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2014 IL App (4th) 120785-U

NO. 4-12-0785

FILED
January 8, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EMERALD WHITE, Defendant-Appellant.	)))))))	Appeal from Circuit Court of Sangamon County No. 11CF679 Honorable John Schmidt, Judge Presiding

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Appleton and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court committed no reversible error when instructing the jury regarding self-defense.

(2) The trial court committed no error in sustaining the State's objection to witness testimony regarding the content of text messages defendant received prior to the alleged offense.

¶ 2 A jury found defendant, Emerald White, guilty of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)) for striking her husband with a motor vehicle and the trial court sentenced her to 12 years and 6 months in prison. Defendant appeals, arguing (1) she was denied a fair trial because an incomplete self-defense instruction was submitted to the jury and (2) the court erred in sustaining the State's objection to text messages she received prior to the alleged offense. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 11, 2011, the State charged defendant with aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)) and aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2010)), alleging on August 1, 2011, she struck her husband, James Phillips, with her car and dragged him down the street. Defendant acknowledged striking James with her vehicle but asserted she did so in self-defense. On November 30, 2011, she filed a notice that set forth her intention to assert the affirmative defense of "use of force in defense of person" as defined by section 7-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/7-1 (West 2010)).

¶ 5 Prior to trial, defendant filed motions *in limine*, requesting that the trial court allow the admission into evidence of (1) James's prior bad acts of domestic violence and (2) text messages allegedly sent from James to defendant prior to the alleged offense. On January 11, 2012, the court conducted a hearing on pretrial motions and granted defendant's requests so long as proper foundations were laid for the evidence.

¶ 6 In February 2012, the trial court conducted defendant's jury trial. Evidence showed in the early morning hours of August 1, 2011, defendant was sitting inside her vehicle, a white Oldsmobile Bravada, which was backed into the driveway of a friend's home. At some point, defendant drove her vehicle forward and struck James, who was on a bicycle. As a result of being struck, James was hospitalized and suffered a subarachnoid bleed in his head, a base skull fracture, L1 and L2 transverse process fractures, a left femur fracture, and a perineal wound. Following the incident, James was found to have had both alcohol and cocaine in his system.

¶ 7 Two witnesses for the State, Jasmine and Alex Jones, testified they saw

defendant's vehicle strike James. Jasmine observed a white sport utility vehicle (SUV) "pull[] out real fast and turn[] left" and "the man that was standing at the end of the driveway got runned [*sic*] over." She stated the man was on a bike and had been doing "[n]othing" but "[s]itting on his bike" before he was struck. Jasmine further testified the SUV went down a block, turned around, and returned to where the man was lying in the street. She observed a female driver and a male passenger exit the SUV and speak with another female on the scene. The female driver then returned to the SUV and "sped off" while the two remaining individuals picked up the man who had been hit and moved him from the street and onto the grass near the driveway.

¶ 8 Alex observed a "white truck pull up the driveway" and hit a man who was on a bicycle at the end of the driveway. The white truck went about half a block before turning around and returning to the scene. The truck stopped and someone got out. Alex saw a man and a woman move the injured man onto the grass. He then observed the truck drive off. Alex called 9-1-1 and an audio recording of that call was entered into evidence and played for the jury. The record reflects Alex reported observing a white vehicle run over a person on a bike and then briefly return to the scene before driving off.

¶ 9 The State presented the testimony of several police officers who arrived on the scene within minutes of the 9-1-1 call. Officer Jason Oliver testified that, besides James, he observed a female witness at the scene, whom he believed was "the one that called." He stated he did not encounter any other civilians. Officer Donald Rummans testified upon his arrival, he encountered Jasmine and Alex but did see any other civilians, witnesses, or observers. Finally, Officer Brian Harhausen testified he was familiar with defendant and did not see her anywhere at the scene.

