2013 IL App (3d) 120275-U

Order filed April 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0275
v.	)	Circuit No. 11-CF-104
	)	
GORDON K. MOORE, II,	)	Honorable
	)	Timothy M. Lucas,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held*: Where the evidence failed to establish provocation, the trial court did not err in granting the State's motion *in limine* to exclude expert testimony regarding defense of second degree murder.

¶ 2 Defendant, Gordon K. Moore, II, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and sentenced to 45 years in prison. On appeal, he argues that the trial court erred in

granting the State's motion *in limine* to exclude expert testimony attempting to establish second degree murder.

¶ 3 Defendant was charged with four counts of first degree murder in the stabbing death of his estranged wife, Teresa Moore, on January 31, 2011. In his answer to the State's request for discovery, defendant stated that he intended to "assert that he suffered serious provocation, which when viewed in light of the [d]efendant's depressed mental state, caused him to act under a sudden and intense passion."

¶ 4 In response, the State filed a pretrial motion *in limine* to exclude any expert testimony concerning defendant's mental state prior to and at the time of the offense. Specifically, the motion requested the exclusion of the testimony of two mental health professionals, Dr. Robert Chapman and Dr. Phillip Ladd, who saw defendant before and after he committed the alleged offense.

¶ 5 At the hearing on the motion *in limine*, the trial court reviewed a report from Dr. Chapman, a forensic pathologist, and a letter from defendant's counselor, Dr. Ladd. Dr. Chapman reported that he interviewed defendant six months after the murder. When he asked defendant if he understood the purpose of the exam, defendant stated that he was being interviewed "to try to come up with an instant crime of passion, causing brief loss of logical thought." The report indicated that defendant then talked to Chapman about the events leading up to Teresa's death. Defendant said that he had been living with his parents and that his wife told him that she did not love him anymore. On the day of the murder, he agreed to meet Teresa at the couple's home to discuss the terms of their divorce. He knew it would be difficult, so he drank five beers and took twelve Vicodin tablets before the meeting. After an hour of discussion, his wife said that she was going to file for sole custody of their three children and move to South Carolina to be with a man she met on Facebook.

At that point, they were in the garage. Defendant told Dr. Chapman that while they were in the garage, he became "hysterically blind" and "blacked out." He said he felt enraged, lost and hopeless. When he woke up, he had a knife in his hand and blood was everywhere. He noticed that Teresa was not breathing, and he wanted to end his own life. He then stabbed himself and collapsed.

¶ 6 Dr. Chapman noted that defendant was mildly anxious and had a history of depression and had been treated with anti-depressants. He diagnosed defendant, at the time of the offense, with adjustment disorder due to marital and family loss, rage and depression, generalized anxiety disorder, and substance abuse. He opined that the trauma of defendant's marital relationship "transferred to the current pending loss and the impairment of self-restraint as a result of the alcohol and Vicodin, combined with the reaction of rage, resulted in the present offense."

¶ 7 Dr. Ladd's letter indicated that he counseled defendant five times between December 13, 2010, and January 25, 2011. During their sessions, defendant mentioned that Teresa had become cold and mean and that she told him that she had been conversing with another man on Facebook. Defendant refused to get a divorce and hoped the marriage would work itself out. After his first meeting with defendant, Dr. Ladd diagnosed defendant with "adjustment disorder with depressed moods" and stated that in the future he would "look at the possibility of major depressive disorder." He noted that there was no history of domestic abuse between the couple. In their third session on January 7, 2011, defendant told Dr. Ladd that he expected to be served with divorce papers. Defendant said that his daughter seemed to be turning against him. Defendant said he went to her room to talk to her, and he became upset and hit the bed with his fist. Dr. Ladd noted that defendant was able to control his emotions by hitting the bed rather than his daughter. Defendant also told Dr. Ladd he was working on his patience and his coping skills. In a later session, defendant said that he

loved his wife and family very much. Finally, on January 25, 2011, defendant talked about struggling with the divorce. He said that he thought his wife's feelings for him were inside her somewhere and that he was planning to give her some space for awhile. Defendant had an appointment scheduled for January 31, the day of the murder, but did not attend the session. At the end of his letter, Dr. Ladd summarized that he was "surprised" when he heard about Teresa's death. He stated that "[he] did not see any evidence that [defendant] could be homicidal." To Dr. Ladd's knowledge, there had been no history of domestic abuse.

¶ 8 At the close of the hearing, the State argued that the proposed expert testimony should be excluded because it would fall within the common knowledge of the jury. Defendant responded that he "had diagnosed medical or psychological conditions" that could only be established by the experts' testimony.

¶ 9 The trial court granted the State's motion *in limine*. The court noted that there were four types of provocation the law recognized as sufficient to raise second degree murder. It then concluded that "[t]he serious provocation category relevant to this case is mutual quarrel or combat" and that defendant made no offering that combat occurred. The trial court found that without any proof of provocation, the expert testimony was not relevant.

