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2012 IL App (3d) 100850-U

Order filed July 3, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois
Plaintiff-Appellee,)	
)	
v.)	Appeal No. 3-10-0850
)	Circuit No. 10-CF-286
PRESTON D. MARIZETTS,)	
)	Honorable James E. Shadid,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in refusing to reopen proofs so that defendant could testify.

¶ 2 Defendant, Preston D. Marizetts, appeals his conviction for first degree murder. After being admonished by the court, defendant chose not to testify. Following the close of evidence,

and after the instruction conference, defendant changed his mind and asked to testify. The court found that, after hearing the court's ruling, no instruction on second degree murder or self-defense would be given, defendant was attempting to manipulate the trial by providing testimony he believed would require the court to give instructions on self-defense and second degree murder. We hold that the trial court abused its discretion in refusing to reopen the evidence.

¶ 3

BACKGROUND

¶ 4 The State charged defendant with first degree murder in connection with the shooting of Jasmine Brittine. Prior to trial, the court appointed the public defender to represent defendant. Even though defendant's counsel met with him numerous times, defendant never told his counsel what happened during the shooting. After reviewing all the information available to him, defense counsel proceeded on a theory of self-defense. Prior to trial, he filed a notice that he intended to call Jonathan Hess as an eyewitness to provide evidence that defendant acted in self-defense, but that Hess might invoke his fifth amendment right not to testify.

¶ 5 The evidence presented at trial showed the following On March 21, 2010, 16-year-old Khalil Armstrong argued with 21-year-old Isiah Foster at the Harrison Homes in Peoria. Initially, the argument did not progress beyond Foster pulling Armstrong from a vehicle. Armstrong left the area following the argument; he planned to return to fight Foster. He recruited friends and family to return to fight Foster. Devonte Harris was one of more than 20 people who returned with Armstrong. Harris was 18 years old and carried a gun. The group

gathered in front of the apartment where Foster was visiting. Armstrong challenged Foster to fight, but Foster would not come out to fight. A woman in the apartment told the group that Foster was going to get a gun.

¶ 6 Foster left through another exit and went to the Taft Homes. While there, he convinced a cousin and defendant to return to the Harrison Homes with him. Defendant carried a 9-millimeter handgun. Fights between people from the Taft Homes and Harrison Homes were frequent. In fact, defendant had received a beating in one of those fights just a few days earlier.

¶ 7 After returning to the apartment, Foster and defendant stepped out onto the patio and were seen by the crowd. Defendant's appearance upset the crowd; many in the crowd demanded that Foster send defendant away. Foster argued with Harris about defendant's presence. Foster testified he could tell that Harris was carrying a gun. As the crowd moved toward the apartment, Foster and defendant went back inside. Someone testified that they heard defendant say he was going to "air out" his gun.

¶ 8 Defendant stepped back onto the porch. Shooting ensued. Foster testified that he did not know who fired first. One witness testified that she saw defendant and thought he was not paying attention to where he was firing. At some point, Harris ran around the side of the building. The victim, who had been near Harris, was shot. She later died at the hospital. Harris came back in front of the apartment and fired at the apartment a few times.

¶ 9 Harris denied pulling his gun before defendant began shooting. Foster testified that he did not know who fired first. One witness described hearing five shots from two different guns.

Defendant called Hess to testify. Hess could not remember much of the incident. He was present during the shooting and saw defendant fire his gun. He did not recall if Harris was present.

¶ 10 During a recess, the court admonished defendant about his right to testify. Defendant indicated that he had discussed the matter with his counsel and did not want to testify.

¶ 11 Detective Shawn Curry then testified. He had questioned Hess about the shooting. Hess told Curry that Harris was present. He also told him that Harris moved toward Foster with his hand inside his shirt as though he was carrying a gun. Hess never told Detective Curry that he saw Harris with a gun.

¶ 12 Evidence closed, and the instruction conference was held. Defendant's counsel requested a self-defense and second degree murder instruction. The State objected on the grounds that there was no evidence to support those instructions, noting that such evidence typically comes from defendant's own testimony. The court refused to give the requested instruction. Defendant was present for the instruction conference.

¶ 13 When trial resumed the following day, defense counsel moved to reopen evidence so defendant could testify. Defendant informed the court that he had been unsure about testifying, but had made up his mind overnight. Defendant had also finally described to his counsel what happened during the shooting.

¶ 14 The court noted that if he testified, it would require reopening the instruction conference and would prejudice the State. The court noted that defendant had heard all of the arguments

during the instruction conference and indicated this was a manipulation of the trial. Defense counsel responded that he had already explained to defendant everything discussed in the instruction conference, so if defendant had intended to create testimony to aid the theory of self-defense, he knew what was required before the conference. The court refused to reopen evidence.

¶ 15 By way of an offer of proof, defendant established that his testimony would have been that Foster pushed him back out the door. He then saw Harris pull his gun out of his waistband. In response, defendant fired in the air hoping to scare everyone away. He saw that Harris continued to draw his gun, so he fired a couple of rounds in Harris's direction. Harris then fired five shots toward defendant.

¶ 16 The jury found defendant guilty of first degree murder. Defendant filed a posttrial motion requesting a new trial. The court denied the motion for a new trial and sentenced defendant to 45 years' imprisonment. This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant argues that the trial court erred in not reopening evidence to allow him to testify. The decision of the trial court whether or not to reopen proofs will only be reversed if the trial court abused its discretion. *People v. Figueroa*, 308 Ill. App. 3d 93, 101 (1999).