¶ 10 Scott Kincaid, a detective with the Springfield police department, testified he interviewed defendant on August 1, 2011, at the hospital where James had been admitted. He recorded that interview and the recording was admitted into evidence and played for the jury. During the interview, defendant acknowledged hitting James with her vehicle. She asserted she was sitting in her vehicle outside a friend's home when she looked up and James was riding up on his bike right in front of her. When asked by the detective what James was saying, defendant stated as follows:

> "[']Come here. Bring your ass over….He said bring your mother fucking ass here.['] With a whole bunch of bitches and what nots and stuff. This is James, he talk very very fast….[']bring your mother fucking ass over here bitch.['] But when I looked up and seen him, because I'm (inaudible)…I'm gonna go, I'm gonna go, I'm gonna go….I'm gonna go *** I looked up and there he was. Well shit was already started, but I just threw the bitch in drive and I went…I just went…I just…I just…went."

¶ 11 Defendant stated she pushed the gas all the way down and her vehicle "fishtailed out of the driveway and halfway up the block." She looked in her rearview mirror and observed James lying in the road. Defendant stated she was trying to get away from James but did not mean to run him over. She asserted she initially stayed with him at the scene, tried to move him out of the street, and provided the police officers who arrived on the scene with James's personal information. Defendant reported she also told police that James was hit by a white truck before getting into her own vehicle and leaving the scene. She then went to her mother's house and

parked her vehicle in the garage.

¶ 12 The State further presented audio recordings of phone calls defendant made while in jail following her arrest. In the phone calls, defendant discussed the alleged offense with James and others. The calls demonstrate defendant's efforts to convince James to provide statements of the incident favorable to her case. In particular, defendant wanted James to say he was "reaching into the car" or "reaching for the door." She stated it did not matter if James contradicted his earlier statements regarding the incident because "[t]he shit ha[d] to sound good for [her]."

¶ 13 Defendant presented the testimony of her friend, Treasa McCarvey, who stated in the early morning hours of August 1, 2011, she was sitting with defendant in defendant's vehicle outside McCarvey's residence, talking and drinking beer. McCarvey testified defendant was depressed and upset because she was going to separate from James. She stated defendant's phone "kept getting blown up." Defendant did not answer her phone but McCarvey saw that she received text messages. The following colloquy then occurred:

> "Q. Okay. Do you know approximately what time those texts [*sic*] messages were coming through?
>
> A. I want to say about 1:40, 1:50, 2:00 o'clock.
>
> Q. Okay. Were you able to view the text messages themselves?
>
> A. Yes, ma'am.
>
> Q. Do you recall what they said?
>
> MR. MAURER [(assistant State's Attorney)]: Objection,

hearsay, Judge.

THE COURT: Sustained.

MS. NOLL [(defense attorney)]: Okay."

McCarvey stated defendant appeared scared and worried after receiving the phone calls and text messages.

¶ 14 At some point, defendant prepared to leave and McCarvey exited the vehicle. McCarvey testified defendant "spotted somebody *** a block-and-a-half down" and was unsure whether that person was James. She stated defendant started panicking then "put the car in gear and she took off." McCarvey testified defendant exited the driveway, turned, and appeared out of control. She stated defendant's vehicle was fishtailing out of the driveway and hit James, who was on a bike. McCarvey stated James "looked mad" and "was just trying to speed down like if he was trying to catch [defendant] before she pulled off out the [*sic*] driveway." It appeared to McCarvey like James was "trying to get to the driver's side of the door." She testified defendant remained at the scene after hitting James and held him while they waited for an ambulance.

¶ 15 On cross-examination, McCarvey testified defendant turned her vehicle in the direction James was coming from when she exited the driveway even though she could have turned the opposite way. McCarvey also stated that, after James was hit, McCarvey drove defendant's vehicle to defendant's mother's house.

¶ 16 Defendant's son, Jiatariious White, testified on August 1, 2011, he lived with defendant and James. On that date, he heard James banging on the door and yelling to be let in. James then broke the door, entered the residence, and looked for defendant. Jiatariious went to a neighbor's house to call his aunt or defendant but got no response. Ultimately, he observed

James attempt to fix the door and then ride off on his bike.

