

No. 1-11-0350

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(3)(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. |) | 08 CR 22526 |
| |) | |
| JOHN BAILEY, |) | Honorable |
| |) | Rosemary Higgins-Grant, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Salone and Justice Steele concurred in the judgment.

ORDER

¶ 1 *Held:* When the defendant's testimony in a murder trial provides some slight evidence that he acted recklessly by struggling with his victim for control of a loaded gun, the trial court must instruct the jury on involuntary manslaughter.

¶ 2 A jury found the defendant, John Bailey, guilty of second degree murder. On appeal, Bailey argues that the trial court erred when it refused to instruct the jury on involuntary manslaughter.

Because some evidence in the record could support a finding that Bailey's reckless conduct caused

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the victim's death, we reverse the conviction and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 On August 30, 2008, Mozell Johnson woke to the sound of his mother, Nikenya Spires, arguing with her boyfriend, Bailey. When Mozell heard his sister, Kadedra Johnson, scream, he ran to his sister, who was kicking the door to Spires's bedroom. Bailey, with blood on his face, opened the door and spoke to Spires's children. Bailey closed the door, but a few minutes later, he opened the door again and pointed a gun at the children. Bailey left the home. Mozell found Spires on her bed, dying from a bullet wound to her head. Kadedra called police.

¶ 5 Bailey took a bus to Minnesota, where he stayed for two months. Police arrested Bailey when he returned to Chicago. A grand jury indicted Bailey for murder.

¶ 6 At trial, the medical examiner testified that the bullet entered the left side of Spires's head and exited from the right side. The examiner found stippling on the left side of Spires's head and on her left arm. According to the examiner, the stippling meant that Spires's left arm was between the gun and her head when the gun discharged.

¶ 7 Spires's friend, Martina Birrages, testified that Spires called her on August 30, 2008. Birrages heard Bailey arguing with Spires, who was telling Bailey to move out. Birrages testified that she heard Bailey say that he "wasn't going anywhere," and "if he couldn't have [Spires], nobody would have her." The line went dead in the middle of Birrages's conversation with Spires.

¶ 8 Mozell testified that when Bailey first opened the door of Spires's bedroom on August 30, 2008, Bailey said, "I'd never hurt your mom," and "you all can't tell me what to do. It's my girl." When Bailey pointed the gun at Mozell and Kadedra, Bailey said again, "I will never hurt your

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mother."

¶ 9 A police officer who came to the scene found a spent bullet in the bedding on Spires's bed. Another officer testified that when she arrested Bailey, Bailey's ticket for the bus trip to Chicago bore the name of Bailey's cousin, Anthony Jackson.

¶ 10 Bailey testified that he went out drinking with friends on August 29, 2008, and he came back to the home he shared with Spires and her children around 3 a.m. He woke around 8 a.m. with Spires straddling him and holding a gun to his face. She asked him who Erica was. Although Bailey explained that Erica was probably one of his customers, Bailey and Spires started arguing. Bailey told Spires he loved her, and he reminded her that they planned to marry soon. She got off Bailey and sat on the bed, and put the gun on the bed next to her left side. Bailey sat next to her, with the gun between them. He reached for the gun, but she reached for it, too. She raised her arm with the gun, and leaned back on the bed while Bailey continued to tug on the gun. According to Bailey, the gun discharged in the struggle.

¶ 11 When Bailey saw the bullet wound, he put the gun in his mouth. But Kadedra's kicking at the door got him up and he opened the door and told Kadedra to call paramedics. He closed the door and dressed. When he opened the door again, he pointed the gun at the children to get them back, away from Spires's bedroom. He told the children he loved Spires and he would never do anything to hurt her.

¶ 12 Bailey testified that he left Spires home and made his way to the home of Jackson, his cousin. Jackson arranged for Bailey to stay with one of Jackson's friends in Minnesota. Bailey returned to Chicago to turn himself in, but police arrested him before he had the chance to do so.

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¶ 13 Bailey testified that Spires did not have her cell phone in the bedroom during their argument. She had the phone in the charger in the next room. According to Bailey, Spires did not talk to Birrages that morning.

¶ 14 Defense counsel requested instructions on second degree murder and involuntary manslaughter. The trial court instructed the jury on second degree murder, but refused the involuntary manslaughter instruction because the court found no evidence Bailey acted recklessly.