¶ 19 “Though it is within the discretion of the trial court to determine the question of whether to grant a defendant's motion to reopen the proofs, a trial court should not exclude defense testimony except in the most extreme circumstances. [Citation.] It is a fundamental

constitutional right for a defendant to testify in his own defense. [Citations.] Society's interest in the efficient administration of justice has to be balanced with a defendant's constitutional right to a fair opportunity to defend. [Citation.]” *People v. Johnson*, 151 Ill. App. 3d 1049, 1053-54 (1987).

¶ 20 A trial court faced with a defense request to reopen proofs should, at a minimum, consider the following factors: the reason the evidence was not timely presented; whether the evidence was not presented due to inadvertence or calculated risk; whether the State will be surprised or unfairly prejudiced; whether the evidence is vital to defendant’s case; and the existence of a “cogent reason[] to deny the request.” (Internal quotation marks omitted.) *People v. Figueroa*, 308 Ill. App. 3d at 103.

¶ 21 The trial court believed that defendant’s decision to testify was an attempt to manipulate the proceedings. In the trial court’s opinion, defendant was attempting to create testimony in direct response to the trial court’s reasons for denying instructions on self-defense and second degree murder. The court also believed that the State would be unfairly prejudiced by this testimony.

¶ 22 Defendant argues that the trial court’s belief that he was manipulating the system was wrong. He points to the presentence investigation report (PSI), which indicates defendant never finished high school and was borderline mentally retarded, as proof that defendant was unlikely to be able to act with such manipulative intent. But, the PSI also indicates that defendant’s caseworker described him as “very manipulative” and stated defendant was “very manipulative

with his counselor.”

¶ 23 We are not persuaded by the court’s determination that the State would be unduly prejudiced. The State had notice prior to trial that defendant intended to present evidence of self-defense. We cannot assume that the State neglected to prepare a response to defendant’s proposed defense of self-defense. Nothing in the record shows that the State would have suffered any prejudice had defendant been allowed to testify. The mere fact that a defendant testifies in his own defense does not prejudice the State. While it may have been an inconvenience to redo the instruction conference, we believe that it would have been just that, an inconvenience not prejudice to the State.

¶ 24 There can be no question that defendant’s proposed testimony that he fired his weapon in response to Harris pulling his handgun and aiming at defendant was vital to defendant’s case. This testimony went to the crux of his case. It would have been direct evidence that he fired in response to the actions of Harris.

¶ 25 The only factor that seriously weighed against reopening proofs to allow defendant to testify was the trial court’s belief that defendant was trying to manipulate the system. We must decide whether the trial court abused its discretion in giving more weight to its belief that defendant was trying to manipulate the system than to defendant’s fundamental constitutional right to testify and the importance of his testimony.

¶ 26 We are not persuaded that any potential manipulation was serious enough to warrant denying defendant the opportunity to testify. Defense counsel’s explanation that nothing was

discussed in the instruction conference that he had not already explained to defendant, minimizes the risk that defendant was driven solely by a desire to manipulate the system. We accept the trial court's factual finding that defendant was attempting to manipulate the system in this case. However, a defendant trying to manipulate the system is not an extreme (or unusual) circumstance that made it proper to deny defendant his right to testify. It is commonly accepted that every defendant gets to hear all the prosecution evidence before testifying. A defendant can always tailor his or her testimony to refute that of prosecution witnesses. Likewise, the State did not point to any real prejudice, such as a rebuttal witness that left town because defendant had previously asserted that he would not testify. The trial court erred in refusing to reopen proofs.

¶ 27 Finally, we address the State's argument that any error that may have been committed by the trial court was harmless. Even constitutional errors "may be regarded as harmless and not requir[e] reversal." *People v. Smith*, 38 Ill. 2d 13, 15 (1967). Constitutional errors are only harmless when a reviewing court finds "beyond a reasonable doubt that the error did not contribute to the finding of guilty." *Id.*

¶ 28 Defendant argues that had he been allowed to testify, he would have been entitled to jury instructions on self-defense and second degree murder. "[A]n instruction on self-defense must be given where the defendant presents some evidence of each of the following elements: (1) force had been threatened against the defendant; (2) defendant was not the aggressor; (3) the danger of harm to the defendant was imminent; (4) the force threatened to the defendant was unlawful; (5) the defendant actually believed that a danger existed, that force was necessary to

avert the danger, and that the amount of force used by the defendant was necessary; and (6) all of defendant's beliefs were reasonable.” *People v. Blue*, 343 Ill. App. 3d 927, 935 (2003). Any time a self-defense instruction is given, a second-degree murder instruction must be given as well. *People v. Washington*, 2012 IL 110283, ¶ 56.

¶ 29 Defendant’s proffered testimony provided some evidence of the six elements required for a self-defense instruction. Testimony that Harris was drawing a weapon provides some evidence that: force was threatened, the danger was imminent, the force threatened was unlawful, and that defendant actually believed deadly force was necessary. Testimony that Foster pushed defendant back outside after he retreated into the house provides some evidence that he was not the aggressor. At the very least, the testimony provided questions of fact to be decided by the jury.

¶ 30 If defendant had been allowed to testify he would likely have been entitled to instructions on self-defense and second degree murder. We cannot find, beyond a reasonable doubt, that the result would have been the same had defendant testified. Therefore, the error was not harmless.

¶ 31 In a nutshell, we read the relevant case law to dictate that a defendant can only be denied his right to testify in his own defense for compelling reasons. We find none.

¶ 32 **CONCLUSION**

¶ 33 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause is remanded for a new trial.

¶ 34 Reversed and remanded.