2014 IL App (1st) 113267-U

SECOND DIVISION
March 31, 2014

No. 1-11-3267

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 08 CR 13164
	)	
KIRK TOBOLSKI,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant could not establish his claim under the plain error doctrine where no error occurred. The state proved defendant guilty of second degree murder beyond a reasonable doubt and the evidence did not support a conviction for involuntary manslaughter. Defendant's second conviction for second degree murder is vacated.

¶ 2 Following a bench trial, defendant Kirk Tobolski was convicted of second degree murder and was sentenced to 12 years' imprisonment. Defendant now appeals and argues: 1) the court's clarification of its ruling amounted to double jeopardy; 2) the State failed to prove him guilty of second degree murder beyond a reasonable doubt; 3) his conviction should be reduced to

involuntary manslaughter; and 4) the mittimus should be corrected to reflect one conviction for second degree murder. For the following reasons, we affirm defendant's conviction but correct the mittimus.

¶ 3 BACKGROUND

¶ 4 On June 14, 2008, Brendan Scanlon was stabbed to death in an alley in Wicker Park. On that day, Scanlon and his roommate, James Cackovic, attended a party at an art gallery on Lyndale and Sacramento until about 9:00 p.m. They met their friend, Joseph Depre at the party. Later, Scanlon, Cackovic and Depre went across the street to another party where they stayed for about two hours. As they were leaving the party, Scanlon and Cackovic saw Neil Barakat. Cackovic testified six months earlier, Barakat had been to a party hosted by Cackovic and Scanlon and he allegedly started a confrontation and punched Scanlon in the face and broke out a window in their apartment.

¶ 5 As Cackovic and Scanlon left the party on the night of the murder, they both confronted Barakat. While Barakat was unlocking his bike, Scanlon hit Barakat in the head with a can of beer while Cackovic held Barakat’s arms behind his back. Barakat screamed for his friends to help. The beating stopped after several minutes and Barakat was able to escape. Scanlon and Cackovic then ran off and hid in a nearby alley. Barakat ran back to where the party was and told Grannum and defendant that he had just been jumped. Barakat testified that he led his friends to where he had been beaten and they saw Scanlon and Cackovic run into an alley.

¶ 6 Harrison Henschel was friends with Bob Grannum and defendant and also attended the party. He saw defendant open a can of beer at the party with a switchblade knife. After the party he was among the friends Barakat found after he was beaten. Barakat was covered in

blood and said he had been beaten by two people who were running down the street. A group went after Scanlon and Cackovic. Henschel rode his bike while Bob Grannum rode his moped.

¶ 7 Depre was waiting outside of the party for Cackovic, along with Cackovic's girlfriend, Brittany. They had plans to go to another party. Depre soon began looking for Cackovic and Scanlon on his bike. Depre ran into his friend Stephen Ozaki, who began helping Depre look for his friends. Depre and Ozaki, who were on their bikes, followed a group of about eight men chasing after somebody.

¶ 8 Barakat, Grannum, defendant, and two or three other people who were not identified, chased Scanlon and Cackovic into an alley. When they did not initially find the two men, Barakat left to go to another party where he stayed for a couple of hours. His friends never arrived.

¶ 9 Cackovic testified that he and Scanlon stayed hidden next to the alley until Scanlon received a phone call from Depre. Depre told Scanlon that he did not see anyone in the alley and to come out of hiding, get his bicycle and vacate the area.

¶ 10 When Cackovic and Scanlon came out of their hiding place, three or four men were coming into the alley. Two men were on a moped and one on a bicycle. Depre testified that as the moped approached him he saw the passenger swinging a U lock. He had to move away to avoid being hit and then elbowed the passenger causing both the driver and the passenger to fall off of the moped. Henschel testified that he was knocked off of his bike and was punched. Depre fell off of his bike and began fighting with the two men who were on the moped. Cackovic heard the men approaching and ran down the alley toward home.

¶ 11 Stephen Ozaki was riding his bike out of the alley at the time of the fight. Ozaki saw Scanlon fighting with someone and saw Scanlon fall onto a couch in the alley. When Scanlon fell, Ozaki saw the person he was fighting with jump on top of him. Henschel saw Grannum fighting with Scanlon on the couch.

