

No. 1-12-0091

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 603
	)	
McKERRY COLEMAN,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PALMER delivered the judgment of the court.  
Justices McBride and Taylor concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Where the evidence presented at trial did not warrant a jury instruction for second degree murder based upon sudden and intense passion resulting from serious provocation, the trial court's refusal to issue the instruction was not error, and defendant's convictions for first degree murder and attempted first degree murder are affirmed.

¶ 2 Following a jury trial, defendant McKerry Coleman was convicted of first degree murder and attempted first degree murder. The trial court sentenced defendant to consecutive prison terms of 45 years for the murder and 25 years for the attempted murder, for an aggregate

sentence of 70 years' imprisonment. On appeal, defendant solely contends the trial court erred when it refused to give a jury instruction for second degree murder because there was evidence of mutual quarrel, some physical contact and very provoking revelations by the victim, and when combined together, this evidence could have led the jury to find that defendant's actions were the result of provocation. We affirm.

¶ 3 At trial, Rosetta Edwards testified that in November 2009, her daughter, Tanisha Edwards, and defendant had been dating on-and-off for three years. The couple had an infant son, Tyreke Coleman, born October 12, 2009. Tanisha was 18 years old, a high school senior, and lived with her baby, her mother, and her two younger brothers in a third-floor apartment. Defendant did not live with Tanisha. In mid-November 2009, Rosetta noticed Tanisha's eyes were bloodshot. Tanisha told her mother that her eyes were injured following an argument with defendant, and Rosetta banned defendant from their home. On November 30, 2009, Rosetta allowed defendant into their home to visit his son. Rosetta and her sister, Audrey Hammond, told defendant to keep his hands off Tanisha, and if he was unable to do so, he would not be allowed to see her. Shortly thereafter, Rosetta went to the store, and while gone, she received a telephone call to return home. Tanisha had been taken to Stroger Hospital and Tyreke had been taken to Comer Children's Hospital. Tyreke underwent surgery and received stitches where his throat had been cut. Rosetta next saw Tanisha's body at the Office of the Medical Examiner.

¶ 4 Deandre Edwards, Tanisha's brother, testified that on November 30, 2009, he was 13 years old and was at home in his family's apartment with Tanisha, defendant, Tyreke, his 10-year-old brother Kahlil, and Kahlil's cousin. About 6 p.m., Tanisha and defendant were playing with their baby when the telephone rang. Tanisha answered the phone and spoke to the caller,

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whom Deandre later learned was Tanisha's ex-boyfriend, Bilal Gill. Defendant took the phone from Tanisha, asked the caller to identify himself, and hung up. Defendant was questioning Tanisha about who called when the phone rang again. Defendant answered the phone and hung up. Defendant then asked Tanisha "[w]hy do you keep calling him?" Tanisha and defendant went into Tanisha's bedroom and began arguing. Tanisha told defendant "get away from me," and she and defendant exited the bedroom. The phone rang again, and defendant answered and asked Gill "[w]hy do you keep calling her?" Defendant talked to Gill then handed the phone to Tanisha. While Tanisha remained on the phone with Gill, defendant carried Tyreke into the kitchen and turned off the light. Deandre did not hear defendant arguing or talking to Tanisha at this time. Defendant laid Tyreke on the kitchen table, grabbed a knife off the table and cut Tyreke's neck. Defendant then grabbed Tyreke by his clothing and threw him to the floor.

¶ 5 Tanisha ran into the kitchen screaming. Defendant grabbed Tanisha, threw her to the floor, got on top of her and punched her in the face with his fist. Tanisha then punched defendant in the mouth. Deandre and Kahlil ran from the apartment, and Deandre banged on his neighbor's door screaming "[h]elp, help, he's killing my sister." Deandre returned to his apartment and saw defendant on top of Tanisha hitting her. Deandre ran and got his neighbor, Durrell Barker, and returned to the apartment. Deandre then saw defendant stab Tanisha above her forehead with a knife. Deandre ran to his landlord's apartment on the first floor and banged on her door screaming for help. The landlord, Bernetta Holt, and her daughter, Tashianna Holt, went upstairs to the Edwards' apartment. Deandre then saw defendant stomp on Tanisha's head with his foot. Defendant looked at the people in the apartment and advanced toward Bernetta

holding a barbeque fork in his hand. Deandre then ran downstairs and out of the building. Shortly thereafter, defendant ran from the building carrying the fork.

