2016 IL App (5th) 150421-U

NO. 5-15-0421

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Perry County.
	)	
v.	)	No. 14-CF-118
	)	
WILLIAM H. FARNSWORTH,	)	Honorable
	)	Eugene E. Gross,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Where the State presented sufficient evidence to find the defendant guilty of second-degree murder beyond a reasonable doubt, the defendant's conviction is affirmed. Where the trial court considered improper aggravating factors and did not give appropriate weight to mitigating factors in sentencing, the defendant's sentence is vacated and remanded for resentencing.

¶ 2 The defendant, William H. Farnsworth, waived his right to a trial by jury and proceeded to a stipulated bench trial upon the State's amended information charging him with first-degree murder, second-degree murder, and driving under the influence of alcohol (DUI). Prior to the hearing on the merits, the defendant pled guilty to the DUI charge, but raised the affirmative defense of self-defense on the charge of second-degree

murder. Following the bench trial, the circuit court of Perry County rendered a guilty verdict on this charge. In a subsequent sentencing hearing, the court sentenced the defendant to 12 years' incarceration. The defendant appeals, arguing that the trial court erred in finding him guilty of second-degree murder based on the evidence presented, and that the trial court erred in using the death of the victim as an aggravating factor in sentencing. For the following reasons, we affirm the trial court's finding of guilty for the second-degree murder charge against the defendant, but vacate the defendant's sentence and remand for resentencing.

¶ 3 Following the State's filing of an amended information, the State and the defendant submitted statements describing what each party believed that various witnesses would testify. Witnesses, including the defendant, also testified at the defendant's sentencing hearing.

¶ 4 The defendant met the victim, Jeffery Harris (Harris), in June 2014, when the defendant paid Harris to do some home improvements on the defendant's property. After Harris obtained the defendant's phone number, Harris began to call the defendant frequently. Near the end of the September 2014, the defendant changed his cell phone number in order to avoid calls from Harris.

¶ 5 On November 7, 2014, the defendant visited the Coulterville Veterans of Foreign Wars (VFW) building. The defendant entered between 11 and 11:30 a.m., and Harris entered the bar approximately 30 minutes later and sat down uninvited next to the defendant. The pair got into an argument approximately an hour later, and the argument escalated to the defendant grabbing Harris by the arm. The defendant testified that he

had accused Harris of smelling like marijuana, and Harris became upset at the accusation. A bartender asked them to separate, and the defendant went to sit at another area of the bar. Harris exited the bar shortly thereafter, and was seen leaning over to say something to the defendant on his way out. The defendant testified that Harris told him that he was going to "whip his ass."

¶ 6 The defendant got up, went to the bathroom, and proceeded outside. The defendant and Harris were seen continuing their altercation in the parking lot; the defendant testified that Harris was still angry about what the defendant had said, because Harris was "hurting for money" and what the defendant had said could hurt his chances of finding work. The defendant testified that he gave Harris a $100 bill, and that he had given Harris money in the past. Harris took the money and left the parking lot at a high rate of speed. Soon after, the defendant got in his truck and left in the same direction. He proceeded down the block to the first stop sign past the VFW and made a southbound turn. Harris's vehicle was then seen quickly coming up behind the defendant's truck. Harris followed the defendant out of town.

¶ 7 The defendant pulled into his driveway, and Harris followed right behind him. The defendant exited his truck, went into his house, and grabbed a double barrel shotgun. The defendant came back outside and waved the gun at Harris, who was still in his vehicle. Harris did not leave, but rather turned off his vehicle. The defendant then walked down the steps to the vehicle and stood by the driver's side door. Harris opened the driver's door, and leaned over to grab something close to him with his right hand.

The defendant lunged forward with the shotgun and shot Harris from a nearly point-blank range, killing him.

¶ 8 In a later interview with the police, the defendant acknowledged that his actions were wrong but stated that he was just protecting himself. When he was informed that the object that Harris was reaching for was a box, the defendant responded, "Well, I didn't know, I didn't know." The State's experts would have testified that the defendant's blood alcohol content was between .239 and .249 when he drove home from the VFW and at the time of the shooting. The defense's experts would have testified that Harris's blood alcohol content at the time he followed the defendant home was .24 and that Harris would test positive for cannabis.