¶ 12 When Ozaki went to help Scanlon, he was stopped by defendant who had a knife in his hand. Defendant threatened to kill Ozaki. When Ozaki tried again to get near Scanlon, defendant threatened again him with a knife. Ozaki then saw defendant approach Scanlon who was still lying on the couch. Ozaki stated that the defendant had the knife out when he approached Scanlon on the couch. Depre testified that while he was fighting, he looked up and noticed Scanlon was on his back on a couch in the alley with Grannum kneeling on top of him, holding his hands down while defendant was making a swinging motion, striking Scanlon in the chest. Depre testified that did not tell this to the police when he was interviewed. Henschel saw defendant approach the couch while holding a knife, and then reach over the couch with the knife.

¶ 13 Depre testified that he attempted to pull the person who was on top of Scanlon and the person who was striking him away. During that time, two other people in the alley starting whipping Depre with a bike chain. Ozaki saw Depre being hit with the bike chain. Depre was able to pull Grannum off of Scanlon and then punched defendant in the face. Defendant told Depre that he was going to cut him and reached for a switchblade in his pocket. Ozaki saw Scanlon get off the couch and head down the alley, but then he collapsed on the ground. Defendant told Depre, “I know you, I know your family. I know where you live. I’m going to kill your family.”

¶ 14 Cody Pinchot was working on his bicycle in a friend's garage behind 3031 Lyndale. It was a warm night so the garage door was open to the alley between Lyndale and Palmer. Pinochet heard fighting, and at one point heard someone from the alley say, "[b]e a pussy, use a weapon." He later saw Scanlon stumbling toward him and watched as he fell onto the trash in the alley. Pinochet did not know Scanlon. Scanlon lost consciousness and Pinochet noticed blood on his shirt. Pinochet lifted Scanlon's shirt and saw a small incision, so he called 911. Depre came over to where Scanlon was laying and, seeing that he was dead, yelled down the alley to the group.

¶ 15 The other men started to move down the alley, and Pinochet did not want them to get away, so he followed him on his bicycle. He followed the person on the moped to Spaulding and Fullerton. The two individuals that left on bicycles had already arrived at the intersection. Pinochet heard the individual on the moped talking into his phone and heard him say, "Well, get rid of the knife." Pinochet called 911 again and told the police where he was. The man on the moped left when he heard Pinochet calling 911. The two men on the bikes went inside the house. Pinochet waited there for the police.

¶ 16 Defendant was arrested shortly after the murder and was returned to the scene where he was identified by Stephen Ozaki. Chicago police detective Brian Spain was assigned to investigate the death of Scanlon. Cackovic identified defendant and Grannum as the offenders who chased him and Scanlon on the scooter. Depre identified Grannum as the person who had beaten Scanlon on the couch and held him down. Depre also identified defendant as the individual who struck Scanlon in the chest as he was being held down, as well as the person who threatened to cut Depre when he tried to go to Scanlon's aid.

¶ 17 Defendant first told Detective Spain that he did not have or carry a knife and said he never touched Scanlon. Defendant had several scratches on both his arms and had no answer as to how he received those injuries. Later, defendant admitted he was carrying a straight razor he had received as a birthday gift, and admitted he threatened Depre with it in the alley. Defendant said he threw it away towards the south when he was in the alley. Detective Spain and his partner returned to the scene and found an open switchblade knife on the roof of the garage at 3026 Palmer.

¶ 18 After Detective Spain recovered defendant's switchblade, defendant said he took the knife out of his pocket "when the shit hit the fan" and Grannum was on top of Scanlon on the couch. Defendant approached with the knife in his right hand. Defendant said someone may have pushed him from the back as he was trying to break up the fight, and he may have then stabbed Scanlon. He recalled a telephone conversation with Grannum, where Grannum was questioning him about where the knife was. Defendant admitted he was the only one with a knife, so he must have done it. He then said he never stabbed Scanlon but he may have cut or slashed him with the knife.

¶ 19 Ozaki identified the switchblade knife as the same knife defendant threatened to cut him with. Henschel also identified the switchblade knife as the same one defendant used earlier at the party to open a beer.

¶ 20 The parties stipulated that no blood or fingerprints were found on the knife. The parties also stipulated that defendant's clothing did not contain Scanlon's DNA, but his DNA could not be excluded from blood on Grannum's shirt. It was further stipulated that Scanlon's cause of death was a stab wound to the left chest, which penetrated the lung and entered the pericardial

sac of the heart. The left side of Scanlon's face showed a patterned contusion suggestive of a footwear impression. Scanlon had defense wounds on his hand and abrasions on his hands, chest and back. The manner of death was homicide.

¶ 21 The defense proceeded by way of stipulation that Detective Spain would testify that Depre did not tell him that he elbowed Grannum off of his moped or that the person on the back of the moped swung a bike lock at his head or that he saw defendant make a swinging motion when Grannum was kneeling on Scanlon or that anyone threw beer bottles at him.