¶ 6 Bernetta Holt testified that Deandre Edwards screamed from the top of the stairs "Ms. Holt, help us, please. He's killing my sister." Bernetta called 911 and ran upstairs to the Edwards' apartment. Tanisha was lying on her side on the floor and defendant was repeatedly stomping on Tanisha's face and head with his foot. Tanisha was not fighting back or hitting defendant in any way. Bernetta told defendant to leave Tanisha alone and get out of the apartment. Defendant then stabbed Tanisha in the chest with a barbeque fork. Defendant walked toward Bernetta and said "[w]ho has to leave the apartment?" Defendant thrust the fork at Bernetta twice, but missed when she jumped backwards. Defendant then left the apartment.

¶ 7 Tashianna Holt testified that she heard Deandre Edwards shout "somebody please help me, he's killing my sister." As Tashianna went upstairs Durrell Barker told her to call the police. Tashianna returned to her apartment to get her phone, then went upstairs to the Edwards' apartment. Tanisha was slouched down on the kitchen floor leaning against a freezer. Tashianna then saw defendant stab Tanisha on the right side of her stomach. Tashianna returned to the first floor and her mother, Bernetta, called police. Tashianna returned to the Edwards' apartment and saw defendant kicking the side of Tanisha's head, causing her head to rock back and forth. When Bernetta yelled at defendant, he stopped kicking Tanisha and walked towards Bernetta, waving a barbeque fork in his hand. Bernetta backed away, and as defendant walked out of the apartment, Tashianna heard him say "she doesn't want to be with me."

¶ 8 Assistant medical examiner Ponni Arunkumar testified that Tanisha sustained stab wounds to her neck, her right cheek and the top of her head. She also suffered multiple abrasions

about her face and neck, and hemorrhages in her eyes. Dr. Arunkumar opined that the cause of death was multiple stab wounds with the neck wound cutting a major artery, and the manner of death was homicide.

¶ 9 Bilal Gill testified that he dated Tanisha on and off for seven years. In 2008, Gill and defendant discovered that Tanisha was cheating on both of them with each other. Gill ended the relationship in January 2009 when Tanisha told him she was pregnant and did not know if he was the father. A week before the murder, Gill met with Tanisha because he wanted to know if the baby was his. On the day of the murder, Gill called Tanisha, but she did not answer. Shortly thereafter, defendant called Gill, and after exchanging words, Gill hung up. Defendant called back and questioned Gill about his relationship with Tanisha. Gill told defendant he would "back off" so they could be a family. Defendant then handed the phone to Tanisha. Tanisha told Gill that she wanted to date him, not defendant. She whispered to Gill that the only reason she was with defendant was because of the baby. Gill then heard defendant demand that Tanisha give him the phone. Gill heard Tanisha and defendant struggling over the phone, and the call was disconnected. Gill repeatedly attempted to call Tanisha back, but there was no answer.

¶ 10 Chicago police officer Derrick Pickett testified that he and Officer Shytell were working the front desk at the police department when defendant turned himself in stating "I'm here for the murder on Evans." Defendant had blood smears on his cheek, wrist and sleeves, and a cut on the left side of his lip.

¶ 11 Chicago police detective John Otto testified that he interviewed defendant on the night of the murder. The videotape of that interview was played for the jury. Therein, defendant stated that a month before the murder, he felt Tanisha was disrespecting him because she repeatedly

yelled and cursed at him, which made him angry. Two weeks before the murder, the couple got into an argument, and when Tanisha pointed her finger in defendant's face, he choked her. On the night of the murder, defendant was using Tanisha's telephone when Gill called on the other line. Tanisha spoke with Gill, which hurt defendant. Defendant held Tyreke and paced while Tanisha remained on the phone with Gill, which made defendant angry. When defendant tried to listen to their conversation, Tanisha told him to back up. Tanisha then told defendant that she no longer wanted to date him. Defendant laid Tyreke on the kitchen table and grabbed a knife from the counter. He placed the back of the knife against Tyreke's throat with such force that he broke the knife. Defendant began crying and felt weak and Tyreke fell to the floor. Tanisha came to the kitchen and was still on the phone with Gill. Defendant stated that he then "grabbed her and threw her on the ground, and I choked her again." Defendant then took another knife from the kitchen table and held it against Tanisha's neck. Defendant stated "she was just looking at me so I was hesitating so I just went down with it," stabbing her in the neck. When defendant moved the knife, Tanisha moved her head and he cut the side of her face. Deandre then came into the room and told defendant to get off his sister. When defendant got up, Tanisha also got up, and defendant pushed her down and kicked her. Defendant then realized that several people from the building were in the room, and he had a meat fork in his hand that he did not recall picking up. Defendant then left the apartment.