¶ 17 Defendant also presented evidence that she was the victim of several instances of domestic violence perpetrated by James. Jiatariious testified on July 28, 2011, he woke up and heard defendant screaming his name. He found defendant and James outside and observed James punching defendant in the face while she was on the ground. Jiatariious attempted to assist defendant and then went into the house to call the police. When he returned outside, Jiatariious observed defendant's vehicle pull away with James driving. He then heard a crashing sound. Later, Jiatariious saw defendant and observed that she was limping and that her hands and knees were scratched. He also observed a dent in the front bumper of defendant's vehicle.

¶ 18 Officer Michelle Awe testified on May 29, 2010, she went to St. John's emergency room for a battery report and made contact with defendant, whom she identified as the victim. Defendant appeared upset and distraught. Awe noticed some bumps on defendant's head, redness to her neck, and scratches on her back. She took a domestic battery report from defendant at that time. Photographs were taken of defendant's injuries and admitted into evidence.

¶ 19 Finally, defendant's mother, stepfather, and sister testified regarding an incident that occurred between James and defendant on September 12, 2010. On that occasion, James entered the family's residence, located defendant upstairs, and attempted to pull or drag defendant down the stairs and out of the residence.

¶ 20 Defendant further presented evidence that James had two prior convictions for unlawful use of a weapon and three convictions for domestic battery. Neither defendant nor James testified at trial.

¶ 21 Over the State's objection, the trial court allowed a self-defense instruction to be presented to the jury. The record reflects the jury received the following instruction:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.
>
> However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

¶ 22 On February 17, 2012, the jury found defendant guilty of both aggravated domestic battery and aggravated battery. Defendant filed motions for a new trial, raising various issues. On May 23, 2012, the trial court denied defendant's posttrial motions and sentenced her to 12 years and 6 months in prison for aggravated domestic battery.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant argues she was denied a fair trial because an incomplete self-defense instruction was submitted to the jury. Specifically, she contends the jury should have been instructed that she was justified in the use of force intended or likely to cause death or great bodily harm if she reasonably believed that such force was necessary to prevent a forcible felony, namely, domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)) or vehicular invasion (720 ILCS 5/12-11.1 (West 2010)).

¶ 26 Initially, defendant acknowledges she forfeited this issue for purposes of review

by failing to raise it with the trial court either during her jury trial or in a posttrial motion. However, she maintains her forfeiture may be excused pursuant to Illinois Supreme Court Rule 451(c) (eff. April 8, 2013) and the plain-error rule (Ill. S. Ct. R. 615 (eff. Jan. 1, 1967)). In *People v. Sargent*, 239 Ill. 2d 166, 188-89, 940 N.E.2d 1045, 1058 (2010), our supreme court addressed similar circumstances, stating as follows:

> "Supreme Court Rule 366(b)(2)(i) (155 Ill. 2d R. 366(b)(2)(i)) expressly provides that '[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it.' In addition, our court has held that a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial and did not raise the issue in a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 *** 870 N.E.2d 403, 409 (2007).
>
> Limited relief from this principle is provided by Supreme Court Rule 451(c) (177 Ill. 2d R. 451(c)), which states that 'substantial defects' in criminal jury instructions 'are not waived by failure to make timely objections thereto if the interests of justice require.'
>
> ***
>
> The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental

> fairness requires that the jury be properly instructed. The rule is coextensive with the plain-error clause of Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a)) ***."

¶ 27 Pursuant to the plain-error rule, a reviewing court may consider unpreserved errors that are "clear or obvious" and (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058. Under the plain-error analysis, a reviewing court must first determine whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. Additionally, "[t]he erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Sargent*, 239 Ill. 2d at 191, 940 N.E.2d at 1059.