¶ 9 Following the amended information filed by the State, the State and the defendant filed their respective versions of the evidence that they would present to the court. The defendant's evidence stated that it stipulated that "[the State's version of the evidence] would be the State's evidence," but the defense "IN NO WAY stipulates that this evidence is sufficient to convict." The defendant further submitted that Harris was stalking the defendant, to the point where the defendant had to change his phone number; that Harris was a drug dealer and had a violent past; and that the defendant was protecting himself and his property, as he had reason to believe that Harris was armed. Following the stipulated bench trial, the trial court found the defendant guilty of second-degree murder, stating that "[the defendant's] belief that he was acting in self defense was unreasonable and doesn't exonerate him[.]"

¶ 10 A sentencing hearing was held on June 5, 2015. At the hearing, the State was asked if it had any evidence in aggravation, to which it replied that it did not. The defendant presented eight factors in mitigation pursuant to the statute (see 730 ILCS 5/5-5-3.1 (West 2014)): the defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another; the defendant acted under a strong provocation; there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense; the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime; the defendant's criminal conduct was the result of circumstances unlikely to recur; the character and attitudes of the defendant indicate that he is unlikely to commit another crime; the defendant is particularly likely to comply with the terms of a period of probation; and, the imprisonment of the defendant would entail excessive hardship to his dependents. In argument, the State noted the factors in aggravation that it found relevant. The State argued that though the court could not use Harris's death as an aggravating factor, the defendant's conduct caused or threatened serious harm. The State also stated that although "second[-]degree murder is not a deterrence crime in terms of deterrence for this man," the sentence was necessary to deter others from committing the same crime. The State requested 12 years' imprisonment.

¶ 11 In response, the defendant reiterated his arguments for his factors in mitigation, and noted that second-degree murder was a nondeterrence crime, and as such, the State's use of it as a factor in aggravation does not apply. The defendant requested probation.

¶ 12 The trial court found that while some of the factors in mitigation were redundant with the nature of second-degree murder (namely, that the defendant acted under a strong provocation, and that there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense), the remaining factors in mitigation likely applied to this case.

¶ 13 In regards to the defendant's history of criminality, the court noted the defendant's two previous misdemeanor DUI's, from 1978 and 1993, constituted "a history of criminality which is relevant in this case because of the alcohol" and because of this, his history of otherwise being law-abiding "cuts both ways." The court found that this incident was unlikely to reoccur and "other than the drinking [the defendant] has led a fairly decent life." In regards to the hardship on the defendant's dependents, the court found that it is always a hardship for the family when someone is imprisoned, and the defendant's circumstances were not exceptional.

¶ 14 The court continued:

> "Concerning the factors in aggravation, other than the obvious that is inherent in the offense itself of the harm caused, concerning the deterrence factor, it's a thin line, and I'm not basing my decision on what I do today on whether or not this is a deterrence case. It's–I'm basing my decision on the fact that what happened here, the drinking and the guns and the loss of human life, is a very serious offense and it would seriously deprecate the conduct if he wasn't sent to the Department of Corrections. And the fact I can consider that he had two prior DUI's."

¶ 15 The court went on to note that it could give the defendant the maximum 20 years, as "it's a serious thing to take a man's life, probably the most serious thing." The court found that the State's recommendation, 12 years' incarceration to be served at 50%, was a fair and just sentence under the circumstances.

¶ 16 On July 2, 2015, the defendant filed a motion for reconsideration. The defendant argued that the trial court gave improper consideration to deterrence as a sentencing factor, and gave insufficient consideration to the defendant's factors in mitigation.

¶ 17 On September 22, 2015, a hearing was held on the motion for reconsideration. The court noted that the defendant did have a criminal history, and though it recognized that the DUI's were only misdemeanors, his conduct was "off the scale unreasonable." The court reiterated that taking a man's life is one of the most serious consequences of a person's actions.