¶ 12 Chicago police officer Tony Shytell testified for the defense that she was working the front desk at the police station when defendant turned himself in for the murder. Defendant had an open cut on the right side of his mouth, which she also described as a "slight cut."

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¶ 13 Defendant testified that he lived with his mother and had been dating Tanisha for three years. In early November 2009, defendant and Tanisha got into an argument during which defendant grabbed Tanisha by the neck and choked her, causing her eyes to become bloodshot. Tanisha's mother told defendant that he was no longer allowed at their apartment. Defendant and Tanisha continued to secretly see each other nearly every day.

¶ 14 On November 30, 2009, defendant was allowed in the Edwards' apartment. Tanisha and defendant were playing with their baby when defendant's friend Chris called on Tanisha's phone. Defendant spoke with Chris, and when he hung up, the other line clicked and defendant saw an unfamiliar number on the caller ID. Defendant had seen the number on Tanisha's cell phone several times late at night, but Tanisha never answered those calls. Defendant called the number and recognized Gill's voice. Defendant briefly argued with Gill and hung up. Defendant then confronted Tanisha about cheating on him with Gill. Gill called back, and defendant answered the phone and argued with him again. When Gill asked to speak with Tanisha, defendant handed her the phone. Tanisha spoke with Gill for several minutes while defendant tried to listen to their conversation. Tanisha repeatedly told defendant to back away from her, and she spoke to Gill in a whisper. Defendant then heard Tanisha tell Gill that defendant was only at her house to see the baby. Defendant felt hurt and repeatedly asked Tanisha to get off the phone, but she walked away. Defendant began to cry as he held Tyreke and asked Tanisha to tell Gill that she was with defendant. Tanisha told defendant he was taking things too seriously and told him to give her Tyreke. Tanisha reached for Tyreke, but defendant moved him away. Tanisha then hit defendant once in the mouth with either her open hand or her fist.

¶ 15 Tanisha told defendant that the baby "probably isn't yours anyway" and that she was still having intimate relations with Gill. Defendant testified that he then grabbed a knife from the top of the freezer and "reacted without thinking." Defendant admitted that he cut Tyreke's neck with such force that he broke the handle off the knife. While he was still holding Tyreke, defendant grabbed Tanisha and threw her to the floor, dropping Tyreke. Defendant then took another knife from the kitchen table and stabbed Tanisha in the neck. Defendant stood up and when Tanisha tried to get up, defendant kicked her twice in her shoulder or head. Defendant denied stomping on her head, and said he pushed her head with his fingertips. Defendant testified that he did not recall stabbing Tanisha in the top of her head, but acknowledged he must have done so. He further testified that as he got off Tanisha, he cut her cheek with the knife, but it was not intentional. Tanisha was sitting against the deep freezer and told defendant "okay, I wanna be with you." Defendant replied "I don't wanna be with you." Defendant then heard Deandre's voice and noticed he was standing in the hallway with two women. Defendant testified that he snapped back from his shock and ran from the apartment carrying a fork in his hand. Defendant took a bus to his friend Chris' house, but felt guilty and turned himself in at the police station. Defendant acknowledged that he never told the detectives that Tanisha hit him in the mouth.

¶ 16 During the jury instruction conference, defendant asked that the jury be given an instruction for second degree murder based on the mitigating circumstance of sudden intense passion. Defense counsel argued that there was evidence that Tanisha had been unfaithful to defendant and that she had punched defendant in the mouth. Counsel argued that the evidence of Tanisha's infidelity coupled with the punch could allow the jury to reasonably conclude that defendant acted immediately under a sudden intense passion.

¶ 17 The trial court noted that Deandre's testimony was that Tanisha was on the floor defending herself when she punched defendant in the mouth. It acknowledged, however, that defendant testified that Tanisha punched him while they were standing. When the court expressed doubt regarding mutual quarrel or combat, defense counsel replied that she was not asserting mutual combat. Counsel argued that the instruction allows for assault as an alternative to substantial physical injury, and argued there was evidence of an assault with a physical injury.

¶ 18 The State argued that all of the cases which allowed an instruction based upon adultery involved a husband and wife, and that adultery is not recognized in boyfriend/girlfriend relationships. The State further argued that the assault category did not apply because defendant did not respond to Tanisha's punch by immediately punching her in return, but instead, he slashed the baby's throat, and thereafter, stabbed Tanisha with a knife.

