

SECOND DIVISION
August 19, 2014

No. 1-12-0212

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**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. 03 CR 1190
	)	
DAVID HERNANDEZ,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's decision to deny jury instructions on the lesser offenses of involuntary manslaughter and second degree murder was not an abuse of discretion where the severity of the beatings suffered by the six year old victim negated any suggestion of recklessness and there was no evidence of mutual combat.

¶ 2 Defendant, David Hernandez, appeals his conviction after a jury trial of first degree murder and his sentence of 80 years imprisonment. On appeal, defendant contends the trial

court erred in refusing to submit jury instructions on the lesser offenses of second degree murder and involuntary manslaughter where some evidence was presented of mutual combat and that his actions resulting in the death of Alma Manjarrez indicated recklessness rather than an intent to kill or knowledge of death or great bodily harm. Defendant also contends that the trial court improperly assessed him \$50 in fees where the \$5-per-day credit for time served in pre-trial custody satisfied those fees. The State agrees with defendant on this issue. For the following reasons, we affirm defendant's conviction and sentence but vacate that portion of the trial court's order requiring defendant to pay those fees.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on December 20, 2011. He filed a notice of appeal on December 28, 2011. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5 BACKGROUND

¶ 6 Defendant was convicted of first degree murder for the death of Alma Manjarrez. The evidence at trial established that on December 24, 2002, Alma, who was six years old and weighed 48 pounds, lived with her mother Rosa and defendant, who was Rosa's boyfriend. Rosa and defendant also had a one-month-old son who lived with them. On that day, defendant left their apartment around 2 p.m. and while he was gone Rosa gave Alma a bath. While bathing her daughter, Rosa noticed a bruise below Alma's stomach. She first noticed the bruise three days earlier and when she asked Alma about it, Alma responded that she had fallen from

her bike. This time, while bathing Alma, Rosa asked again how she was injured. Defendant was not in the apartment, so Alma told Rosa that defendant had hit her and told her to say that she had fallen off her bike.

¶ 7 Defendant returned to the apartment around 11 p.m. and he was drunk. At the time, defendant weighed 140 pounds and he was 5 feet, 5 inches tall, about an inch or two taller than Rosa. He began yelling at Rosa and Rosa pushed him onto the floor because she thought he was going to beat her. Defendant got up and as he approached Rosa she pushed him onto the couch. Defendant then got up and punched Rosa in the stomach and in her face. Alma, who had been sleeping, woke up, ran to Rosa, and hugged her. Defendant continued to hit Rosa and Alma began to cry. Defendant hit Alma as well, punching her in the stomach. Defendant continued to strike both Rosa and Alma repeatedly. Rosa told Alma to go outside to a neighbor's for help. After Alma left defendant continued to beat Rosa and Rosa, fearing the neighbors would call police, either hugged defendant or grabbed him by the neck, and he calmed down.

¶ 8 Alma went to her neighbor's apartment across the hall. Laurie Corvillion and her boyfriend, Steven Sacher, testified that the night was cold and snowy. Around 11 p.m. they heard a knock at the door and when they opened it they saw Alma. Alma looked "very scared" and as Alma looked back over her shoulder at her apartment, Laurie heard "noises, screaming, slapping sounds, and [Alma] looked like she just wanted to run into my apartment, so I took her in." From Alma's apartment Laurie a woman crying and a man's voice, "very harsh, yelling. Very – just very guttural sounding." The woman kept saying "stop, stop" and she heard the male say "cayate" which is Spanish slang for shut up. Steven testified that the man was yelling and seemed to be the aggressor and the woman seemed "timid, quiet" and "almost fearful."

Laurie gave Alma something to eat and Alma petted Laurie's dogs. Laurie and Steven then saw bruises on Alma's arm and neck. Steven immediately left the apartment to call police. When they arrived, Rosa did not tell them much because she spoke little English. An officer looked at Alma's arm and then the police left. Rosa took Alma back to their apartment and Alma was in pain, holding her stomach and back. Alma fell asleep on the couch.