¶ 18 The court stated:

> "I do believe that anytime guns are used in an offense such as this, it was a conscious act that [the defendant] made to pick up his Browning shotgun, it was a conscious act for him to go outside to the car, and I know from his statements that he made at the time of sentencing that he regrets his actions. I believe he was sincere in that; however, that conduct was such a severe nature that I believe deterrence is an important factor.
>
> And I do believe the 12-year sentence is the appropriate sentence in this case *** in light of all the factors in aggravation and mitigation *** because had

there been no factors in mitigation, it was likely that I would have gave him the 20 years."

The court denied the motion to reconsider the sentence. The defendant appeals.

¶ 19 On appeal, the defendant argues that the facts submitted by the State's Attorney were insufficient to convict the defendant of second-degree murder, as the State failed to submit evidence sufficient to overcome the defendant's affirmative defense of self-defense. The defendant also argues that the trial court's imposition of a 12-year sentence was an abuse of discretion, as it relied on an improper aggravating factor, the death of Harris, and imposed a more severe sentence than it would have if that factor had not been considered. We address these issues in turn.

¶ 20 When challenging the sufficiency of the evidence in a bench trial, all reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 21 The defendant was convicted of second-degree murder. A person commits the offense of second-degree murder when he commits the offense of first-degree murder and one of the enumerated mitigating factors is present. 720 ILCS 5/9-2(a) (West 2014).

¶ 22 The first-degree murder statute states in part that a person who kills an individual without lawful justification commits first-degree murder if, in performing the acts which cause the death, (1) he either intends to kill or do great bodily harm to that individual, or knows that such acts will cause death to that individual; or (2) he knows that such acts create a strong probability of death or great bodily harm to that individual. 720 ILCS 5/9-1(a)(1)-(2) (West 2014).

¶ 23 One of the mitigating factors reducing first-degree murder to second-degree murder, sometimes referred to as "imperfect self-defense," occurs when there is sufficient evidence that the defendant believed that he was acting in self-defense at the time of the killing, but that belief was objectively unreasonable. 720 ILCS 5/9-2(a); *People v. Jeffries*, 164 Ill. 2d 104, 113 (1995).

¶ 24 Here, the defendant maintains that the State's evidence was insufficient to convict him of second-degree murder and that evidence did not overcome the defendant's affirmative defense.

¶ 25 One of the recognized justifications to first-degree murder is the affirmative defense of self-defense. *Jeffries*, 164 Ill. 2d at 127. Section 7-1 of the Criminal Code of 2012 provides in relevant part:

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he 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 or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2014).

¶ 26 Once an affirmative defense is raised, the State has the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense. *Jeffries*, 164 Ill. 2d at 127.

¶ 27 In order for the trier of fact to consider 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. *Id.* at 128.

¶ 28 When a defendant is found guilty of second-degree murder, the trier of fact has, in essence, concluded that the evidence that the defendant has offered was not sufficient to support his claim of self-defense, but there exists a mitigating factor (*i.e.*, the objectively unreasonable belief that he was acting in self-defense) sufficient to reduce the offense of murder to second-degree murder. *Id.* at 129. Whether the defendant believed, albeit unreasonably, that his use of force was necessary is a question of fact, the determination of which will not be disturbed on appeal if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have reached that determination. *People v. Reid*, 179 Ill. 2d 297, 308 (1997).

¶ 29 Here, taking the evidence in the light most favorable to the State, we find any rational trier of fact could agree with the trial court that the evidence supported a conviction on the second-degree murder charge.