¶ 19 Relying on our supreme court's decision in *People v. Chevalier*, 131 Ill. 2d 66 (1989), as well as other case law, the trial court found that a claim of provocation based on adultery is limited to situations where the victim is discovered engaged in the act of adultery, or immediately before or after such an act, and the killing immediately follows that discovery. The trial court further explained that a verbal communication that adultery has occurred or will occur falls under the rule that mere words are insufficient provocation, and therefore, insufficient to reduce a charge of first degree murder to second degree murder. The court also noted that provocation based on adultery applies to married couples, and defendant and Tanisha were not married. In addition, the court found that Tanisha's one punch was not sufficient provocation to reduce the charge to second degree murder. The court noted that, according to defendant's testimony, after Tanisha hit him, he did not attack her, but instead, grabbed a knife and cut the

baby's throat before he stabbed Tanisha. Based on these findings and the case law, the trial court concluded that Tanisha's one punch and her revelations about her relationship with Gill were not sufficient to provoke a sudden and intense passion. Accordingly, the trial court denied defendant's request for a jury instruction for second degree murder.

¶ 20 Following deliberations, the jury found defendant guilty of first degree murder, attempted first degree murder, and aggravated battery of a child. The trial court subsequently sentenced defendant to consecutive prison terms of 45 years for the murder and 25 years for the attempted murder for an aggregate sentence of 70 years' imprisonment. No sentence was entered for the aggravated battery offense.

¶ 21 On appeal, defendant solely contends the trial court erred when it refused to give a jury instruction for second degree murder because there was evidence of mutual quarrel, some physical contact and very provoking revelations by Tanisha, and when combined together, this evidence could have led the jury to find that defendant's actions were the result of provocation. Defendant argues that his statement to police and testimony show that he acted out of anger and under a sudden and intense passion that resulted from Tanisha's serious provocation. Defendant asserts that such evidence demonstrates that he and Tanisha argued after she received the telephone call from Gill, that Tanisha struck him in the mouth with her fist or hand, and that Tanisha told him the baby probably was not his and she was still having intimate relations with Gill. Defendant acknowledges that case law has limited the adultery provocation defense to situations where a spouse is caught in the act of adultery, but urges this court to reconsider "this restrictive interpretation" and extend the defense to unmarried partners confronted with an oral revelation of infidelity who then engage in a mutual quarrel with physical violence.

¶ 22 Whether a jury instruction for second degree murder should be issued is a decision that rests within the sound discretion of the trial court. *People v. Austin*, 133 Ill. 2d 118, 124 (1989).<sup>1</sup> A defendant's request for the instruction should be granted where there is evidence in the record that, if believed by the jury, would reduce the offense from first degree to second degree murder. *Austin*, 133 Ill. 2d at 124-25. It is defendant's burden to prove that at least some evidence of serious provocation exists, or the trial court may deny the instruction. *Austin*, 133 Ill. 2d at 125. The evidence defendant relies upon must be more than a mere factual reference or comment from a witness; otherwise, the trial court could be forced to include unlimited instructions that are unrelated to the case. *Austin*, 133 Ill. 2d at 125. The trial court's determination of whether or not to give a jury instruction will not be disturbed on appeal absent an abuse of discretion. *People v. Ingram*, 409 Ill. App. 3d 1, 19 (2011).

¶ 23 Illinois law provides, in relevant part, that a person commits second degree murder when he commits first degree murder, and at the time of the killing he is acting under a sudden and intense passion caused by serious provocation by the victim. 720 ILCS 5/9-2(a)(1) (West 2008). Serious provocation is statutorily defined as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2008). Defendant must show that he was acting under a sudden and intense passion caused by the victim's provocation by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2008).

¶ 24 Passion on defendant's part, no matter how violent, will not relieve him from liability for first degree murder unless it is caused by a provocation which the law recognizes as reasonable

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<sup>1</sup> The statute defining second degree murder was specifically intended to retain all substantive law which previously applied to voluntary manslaughter; consequently, our reliance on voluntary manslaughter cases is appropriate. *People v. Leach*, 405 Ill. App. 3d 297, 315 n.2 (2010).

and adequate. *Austin*, 133 Ill. 2d at 125. Where the provocation is insufficient, the crime is first degree murder. *Austin*, 133 Ill. 2d at 125. The four categories of provocation recognized by our supreme court are substantial physical injury or assault, mutual quarrel or combat, illegal arrest and adultery with the defendant's spouse. *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989). Mere words are insufficient provocation, regardless of how abusive, aggravated, indecent or insulting the language. *Chevalier*, 131 Ill. 2d at 71-72, 76.