¶ 9 Rosa testified that defendant had left the apartment because he was afraid the neighbors would call the police. Defendant returned a little later and when Rosa opened the door he began yelling at her and accused her of calling the police. Defendant kicked Rosa, bit her on her back, and pulled her hair. Defendant also yelled at Alma and beat her in the stomach and face with his fists. He then grabbed Alma's arm and threw her outside into the cold and snow. Rosa testified that it was very cold so she tried to get Alma but defendant grabbed her hair and forced her back inside. Whenever Rosa tried to get Alma from outside defendant would pull her back into the apartment.

¶ 10 Laurie, who was awake, testified that around 1 to 1:30 a.m. she heard fighting in the hallway and when she opened her door she saw Rosa holding onto the doorway trying to leave the apartment while defendant was pulling her back in by her hair and punching her. Rosa lost her grip and defendant pulled her in while continuing to punch her. Laurie testified that she and defendant made eye contact and defendant then shut the door. When Laurie looked out of her glass back door, she saw Alma in the cold on the back steps. She opened the door and brought Alma inside. Alma was wearing only a t-shirt and "little jogging pants." Alma was very cold to the touch and looked kind of dazed. She did not say anything and she did not smile at Laurie's dogs. Laurie wrapped blankets around Alma and the noises from across the hall eventually stopped.

¶ 11 After defendant pulled Rosa back into the apartment, he threw her to the floor and began beating and choking her until she felt she could not breathe. Their one-month-old baby was in his car seat and defendant grabbed the baby by his clothes and dropped him onto the couch. Rosa took the baby and returned him to his car seat. She told defendant to leave the baby alone. Defendant continued to beat Rosa and at some point she hit him with a shoe. He became more upset and started choking Rosa until she lost consciousness. When she awoke, she saw defendant sleeping on the couch.

¶ 12 Rosa went outside to look for Alma but she did not see her. Rosa then went to her neighbors where she found Alma covered with a blanket. She took Alma back to their apartment but Alma could not walk due to pain in her stomach and back. Rosa removed Alma's wet clothing, covered her, and put her to bed. When she was in the kitchen, Rosa heard Alma cough. She went to the bedroom to check on Alma and found her vomiting and convulsing. Rosa called her name but Alma did not respond. She cleaned up and called to defendant for help. Rosa attempted CPR on Alma and defendant took over while Rosa went to Laurie's to call 911. Laurie opened her door and found Rosa, frantic, saying "My baby, My baby, My baby." Laurie and Rosa returned to Rosa's apartment and Laurie saw defendant giving CPR to Alma.

¶ 13 Paramedics responded to a call around 3:04 a.m. on December 25, 2002, and were dispatched to Alma's apartment. Firemen were already inside. Paramedic Gollogly saw defendant attempting CPR on Alma and he told defendant to stop. The paramedic noticed extensive bruising on Alma, who was naked. She "had bruising over her entire body" and was covered in vomit. Alma was not breathing. Paramedic Notow put Alma in a blanket and rushed her outside to the ambulance. Defendant started to leave but Laurie told the firemen to

guard the doorway because defendant has "gotten away twice tonight and this is what's happened." The paramedics attempted various procedures on Alma on the way to the hospital but she remained unresponsive.

¶ 14 Dr. David Jaimovich was the treating physician when Alma arrived at Christ hospital. He observed that her body temperature was in the mid-80's when it should have been 98.6 degrees. Alma was in full cardiorespiratory arrest as she was not breathing on her own nor was her heart beating on its own. Dr. Jaimovich also noticed extensive bruising "pretty much everywhere" including a bruise over her genital region, "bruises on her back as well as her buttock and her lower extremities, her legs and the back also." He also observed bruising on her jaw, neck, shoulder and eye area. Dr. Jaimovich was able to regain a weak pulse but Alma suffered another cardiac arrest and resuscitation failed.