¶ 15 The jury found Bailey guilty of second degree murder. The trial court denied Bailey's posttrial motion, in which he again protested the refusal of the involuntary manslaughter instruction. Because of Bailey's prior felonies, the court sentenced him to 28 years in prison. Bailey now appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, Bailey argues only that the court committed reversible error when it denied his request for an instruction on involuntary manslaughter. The trial court has discretion to decide whether to give a proffered instruction, and this court will not reverse a judgment because of the refusal of a proposed jury instruction unless the trial court abused its discretion. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). A defendant in a criminal trial has a right to have the jury instructed on those defenses that some evidence supports, even if only slight evidence supports the defense. *People v. Everette*, 141 Ill. 2d 147, 156 (1990). The trial court abuses its discretion if it refuses an instruction on a lesser offense when some credible evidence in the record supports the instruction. *People v. Jones*, 175 Ill. 2d 126, 132 (1997). "The question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject

to *de novo* review." *People v. Washington*, 2012 IL 110283, ¶ 19.

¶ 18 In general, when two persons struggle for a loaded gun, both have grossly deviated from the standard of care reasonable persons exercise. *People v. Consago*, 170 Ill. App. 3d 982, 986 (1988). "Thus, if some evidence is presented which shows accidental discharge of a loaded weapon, that amounts to some evidence of recklessness and, accordingly, requires the tender of an instruction of involuntary manslaughter." *Consago*, 170 Ill. App. 3d at 986.

¶ 19 Here, Bailey testified that after Spires calmed down somewhat, got off Bailey and put down the gun, Bailey reached for the gun and struggled with Spires for control of the gun. Because the immediate threat that Spires might shoot him had passed, a trier of fact could find that Bailey acted recklessly when he reached for the gun and when he tried to wrest the gun from Spires's grip. See *Consago*, 170 Ill. App. 3d at 986; *People v. Santiago*, 108 Ill. App. 3d 787, 802-03 (1982); *People v. Andersch*, 107 Ill. App. 3d 810, 818 (1982).

¶ 20 The State emphasizes that Bailey's account of the homicide conflicts with the medical examiner's testimony. Bailey said that he sat on Spires's left side, with the gun between him and Spires, when they started struggling for the gun. But the bullet entered Spires's left temple, and her left arm showed stippling, which, according to the medical expert, indicated that her left arm came between the gun and her head when the gun discharged. Thus, the trier of fact could conclude from the medical examiner's testimony that Spires either had no hold on the gun when it discharged, or she held it in her right hand. But Bailey has no cogent explanation for how Spires positioned herself to use her right hand to send a bullet into her left temple and straight across her head to exit from the right side of her head.

¶ 21 However, the inferences from the physical evidence depend on the testimony of the medical examiner. The trier of fact must determine the credibility of the expert and the weight to be accorded his testimony. *People v. Slover*, 2011 IL App (4th) 100276, ¶ 22. The court's assessment of the relative credibility of the defendant and the expert does not permit the court to invade the province of the jury by denying the defendant his right to have the jury instructed on a defense when he has presented some evidence to support that defense. *Everette*, 141 Ill. 2d at 156; *Consago*, 170 Ill. App. 3d at 986; *Santiago*, 108 Ill. App. 3d at 802-03. "It is the function of the trier of fact to assess the credibility of the witnesses, to determine the appropriate weight of the testimony, and to resolve conflicts or inconsistencies in the evidence." *People v. Evans*, 209 Ill. 2d 194, 211 (2004).

¶ 22 We find this case similar to *People v. Robinson*, 163 Ill. App. 3d 754 (1987). In *Robinson*, the defendant testified that he got into an argument with the victim, and one of the victim's friends pulled out a shotgun. The defendant grabbed for the gun, and it discharged when it fell to the ground. The trial court refused to instruct the jury on involuntary manslaughter, and the appellate court reversed. The *Robinson* court held that the jury might infer that the defendant acted recklessly when he struggled for control of the loaded gun. *Robinson*, 163 Ill. App. 3d at 780.

¶ 23 Here, too, a jury who believes Bailey and not the medical examiner might find that Bailey acted recklessly when he struggled with Spires for the gun after she put it down and stopped threatening Bailey. The trial court's refusal to give the instruction on involuntary manslaughter requires reversal of the conviction and a remand for a new trial.

¶ 24 CONCLUSION

¶ 25 Because some evidence in the record supports the conclusion that Bailey acted recklessly

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when he reached for the gun and struggled with Spires for control of the gun after she put it down, the trial court had a duty to instruct the jury on the offense of involuntary manslaughter.

¶ 26 Reversed and remanded.