¶ 25 In this case, defendant claims the provocation consisted of a combination of mutual quarrel, physical contact and the revelations of infidelity by Tanisha. Our review of the record reveals that the evidence did not support a finding of provocation under any of these categories, either singularly or combined.

¶ 26 Mutual combat occurs where both parties willingly enter into a fight or struggle, or where two people engage in a sudden quarrel, and in hot blood, mutually fight on equal terms, with death resulting from that combat. *Austin*, 133 Ill. 2d at 125. A person who instigates the quarrel or combat cannot rely on the victim's response as evidence of mutual combat that would be sufficient to reduce the killing from first degree to second degree murder. *Austin*, 133 Ill. 2d at 126. The provocation must be proportionate to the manner in which defendant retaliated, and a slight provocation is not enough. *Austin*, 133 Ill. 2d at 126-27. Where defendant attacks the victim with violence that is out of proportion to the provocation, the offense is first degree murder, especially where the murder is committed with a deadly weapon. *Austin*, 133 Ill. 2d at 127. Consequently, where the defendant attacks the victim based on slight provocation with a disproportionate level of violence, the mutual combat aspect of provocation does not apply as a matter of law. *Austin*, 133 Ill. 2d at 127; *People v. Leach*, 405 Ill. App. 3d 297, 316 (2010).

¶ 27 In addition, a verbal communication that adultery has occurred falls under the rule stated above that mere words are insufficient provocation. *Chevalier*, 131 Ill. 2d at 72. Adultery as provocation has been limited by Illinois courts to circumstances where the defendant discovers his or her spouse engaged in the act of adultery, or immediately before or after such an act, and the killing immediately follows that discovery. *Chevalier*, 131 Ill. 2d at 72. Our supreme court has expressly declined "to change the law by holding that a confession of adultery by a spouse is legally adequate provocation." *Chevalier*, 131 Ill. 2d at 76. Furthermore, application of the adultery category of provocation has been limited to married parties, and the courts have declined to expand the category to unmarried couples. *People v. Sutton*, 353 Ill. App. 3d 487, 494-95 (2004).

¶ 28 Here, our review of the record reveals no evidence of provocation by Tanisha that was sufficient to issue a jury instruction for second degree murder. Defendant's own testimony and his video-recorded interview with police, as well as Deandre's testimony, demonstrate that defendant became angry when Tanisha's ex-boyfriend, Bilal Gill, called Tanisha, and Tanisha spoke with Gill on the telephone. Defendant tried to listen to their conversation, and Tanisha repeatedly told him to back away from her. In his statement, defendant said Tanisha then told him she no longer wanted to date him. In court, defendant testified that he heard Tanisha tell Gill that defendant was at her house only to see the baby, and she told defendant that he was taking things too seriously and to hand her Tyreke. When Tanisha reached for Tyreke, defendant moved the baby away, and Tanisha struck defendant once in the mouth with either her open hand or fist. Defendant further testified that Tanisha then told him the baby may not be his, and that she was still dating Gill. This is the extent of the evidence defendant claims was sufficient

provocation. We disagree. Tanisha's mere words, no matter how hurtful, combined with her act of hitting defendant once in the mouth, do not constitute serious provocation.

¶ 29 Notably, at this point, defendant did not attack Tanisha, but instead, laid his infant son on the kitchen table and cut his throat with a knife. According to defendant's testimony and statement, he then grabbed Tanisha, threw her to the floor, took a second knife from the kitchen table and stabbed her in the neck. There is no evidence of mutual combat. When Tanisha tried to get up, defendant pushed her back down and kicked her in the head. Multiple witnesses saw defendant stab Tanisha and saw him stomping on or kicking her head. Bernetta Holt testified that Tanisha did not fight back or resist defendant's attack. The cut defendant received to his mouth, possibly from Tanisha, was described by Officer Shytell as a "slight cut," and does not demonstrate evidence of mutual combat. Defendant's violent attack, stabbing Tanisha three times with a knife and possibly a barbeque fork, was grossly out of proportion to her act of striking him once in the mouth.

¶ 30 We find that defendant failed to present any real evidence of serious provocation. Accordingly, we conclude that the trial court did not abuse its discretion when it refused to issue a jury instruction for second degree murder.

¶ 31 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.