¶ 22 The court found that at the time of the killing, defendant was acting under sudden and intense passion resulting from provocation from Scanlon and therefore found defendant guilty of second-degree murder. Defendant's motion for a new trial was denied. The court sentenced defendant to 12 years in the Illinois Department of Corrections. It is from this judgment that defendant now appeals.

¶ 23 ANALYSIS

¶ 24 Defendant first argues that the mittimus in this case shows a conviction for two counts of second degree murder and one of those conviction should be vacated under the one-act, one-crime doctrine. The State agrees.

¶ 25 Under the one-act one-crime rule, multiple convictions arising out of a single physical act are prohibited. *People v. King*, 66 Ill. 2d 551, 566 (1977). As both convictions for second degree murder arise out of the same physical act in this case, we vacate one of defendant's convictions for second degree murder.

¶ 26 Defendant next argues that his conviction for second degree murder should be reversed where the trial court, as the trier of fact, found that the State failed to prove all of the elements

of first degree murder beyond a reasonable doubt. Defendant argues that the trial court's finding that the State had failed to meet its burden amounted to an acquittal in this case and therefore the court's reconsideration of its acquittal during a hearing on defendant's motion for a new trial violated double jeopardy principles. In addition, defendant argues that his conviction for second degree murder should be reversed in light of the trial court's finding that he "negligently or accidentally" caused the victim's death.

¶ 27 Defendant acquiesces that he did not raise the double jeopardy issue below. However, he urges us to review the issue using the plain error doctrine. Generally, the failure to set forth the alleged errors made by the trial court and to specify grounds for a new trial in a post-trial motion constitutes a procedural default of the issue on review in the absence of plain error. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The waiver principle encourages the defendant to raise issues before the trial court, allowing the court to correct its own errors before the instructions are given, and consequently disallowing the defendant to obtain a reversal through inaction. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472-73 (2005). The plain-error doctrine is a limited and narrow exception to the general rule of procedural default and allows a reviewing court to consider unpreserved error when one of two conditions is met: (1) a clear or obvious error occurred and 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) a clear or obvious error occurred and that 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. *Walker*, 232 Ill. 2d at124. Under both prongs of the plain-error doctrine, the burden of persuasion remains with defendant. *People v. Naylor*, 229 Ill. 2d 584

(2008). If a defendant fails to satisfy this burden, the procedural default must be honored. *Walker*, 232 Ill. 2d at 124.

¶ 28 When dealing with the plain-error doctrine, we must first decide whether an error has occurred. *People v. Sims*, 192 Ill. 2d 592, 621 (2000). Here, defendant contends that when the court found that the State had not met its burden of proof for first degree murder, that the defendant should have been acquitted of all charges and that finding him guilty of second degree murder was error because it amounted to double jeopardy. Defendant relies on the trial court's initial statement, in relevant part:

> "***Because there is only one stab wound, while I believe that there is some evidence in this case that shows the defendant committed first-degree murder, it is the court's view that evidence falls woefully inadequate of the state's burden of proof beyond a reasonable doubt.
>
> However, I do believe that as I indicated [defendant] did stab [the victim]. I believe that he killed him. And I believe at the time of killing, [defendant] believed that [sic] it was acting under a sudden and intense passion resulting from the provocation by [the victim], and that the evidence shows that he at least acted negligently and accidentally when he caused the death; therefore, under the statutes of the state of Illinois 5/9-2 of 720 Illinois Compiled Statues, I find the defendant guilty of second degree murder and I enter judgment on the finding."

¶ 29 After defendant filed a motion for a new trial, the court clarified its prior ruling, stating in relevant part:

"Well, let me say this, and, perhaps, I wasn't clear in my ruling, because I did find that there were problems with the case given the fact that there were so many eye witnesses and so many different vantage points, and couple that with what I thought was not the greatest police investigation. I didn't think that the case was overwhelming. That doesn't mean [sic] because I didn't believe the state had proven their case beyond a reasonable doubt.

* * * The detective came in and quoted [defendant]. In his statement to the detective, in fact, he admitted that he stabbed [the victim]. So while he never took the stand directly, he did take the stand indirectly through the voice and the words that he spoke to the detective, and I gave that great weight.

* * *

What I found, and I'm going to make this abundantly clear to everyone, that the state met its burden of first-degree murder in Count 2. That [defendant] on June 14th of 2008, without lawful justification, stabbed and killed [the victim] with a knife, knowing that such stabbing with a knife created a strong probability of death or great bodily harm to [the victim].