¶ 28 As stated, defendant argues the jury was not accurately instructed on the issue of self-defense. Generally, a defendant is entitled to have a jury instructed on defenses that are supported by the evidence, even where the evidence is slight or inconsistent with the defendant's testimony. *People v. Everette*, 141 Ill. 2d 147, 156, 565 N.E.2d 1295, 1298 (1990). "[T]o instruct the jury on self-defense, the defendant must establish some evidence of each of the following elements: (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied;

and (6) his beliefs were objectively reasonable." *People v. Jeffries*, 164 Ill. 2d 104, 127-28, 646 N.E.2d 587, 598 (1995).

¶ 29 The relevant jury instruction states as follows:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself) (another)] against the imminent use of unlawful force.
>
> [However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)]) (the commission of _____)].]" Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 24-25.06).

The committee notes explain that, when applicable, a forcible felony should be inserted in the blank of the second paragraph. IPI Criminal 4th No. 24-25.06, Committee Note, at 326.

¶ 30 Here, defendant received a self-defense instruction but complains the jury was not fully instructed. As stated, she argues the jury should have been, but was not, instructed that she was justified in using force intended or likely to cause death or great bodily harm when she reasonably believed that type of force was necessary to prevent the commission of a forcible felony.

> " 'Forcible felony' means treason, first degree murder, second

> degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2010).

Defendant contends the forcible felonies applicable to her case are domestic battery and vehicular invasion.

¶ 31 First, domestic battery is a Class A misdemeanor rather than a felony. 720 ILCS 5/12-3.2(b) (West 2010)). Although that offense may be enhanced to a felony based upon a defendant's prior criminal acts, we find it is not a forcible felony even when so enhanced. In particular, we note the felony offense of aggravated battery, when based on the underlying offense of a simple battery that occurs on or about a public way (720 ILCS 5/12-3.05(c) (West 2010)), is not a forcible felony. *People v. Rodriguez*, 258 Ill. App. 3d 579, 585, 631 N.E.2d 427, 432 (1994) ("Simple battery upon a public way intentionally was omitted from the definition of forcible felony."). The offense of battery is a misdemeanor and involves only "bodily harm to an individual" (720 ILCS 5/12-3(a) (West 2010)), the same type of harm involved in the offense of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)). If a simple misdemeanor battery which becomes a felony when it happens upon a public way is not a forcible felony, neither is the misdemeanor offense of domestic battery when it is enhanced to a felony based upon a defendant's criminal history.

¶ 32 Second, even assuming error occurred because the trial court failed to instruct the jury that defendant would be justified in using force to prevent a vehicular invasion, a forcible felony (see *People v. McCormick*, 332 Ill. App. 3d 491, 498, 774 N.E.2d 392, 398 (2002)), reversal is unwarranted. Specifically, the evidence was not "so closely balanced" the failure to provide the forcible felony instruction to the jury "alone threatened to tip the scales of justice against the defendant," nor was the alleged error "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." See *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058.

¶ 33 Here, defendant acknowledged striking James with her vehicle. Two witnesses for the State observed defendant's vehicle accelerate forward and strike James, who was on a bicycle at the end of the driveway. One witness observed James doing "[n]othing" but "sitting on his bike" before he was struck. The State's evidence further indicated defendant left the scene, concealed her vehicle inside her mother's garage, and tried to convince James to add information to his statement of the incident to support her self-defense claim. By contrast, defendant presented evidence of past instances of domestic abuse perpetrated by James and the testimony of her friend, Treasa McCarvey, who stated James "looked mad" and appeared as if he was trying to catch defendant or get to the driver's side door of her vehicle. However, McCarvey's testimony was contradicted in several respects by not only the State's witnesses, but also defendant's statement to police shortly following the incident. We find the evidence was not "so closely balanced" the failure to provide the forcible felony instruction to the jury "alone threatened to tip the scales of justice against the defendant." See *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058.