¶ 15 Dr. Cynthia Gardner, who performed the autopsy on Alma, testified that she observed 11 bruises around Alma's jaw line as well as a bruise on her left cheek. There was also a large bruise on her neck and bruises on her chest, arms, upper and lower back, buttocks, legs and genital region, totaling around 70. Dr. Gardner also found hemorrhages under Alma's scalp, and in a large area between her ribs on her right side. She also observed soft tissue hemorrhaging above Alma's right hip, on her right shoulder, mid back, left shoulder, and left upper arm area. She found a large blood clot behind Alma's kidney and evidence of injury to Alma's large back muscle. Dr. Gardner concluded that almost all of the bruises occurred within several hours of Alma's death. She also testified that Alma's injuries would not be "immediately fatal, it would take some time for the person to begin showing adverse effects." Dr. Gardner also noted that the hospital records showed Alma's body temperature upon arrival at 85 degrees Fahrenheit, "which is by definition hypothermic." She opined that Alma died of

"blunt trauma to the abdomen due to assault" and that "hypothermia played a contributing role in her death." She determined that the manner of death was homicide.

¶ 16 Chicago police Sergeant Alderden and his partner, Officer Roa, were dispatched to the apartment at 3:18 a.m. on December 25, 2002. When they arrived at the scene they saw Alma receiving treatment in the ambulance. Inside the residence, Sergeant Alderden noticed that Rosa had facial bruising surrounding her eye. Defendant had no visible injuries. Officer Roa, who spoke Spanish, talked to Rosa and defendant was taken into custody and arrested.

¶ 17 Detective Padilla, who arrived at the scene to follow-up on a probable homicide, noticed that the apartment appeared "disheveled" and Rosa had a swollen face and a black eye. She complained of pain in her stomach and back so she was taken to a hospital for treatment. Detective Padilla noted that the back door to the building locked from the inside and could not be opened from the outside without a key. He returned to the police station where he met with defendant, who was 24 years old, 5'5" tall and weighed 140 pounds. Defendant was "coherent" and his hands were swollen especially around the knuckles.

¶ 18 On December 27, 2002, Assistant State's Attorney Garcia spoke with defendant. He gave defendant his *Miranda* rights and defendant replied that he understood. Defendant told ASA Garcia that he first hit Alma in the stomach/pelvis area on December 21, 2002, as discipline for misbehaving. On Christmas Eve, he left the apartment around 8 p.m. and went to a friend's house and drank 12 beers. When he returned home, Rosa started a fight and he hit her in the face. Defendant stated that Rosa scratched him on his neck. While defendant hit Rosa, Alma got between them during the fight and he hit Alma more than once in the stomach. Alma fell onto the couch and began crying. After the fight, he left the apartment to get more beer. When he returned, he and Rosa continued their argument. Suddenly Alma began gagging and

vomiting in her bed. While Rosa ran to get help, defendant started pressing on Alma's chest. Defendant gave a similar statement to Detective Cliff Gehrke. When ASA Garcia asked defendant how Alma ended up outside for a time, defendant replied that he did not know. ASA Garcia took a photograph of defendant.

¶ 19 In testifying for the defense, ASA Garcia stated that he spoke to Rosa in the early morning of December 26, 2002, and she told him that during the fight with defendant she grabbed him by the neck and he calmed down. She then let go and defendant left the apartment. Rosa also told him that defendant choked her until she began to pass out, and then he let go.

¶ 20 The jury found defendant guilty of first degree murder, and found that the victim was under 12 years of age and the murder resulted from exceptionally heinous and brutal conduct indicative of wanton cruelty. The trial court denied defendant's motion for a new trial. The trial court sentenced defendant to an extended term of 80 years' imprisonment.¹ Defendant filed this timely appeal.

¶ 21 ANALYSIS

¶ 22 Defendant contends the trial court erred in refusing to submit jury instructions on the lesser offenses of second degree murder and involuntary manslaughter where some evidence was presented to support a finding on these lesser offenses. Whether or not to allow a jury instruction is within the province of the trial court. *People v. Garcia*, 165 Ill. 2d 409, 432 (1995). However, the trial court should give instructions on a lesser offense if the record reveals some credible evidence to support a finding on the lesser offense. *People v. Ward*, 101

¹ Although originally a death penalty case, Illinois abolished the death penalty during pre-trial proceedings.