I felt that the state through all of the evidence, even though some of it was contradicted and some of it was not real clear, that the state had met that burden.

Further, as you point out in your motion, I found that there was evidence presented in the case, that there were factors under 720 Illinois Compiled Statutes 5/9-2 for second degree murder.

Now, I specifically found that there was evidence presented to the Court that at the time of the killing, [defendant] believed the circumstances to be –that at the time of the killing, [defendant] was acting under a sudden and intense passion resulting from serious provocation by [the victim] or another who he endeavored to kill, but that he negligently or accidentally caused the death or [the victim]. I'm paraphrasing, but that comes right out of 9-2(a)(1)."

¶ 30 The court then referenced defendant's post trial motion and his citation to *People v Thompson*, 354 Ill. App. 3d 579 (2004), in support of the proposition that once the defendant carries his burden of proving mitigating factors in the context of a second degree murder analysis, "the burden shifts back to the state to prove the absence of the mitigation factor beyond a reasonable doubt." The trial court continued:

"And that was what the Court was referring to when I said that it was willfully and adequately done. While I do find the state proved the first degree murder, I also find that the defense presented either by cross-examination of the state's witnesses that they presented evidence of Section 8, paragraph 1, of the sudden intense—acting under sudden passion with a serious provocation.

I hope that clarifies my finding. I have read your motion. Perhaps it was just some – maybe I wasn't clear or articulate as I should have been in my finding, but I do find that the state did meet the first hurdle.

I find that the defense either through their cross or through the state's witnesses presented evidence for second degree, and I do not feel that the state beyond a reasonable doubt overcame that. And that was the basis for my finding.

I found the defendant guilty of second degree murder, and I stand on that finding. Your motion for judgment of acquittal or a new trial is considered, but it is denied."

¶ 31 Contrary to defendant's argument, we find no error in this case. The double jeopardy clause prohibits retrial after a conviction is reversed due to insufficient evidence to support that conviction. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). Trial judges are encouraged to spread of record the reasons for their decisions to better aide the parties and the courts of review in understanding the court's rationale and basis for its decision. We recognize that there are occasions when the transcript of proceedings can be read in a way that arguably supports an argument that favors the proponent of appellate issues because trial judges at times fail to perfectly articulate the reasons for their decision. That stated, we consider the transcribed comments in context with the entire record to give effect to the substantive findings of the trial judge. Here, at no time was defendant acquitted of the charges against him. Although the trial court initially stated that the "evidence falls woefully inadequate of the state's burden of proof beyond a reasonable doubt" the trial court entered a finding of guilty for second degree murder stating, "I believe that he killed him. And I believe at the time of killing, [defendant] believed that [sic] it was acting under a sudden and intense passion resulting from the provocation by [the victim], and that the evidence shows that he at least acted negligently and accidentally when he caused the death." Despite the court's initial statement, its finding and judgment clearly indicate that the court believed the state proved defendant guilty of second degree murder beyond a reasonable doubt.

¶ 32 Then, so that there would be no mistake as to the court's findings, the court later clarified its position at the hearing on defendant's motion for a new trial. The court reiterated that the

State had met its burden in proving all of the elements of first degree murder in Count II. In a bench trial, the trial court, sitting as the trier of fact, is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences therefrom. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The trial court clearly was focused on the statutory requirements of second degree murder and that the evidence established beyond a reasonable doubt that the state proved all of the elements of first degree murder, that the defendant proved by a preponderance of the evidence the mitigating factor of provocation and, finally, the State proved all of the elements of first degree murder beyond a reasonable doubt and the absence of circumstances at the time of the killing that justified or exonerated the murder. *People v. Jefferies*, 164 Ill. 2d 104, 114 (1995). We will not substitute our judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *Jackson*, 232 Ill. 2d at 280-81. Consequently, because no error occurred, plain error analysis is unnecessary here.

¶ 33 In a related argument, defendant also contends that the trial court erred in convicting him of second degree murder because the court found the stabbing was an accident. He argues the trial court's finding misapplied the statute's provocation standard and the court entered a conviction for second degree murder where defendant acted negligently or accidentally.

¶ 34 The relevant question here 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. Newbern*, 219 Ill. App. 3d 333, 342 (1991). Section 9–2 of the Criminal Code defines the offense of second-degree murder, in pertinent part: (a) A person commits the offense of second-degree murder when he commits the offense

of first-degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9–1 of this Code and the following mitigating factors are present: (1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed. *Thompson*, 354 Ill. App. 3d at 585. The evidence presented, as well as any inferences to be drawn from the evidence is within the province of the trier of fact and, on review, the court will not substitute its judgment unless the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt as to defendant's guilt. *People v. Howard*, 209 Ill. App. 3d 159, 173 (1991).