¶ 34 Additionally, "[a] trial court's failure to instruct the jury on a self-defense theory based on prevention of a forcible felony may be harmless if the trial court instructed the jury on similar defense theories." *People v. Jackson*, 304 Ill. App. 3d 883, 891-92, 711 N.E.2d 360, 367, (1999). As stated, defendant's jury was instructed that the use of force "intended or likely to cause death or great bodily harm" is justified if a defendant "reasonably believes that such force is necessary to prevent imminent death or great bodily harm." During closing argument, defense counsel argued defendant struck James with her vehicle as she was attempting to flee the scene because she was "panicked for her life," and feared "being beaten badly" by James or "put in the hospital." We find the record reflects defendant's theory of defense implicated the type of harm for which her jury was instructed. Under these circumstances, her self-defense theory was sufficiently presented to the jury. Any error by the trial court in failing to instruct the jury on a self-defense theory based on prevention of a forcible felony was harmless.

¶ 35 On appeal, defendant also argues the trial court erred in sustaining the State's objection to evidence regarding the content of text messages she received prior to the alleged offense. She contends the court's ruling was inconsistent with its pretrial decision on the matter, and the text messages were not hearsay and admissible to demonstrate her and James's states of mind. (In her appellate briefs, defendant inconsistently argues both that the text messages were admissible as evidence of James's state of mind and that "[t]he defense did not seek admission of the text messages to establish Mr. Phillips's James' [*sic*] state of mind." The record refutes the latter contention, showing defendant sought admission of the text messages to show both her state of mind and James's state of mind prior to the alleged offense.)

¶ 36 "The admissibility of evidence at trial is a matter within the sound discretion of

the trial court and that court's decision will not be overturned absent a clear abuse of that discretion." *People v. Adkins*, 239 Ill. 2d 1, 23, 940 N.E.2d 11, 24 (2010). "An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citations]." *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010).

¶ 37 Prior to trial, defendant filed a motion asking that the trial court allow into evidence text messages she received prior to the alleged offense. The record shows defendant's pretrial motion to admit the text messages specifically referenced only two messages. However, she later filed a supplemental motion *in limine* and attached "Group Exhibit 2" to her motion, containing photocopies of three text messages. The photocopies reflect times of 1:12 a.m., 2:27 a.m., and 2:30 a.m., and stated: (1) "Fuck it…U aint gotta tell me…U ON ONE," (2) "I guess u out fuckim now huh. U driving the truck must b serious," and (3) "Im pissed. Uz u on tht n I knw u on tht. Thts really? Why we on????" In ruling on defendant's motion, the trial court stated as follows:

> "I don't think these text messages are hearsay. They do [*sic*] want to admit them for the truth of the matter asserted, they are admitting them on the state of mind of the sender and to the receiver. If the foundation can be laid, the text messages in Group Exhibit 2 dated 1/11/12 will be admissible ***."

At trial, McCarvey testified she saw the defendant receive text messages at approximately 1:40, 1:50, and 2:00, and was able to view them. When asked whether she recalled what the messages said, the State objected on the basis of hearsay and the trial court sustained the objection.

Defendant did not make any further attempt to introduce the content of the text messages into evidence.

¶ 38 Here, the text messages McCarvey described were received by defendant at times other than those reflected in defendant's "Group Exhibit 2." That exhibit contained three text messages, which the trial court reviewed during pretrial proceedings and found admissible pursuant to certain hearsay exceptions. The record fails to reflect the text messages about which McCarvey would have testified were the same as the messages in defendant's "Group Exhibit 2." Defense counsel made no offer of proof as to what McCarvey would have testified and accepted the court's ruling without further comment. As the court's pretrial ruling concerned only the text messages in defendant's "Group Exhibit 2," no other text messages were submitted to the court for consideration, and we can only speculate as to the subject matter of McCarvey's testimony, we find no error. The court did not abuse its discretion by sustaining the State's objection to McCarvey's testimony.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal.

¶ 41 Affirmed.