Ill. 2d 443, 451 (1984). Where some evidence exists to support such an instruction, the trial court's failure to give the instruction to the jury constitutes an abuse of discretion. *People v. Jones*, 175 Ill. 2d 126, 132 (1997).

¶ 23 Defendant first argues that some evidence was presented at trial to support a finding of second degree murder based on a serious provocation from mutual combat. A person has committed second degree murder when he intended to kill or inflict great bodily harm upon the victim, or knew that his actions created a strong probability of death or great bodily harm, but acted under a sudden and intense passion resulting from serious provocation. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008). Serious provocation may arise in situations of substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery. *Garcia*, 165 Ill. 2d at 429. "Mutual combat is a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *People v. Austin*, 133 Ill. 2d 118, 125 (1990).

¶ 24 Defendant argues that the testimony at trial shows he and Rosa quarreled when he came home after a night of drinking, and Rosa initiated physical contact by pushing him down. As they were fighting, Alma rushed in to protect her mother and she was caught in the middle. Although defendant acknowledges that he struck Alma during his fight with Rosa, he contends that he had no intent to harm Alma. He further argues that the fight with Rosa "was not on drastically unequal terms" because he used no weapons and physically he was not significantly larger than Rosa. Defendant contends that this evidence provides some support for a jury instruction on second degree murder based on mutual combat.

¶ 25 We disagree. According to the testimony at trial, defendant returned to the apartment around 11 p.m. and he was drunk. He yelled at Rosa and she pushed him to the floor because

she thought he was going to beat her. Defendant got up and as he approached Rosa she pushed him onto the couch. Defendant got up again and punched Rosa in her stomach and face. Although defendant argues that Rosa initiated physical contact by pushing him to the floor, it was defendant who started the quarrel by yelling at Rosa and frightening her. One who instigates a quarrel or combat cannot rely on the victim's response as evidence of mutual combat. *People v. Lopez*, 371 Ill. App. 3d 920, 935 (2007). Even if Rosa somehow provoked defendant when she pushed him, his response of punching her in the stomach and face, and continually beating her and Alma, was disproportionate to the provocation. See *Austin*, 133 Ill. 2d at 126-27 ("[t]he crime is murder when a defendant attacks a victim with violence out of all proportion to the provocation.") Furthermore, Rosa testified that she pushed defendant because she was afraid he would beat her. When the quarrel began Rosa acted out of fear and her actions were defensive in nature. There was no mutual struggle into which Rosa willingly entered. See *People v. Delgado*, 282 Ill. App. 3d 851, 858 (1996) (the fighting must be mutual to warrant a provocation instruction based on mutual combat). As such, we find no evidence in the record supporting an instruction on second degree murder based on mutual combat.

¶ 26 Defendant also makes a brief argument that "the fight was not on drastically unequal terms" given his physical size compared with Rosa. However, defendant not only beat Rosa but he also beat Alma, who was six years old and weighed 48 pounds. Alma died as a result of the beating and she is the victim at issue here. Defendant does not argue that his beating of Alma was on equal terms and we need not address the issue further.

¶ 27 Defendant next argues that the trial court should have given an instruction on involuntary manslaughter since there was some evidence showing that he acted recklessly when he hit Alma. A conviction of involuntary manslaughter requires proof that defendant did not intend to kill the

victim, but instead acted recklessly in a manner that caused death or great bodily harm to the victim. 720 ILCS 5/9-3(a) (West 2002). The following factors, although not dispositive, may indicate whether a defendant acted recklessly to warrant an involuntary manslaughter instruction: (1) disparity in the size and strength of the defendant and victim; (2) the brutality and duration of the beating; (3) the severity and number of injuries suffered by the victim; and (4) whether the defendant used bare fists or a weapon. *People v. DiVincenzo*, 183 Ill. 2d 239, 250-51 (1998). A determination of recklessness is based on the facts and circumstances of a particular case. *Id.* The trial court should give an instruction on involuntary manslaughter even if the evidence supporting it is "very slight." *People v. Presley*, 230 Ill. App. 3d 77, 86 (1992). A jury instruction on manslaughter should not be given, however, "when the evidence clearly shows the homicide to be murder." *Id.*