¶ 30 Upon review of the evidence presented to the trial court, we find that the State proved the elements of first-degree murder and that the murder was not carried out in self-defense. The State presented evidence that the defendant had been drinking and got into a heated altercation with Harris, who followed him to his home after the altercation

was presumably over. With Harris tailing him, the defendant immediately fetched his gun upon arriving home, waved it at Harris in an apparent attempt to threaten him into leaving, and ultimately shot him nearly point-blank after mistakenly assuming that Harris was reaching for a weapon in his car. The trial court heard both parties' versions of the events leading up to the encounter in the driveway. A reasonable trier of fact could find that insufficient evidence supported the defendant's claim of self-defense, as it was the defendant who escalated the encounter and threatened Harris with the gun immediately preceding the fatal shot. The trial court weighed the evidence and found that the defendant's claim failed because his belief in the necessity of such deadly force was objectively unreasonable, and that this same objectively unreasonable belief mitigated the defendant's charge from first-degree to second-degree murder. We affirm the trial court's decision in this regard.

¶ 31 We turn to the defendant's contention that the trial court improperly considered Harris's death as an aggravating factor and his sentence should be reduced accordingly.

¶ 32 The sentence by the trial court was within the statutory range. Absent an abuse of discretion by the trial court, the sentence may not be altered on review. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). However, a sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Id.* at 210. A reasoned judgment as to the proper penalty to be imposed must be based upon the particular circumstances of each individual case. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977).

¶ 33 The defendant properly points out that the death of the victim is not a proper aggravating factor to be considered in sentencing. *People v. Saldivar*, 113 Ill. 2d 256, 272 (1986). In *Saldivar*, the defendant was convicted of voluntary manslaughter and sentenced to seven years' imprisonment. *Id*. at 261, 264. At the sentencing hearing, evidence in mitigation was presented, including that the defendant acted under strong provocation, the conduct was unlikely to reoccur, the defendant was unlikely to commit another crime, and he was likely to comply with probation; no evidence was offered in aggravation by the State. *Id*. at 261. The trial court found as the primary statutory aggravating factor "the terrible harm that was caused to the victim" and noted that the defendant's conduct caused the death and that a human life was taken. *Id*. at 264. Our Illinois Supreme Court overruled the trial and appellate courts to impose the statutory minimum sentence of four years. *Id*. at 272. The court found that while it is appropriate to consider the force employed and the physical manner in which the victim's death was brought about, it is not appropriate to consider the end result of the defendant's conduct, *i.e*., the death of the victim, as a factor in aggravation, "a factor which is implicit in the offense of voluntary manslaughter[.]"

¶ 34 We find *Saldivar* instructive, as like voluntary manslaughter, the death of a victim is implicit in the offense of second-degree murder. Here, the trial court explicitly stated that its decision was based on "the drinking, the guns, and the loss of human life." The court appeared to give great weight to Harris's death in deciding the sentence, noting that it is "the most serious thing" to take someone's life. Per *Saldivar*, then, Harris's death

cannot properly be considered as an aggravating factor and we must examine the properly remaining aggravating factors to ascertain if the trial court's sentence was excessive.

¶ 35 Again like *Saldivar*, the State offered no aggravating factors at the sentencing hearing, and the defendant offered many of the same factors in mitigation as the *Saldivar* defendant. After removing the improper considerations,[1] the trial court considered the defendant's history of criminality, *i.e.*, his two misdemeanor DUI's from 37 years and 22 years prior to the incident, and, though the trial court made a contrary remark at the sentencing hearing, appeared at the motion to reconsider hearing to consider deterrence as a factor.

¶ 36 Deterring others from committing the same crime is a proper aggravating factor to consider when sentencing a defendant for second-degree murder. 730 ILCS 5/5-5-3.2(a)(7) (West 2014); *People v. Behl*, 279 Ill. App. 3d 1071, 1075 (1996). However, a sentence of 12 years, based entirely upon deterring others from committing a similar crime and the defendant's dubiously relevant "history of criminality," we think is greatly at variance with the spirit and purpose of the law.

¶ 37 When compared to the factors in mitigation discussed by the trial court, we find this sentence was insufficiently supported by proper statutory aggravating factors and

[1]We note also that considering the involvement of alcohol as an aggravating factor is outside the statutory guidelines for factors in aggravation. 730 ILCS 5/5-5-3.2 (West 2014).

was therefore excessive based on the particular circumstances of this case. For the foregoing reasons, we remand this case to the circuit court for resentencing.

¶ 38 Sentence vacated and remanded.