury's question regarding the definition of "provocation" with the following remarks: "You have received all the evidence, all the exhibits, and stipulations, and the instructions, please continue to deliberate." Defendant argues that the trial court should have answered the jury's question by rereading IPI Criminal 4th No. 7.03, which the jury had already been given. For the reasons that follow, we disagree with defendant and affirm the trial court's findings.

¶ 38 Generally, a trial court must provide instruction when the jury has posed an explicit question or asked for clarification on a point of law arising from facts showing doubt or confusion. *People v. Millsap*, 189 Ill. 2d 155, 160 (2000) (citing *People v.*

Childs, 159 Ill. 2d 217, 228-29 (1994)). A trial court may, nevertheless, exercise its discretion to decline answering a question from the jury under appropriate circumstances. *Millsap*, 189 Ill. 2d at 161. Appropriate circumstances include when the jury instructions are readily understandable and sufficiently explain the relevant law, when additional instructions would serve no useful purpose or may potentially mislead the jury, when the jury's request involves a question of fact, or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other. *People v. Averett*, 237 Ill. 2d 1, 24 (2010).

¶ 39 Here, the jury was seeking clarification as to what facts in this case would be considered provocation: the stabbing or the reason for the stabbing. The trial court found that answering this question would amount to the court making a determination of fact. The trial court further found, and defense counsel agreed, that Illinois Pattern Criminal Instruction 7.03, which had already been given to the jurors, sufficiently answered the jury's question. For these reasons, the trial court simply responded to the jury's question by stating the following: "You have received all the evidence, all the exhibits, and stipulations, and the instructions, please continue to deliberate."

¶ 40 We find that the trial court did not abuse its discretion when it responded to the jury's question by stating, "You have

received all the evidence, all the exhibits, and stipulations, and the instructions, please continue to deliberate," rather than rereading IPI Criminal 4th No. 7.03. The trial court is given broad discretion in answering jury's questions, and an abuse of discretion will not be found in circumstances where "jury instructions are readily understandable and sufficiently explain the relevant law, when additional instructions would serve no useful purpose or may potentially mislead the jury, when the jury's request involves a question of fact, or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other." *Averett*, 237 Ill. 2d at 24. When reviewing the above factors in the context of the facts of this case, we find that the trial court did not abuse its discretion.

¶ 41 First, IPI Criminal 4th No. 7.03 defines provocation for the jurors. IPI Criminal 4th No. 7.03 states: "A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if, at the time of the killing, the defendant acts under a sudden and intense passion resulting from serious **provocation by the deceased**. Serious **provocation is conduct sufficient to excite an intense passion in a reasonable person.**" IPI Criminal 4th No. 7.03 (emphasis added). As such, IPI Criminal 4th No. 7.03 was "readily understandable and sufficiently explain[ed] the relevant law" and defense counsel conceded that IPI Criminal 4th No. 7.03 was

sufficient in answering the jury's question regarding provocation. In fact, defense counsel wanted the judge to respond to the jury's question by rereading IPI Criminal 4th No. 7.03 to the jurors, further emphasizing his belief that IPI Criminal 4th No. 7.03 "sufficiently explain[ed] the relevant law." Our courts have held that where an instruction previously given to the jury properly answers the jury's question and sufficiently explains the relevant law, the trial court does not commit error by instructing them to continue to deliberate. See *People v. Boyd*, 366 Ill. App. 3d 84, 100 (2006).

¶ 42 Second, additional jury instructions were discussed, namely IPI Criminal 4th No. 24-25.11, and the trial court and defense counsel agreed that reading IPI Criminal 4th No. 24-25.11, which would be an additional jury instruction that had not been previously given to the jurors, would only serve to confuse the jury because it did not answer the jury's specific question. IPI Criminal 4th No. 24-25.11 states: "A person is not justified in the use of force if he initially provokes the use of force against himself with the intent to use that force as an excuse to inflict bodily harm upon the other person." We find, like the trial court and defense counsel, that IPI Criminal 4th No. 24-25.11 was not on point and IPI Criminal 4th No. 7.03 was on point in answering the jury's question. Accordingly, "additional instructions would serve no useful purpose or may potentially mislead the jury."

¶ 43 Third, and as stated above, giving a direct answer to the jury's question--a question that essentially asked the judge "what facts constitute provocation in this case?"--would undoubtedly amount to the trial court deciding an issue of fact that would direct the jurors towards a finding of provocation (if the trial court told the jurors whether the stabbing or the reason behind the stabbing constituted provocation) or towards a finding of no provocation (if the trial court answered that neither scenario pointed out by the jury fell within the definition of "provocation"). Thus, answering the jury's question would not only involve determining an issue of fact, but "giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other." As such, we find that the trial court did not abuse its discretion in responding to the jury's question regarding provocation by stating: "[You] have received all the evidence, all the exhibits, and stipulations and the instructions. Please continue to deliberate."

¶ 44 Furthermore, even if this court were to find that the trial court's response to the jury's question somehow amounted to error, that error was clearly harmless in light of the overwhelming evidence the State presented in support of the first degree murder conviction. The State proved beyond a reasonable doubt that defendant shot Echols in the head after they had stopped fighting and while Echols was bending over collecting his

1-11-2462

belongings off the ground, defenseless.

¶ 45 CONCLUSION

¶ 46 For the above reasons, we affirm the trial court's conviction of defendant finding that it did abuse its discretion in refusing to give the "imperfect self defense" instruction to the jury and by not responding to a jury's question regarding the meaning of "provocation."

¶ 45 Affirmed.