¶ 28 Defendant acknowledges that he struck Alma repeatedly and put her outside in 20 to 30 degree weather without a coat, but he argues that there was some evidence he acted recklessly rather than intentionally or knowingly. He contends that Alma was not the focus of his beating, and she was struck only when she tried to intervene and protect Rosa. He also argues that he used his bare fists instead of a weapon, indicating he acted recklessly when he struck Alma rather than with the intent to cause death or serious bodily harm.

¶ 29 We are not persuaded by defendant's argument. The duration and severity of the beatings negates any suggestion that defendant's conduct was reckless. *Ward*, 101 Ill. 2d at 451; *Presley*, 230 Ill. App. 3d at 87. Over a period of about two hours, Alma suffered severe beatings from defendant on two separate occasions. After the last beating, defendant threw Alma outside on a cold, snowy December night without a coat. Dr. Cynthia Gardner testified that she observed 11 bruises around Alma's jaw line as well as a bruise on her left cheek. There

was also a large bruise on her neck and bruises on her chest, arms, upper and lower back, buttocks, legs and genital region, totaling around 70. She found hemorrhages under Alma's scalp, and in a large area between her ribs on her right side. She also observed soft tissue hemorrhaging above Alma's right hip, on her right shoulder, mid back, left shoulder, and left upper arm area. She found a large blood clot behind Alma's kidney and evidence of injury to Alma's large back muscle. Dr. Gardner concluded that almost all of the bruises occurred within several hours of Alma's death. She also noted that the hospital records showed Alma's body temperature upon arrival at 85 degrees Fahrenheit, "which is by definition hypothermic." She opined that Alma died of "blunt trauma to the abdomen due to assault" and that "hypothermia played a contributing role in her death."

¶ 30 Although defendant used his bare fists to beat Alma rather than a weapon, the fact that he used them to inflict such severe injuries upon a six year old child belies any argument that defendant acted with mere recklessness. See *Ward*, 101 Ill. 2d at 452 (the supreme court noted the "sickening severity of the beating" of a four year old boy and determined that "[a] blow from a bare fist can result in murder where, as here, there is great disparity in size and strength between the defendant and the victim.") The cases defendant cites in support of his argument, *People v. Lefler*, 38 Ill. 2d 216 (1967), and *People v. Turner*, 193 Ill. App. 3d 152 (1990), are inapposite as they do not involve severe, sustained beatings, nor do they address the jury instruction issue before us.

¶ 31 Defendant also argues that his intoxication on the night of the beatings "provided further evidence that his actions were reckless and not intentional or knowing." Although evidence that defendant was intoxicated may support a finding that he acted recklessly, if the evidence is clear that defendant knew what he was doing and could recall details of his actions the trial court

may properly refuse the involuntary manslaughter instruction. *Presley*, 230 Ill. App. 3d at 88. Here, defendant could recall that he went out drinking and when he returned he quarreled with Rosa. He acknowledged that while he was striking Rosa, Alma ran to protect her mother and he struck Alma as well. He recognized that their fighting might have attracted the attention of their neighbors, who may call the police, so defendant left the apartment after the first beating. Notwithstanding defendant's claimed intoxication when he beat Rosa and Alma, given the evidence presented which negated recklessness, the trial court did not err in refusing to give a jury instruction on involuntary manslaughter.

¶ 32 Defendant's final contention is that the trial court improperly assessed him \$50 in fees where the \$5-per-day credit for time served in pre-trial custody satisfied those fees. The State concedes this issue, although it argues that defendant failed to preserve the issue for appeal. We therefore vacate that portion of the trial court's judgment assessing \$50 in fines to defendant.

¶ 33 For the foregoing reasons, the judgment of the circuit court is affirmed in part, and vacated in part.

¶ 34 Affirmed in part and vacated in part.