¶ 35 Defendant's argument here again centers on the trial court's initial findings, wherein the court stated:

> "I believe that he killed him. And I believe at the time of killing, [defendant] believed that [sic] it was acting under a sudden and intense passion resulting from the provocation by [the victim], and that the evidence shows that he as least acted negligently and accidentally when he caused the death; therefore, under the statutes of the state of Illinois 5/9-2 of 720 Illinois Complied Statues, I find the defendant guilty of second degree murder and I enter judgment on the finding."

However, in clarifying its ruling, the trial court stated:

> "What I found, and I'm going to make this abundantly clear to everyone, that the state met its burden of first-degree murder in Count 2.That defendant on June 14th 2008, without lawful justification, stabbed and killed the victim with a knife, knowing that such stabbing with a knife created a strong probability of death or great bodily harm to the victim.

¶ 35 The trial court made the references to defendant acting "negligently and accidentally" in the context of discussing the killing and whether the mitigating factors necessary for second degree murder, provocation and the defendant acting under sudden or intense passion, were present. When the court clarified its prior ruling, the court made it clear that the evidence supported its finding that the defendant committed first degree murder and that there was a mitigating factor present to warrant a second degree murder finding. Defendant took out his knife at some point during the fight, threatened one person, and stabbed Scanlon, killing him. While there was only one stab wound, the victim was unarmed at the time and engaged in fighting another attacker. Therefore, we cannot say that the trial court erred when it found defendant acted knowingly and intentionally and convicted him of second-degree murder. We will not substitute our judgment for that of the trial court.

¶ 36 Defendant argues in the alternative, that if this court is not willing to vacate his conviction for second-degree murder, this court should reduce his conviction to involuntary manslaughter.

¶ 37 The offenses of involuntary manslaughter and first degree murder require different mental states, such that involuntary manslaughter requires a less culpable mental state than first-degree murder. *People v. Jones*, 219 Ill. 2d 1, 30 (2006). A defendant commits first-degree murder when he kills an individual without lawful justification and he knows that his acts create a strong probability of death or great bodily harm. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). As previously discussed, in order to be convicted of second degree murder, the State must first prove all of the elements of first degree murder, including that a defendant acted knowingly and intentionally. Only then does the burden shift to defendant to prove the existence

of a mitigating factor which would reduce the crime to second degree murder. *Thompson*, 354 Ill. App. 3d at 585. Contrarily, a defendant commits involuntary manslaughter when he performs acts that are likely to cause death or great bodily harm to another and he performs those acts recklessly. *Sipp*, 378 Ill. App. 3d at 163. A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. *Id*. Clearly, reckless conduct involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. See *People v. Davis*, 35 Ill. 2d 55, 60 (1966).

¶ 38 Certain factors may suggest recklessness with respect to involuntary manslaughter, including: 1) disparity in size and strength between the defendant and the victim, 2) the severity of the victim's injuries, 3) whether the defendant used his bare fists or a weapon, 4) whether there were multiple wounds, or 5) whether the victim was defenseless. *Sipp*, 378 Ill. App. 3d at 164. A defendant's testimony that he did not intend to kill anyone does not provide a sufficient basis for instructing on involuntary manslaughter. *Id*. A defendant is not entitled to reduce first-degree murder to involuntary manslaughter by a hidden mental state known only to him and unsupported by the facts. *Id*. Reckless conduct generally involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *DiVincenzo*, 183 Ill. 2d at 250.

¶ 39 In *DiVincenzo*, 183 Ill. 2d 250, our supreme court found that an involuntary manslaughter instruction was appropriate since there were no weapons involved in the fight, the defendant and victim were fighting one on one, and they were evenly sized. In this case, unlike *DiVincenzo*,

defendant threatened Depre with the knife. Defendant then walked over to the couch where Scanlon was being held down on the couch by Grannum. Defendant engaged Scanlon, who was unarmed, with a knife in his hand. There is not a scintilla of evidence in this case to support a finding that defendant acted recklessly rather than knowingly and intentionally. Therefore, we reject defendant's request to reduce his conviction to involuntary manslaughter.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, we affirm defendant's conviction but vacate defendant's second conviction for second degree murder.

¶ 42 Affirmed in part; vacated in part.