¶ 10 At the stipulated bench trial, the evidence demonstrated that defendant and Teresa began arguing in the kitchen and that the quarrel ended in the garage. The couple's fourteen-year-old daughter, Elizabeth, and their three-year-old son were both in the house listening to the argument. When Elizabeth heard a thud in the garage, she opened the kitchen door and saw defendant on top of her mother moving a knife across her neck. She jumped on defendant's back and began hitting him. Defendant continued to stab Teresa, while professing his love for her and his children.

Elizabeth ran back inside the house to get her brother and then ran with him through the garage to a neighbor's house. The trial court found defendant guilty of first degree murder beyond a reasonable doubt.

¶ 11 ANALYSIS

¶ 12 Defendant argues that the trial court erred in granting the State's motion to exclude Dr. Chapman's and Dr. Ladd's testimony regarding his defense of second degree murder. Defendant claims that the experts' testimony was beyond the common knowledge of the jury and was necessary to establish his state of mind.

¶ 13 The second degree murder statute provides:

> "(a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:
>
> (1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed ***[.]
>
> * * *
>
> (b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(a), (b) (West 2010).

A defendant who seeks the benefit of the second degree murder defense has the initial burden to prove by a preponderance of the evidence that he was provoked into a sudden and intense passion by the victim. 720 ILCS 5/9-2(c) (West 2010).

¶ 14 The question of defendant's state of mind at the time of a crime is a question of fact for the jury to determine. *People v. Raines*, 354 Ill. App. 3d 209 (2004). Mental states such as the intent

to kill or cause great bodily harm are generally not shown by direct evidence and may be inferred by the defendant's conduct and other circumstantial evidence surrounding the commission of the crime. *Id.* at 220. The admissibility of psychiatric evidence regarding a defendant's intent, or lack thereof, the ultimate issue in a murder case, depends on whether the expert will testify to "facts requiring scientific knowledge not within the common knowledge of the jury." *People v. Ambro*, 153 Ill. App. 3d 1 (1987), *overruled on other grounds*, *People v. Chevalier*, 131 Ill. 2d 66 (1989). Unless a subject is difficult to comprehend or understand, expert opinions may not be admitted on matters of common knowledge. *People v. Hulitt*, 361 Ill. App. 3d 634 (2005) (expert not allowed to testify regarding the effects of defendant's postpartum depression on her mental state during the murder trial of her 1½-year-old daughter). If an expert's opinion does not present a concept beyond a jury's general understanding, the expert's testimony is properly excluded. *People v. Pertz*, 242 Ill. App. 3d 864 (1993) (psychiatrist opinion as to defendant's credibility during questioning was a concept within the jury's common and ordinary understanding and was properly excluded).

¶ 15 Here, defendant's conversations with the forensic pathologist and his counselor indicate that he was having difficulty dealing with his failing marriage and was experiencing feelings of depression. He also admitted that he ingested alcohol and Vicodin shortly before meeting Teresa that evening. However, neither Dr. Chapman's nor Dr. Ladd's reports state that defendant suffered from clinical depression as a diagnosis or another severe mental condition that would have caused him to react in a manner that was beyond the jury's common understanding. Further, neither Dr. Chapman's nor Dr. Ladd's reports explained the medical effects of possible depression coupled with the use of alcohol and prescription pain relievers. Dr. Chapman's report simply concluded that defendant killed his wife because he was distraught and had been drinking and abusing substances.

Dr. Ladd's letter merely stated that defendant was experiencing feelings of depression but that he loved his wife and did not want a divorce. It is not beyond a jury's common and ordinary understanding that defendant was depressed about his failing marriage, nor is it beyond common understanding that he was having trouble copping with losing his wife and his three children. An expert's testimony is not necessary to explain to a jury the emotional effects of divorce and how those emotions can lead to the excessive use of alcohol and other drugs. Since the matters the experts would have testified to were matters within a jury's knowledge, the trial court did not err in barring their testimony.

¶ 16 Even assuming the trial court erred in preventing defendant's experts from testifying, the error was harmless. Illinois law recognizes four types of provocation that are reasonable to mitigate first degree murder to second degree murder: (1) substantial physical injury or physical assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the offender's spouse. *People v. Garcia*, 165 Ill. 2d 409 (1995). "Words, in and of themselves, no matter how vile, can never constitute serious provocation such that second degree murder should be found instead of first degree murder." *Id.* at 429-30. The aggressor's words must be coupled with serious mutual combat to be considered as possible mitigation of first degree murder. *Id.*

¶ 17 In this case, the evidence presented at the pretrial hearing and stipulated bench trial demonstrate that defendant would not have been able to present a defense based on a recognized form of reasonable provocation. Defendant was not physically injured or illegally arrested, nor had the victim committed adultery with defendant's spouse. Provocation by mutual combat is equally unavailing. Elizabeth would have testified that her parents argued and yelled at each other. She did not see the victim or defendant with a weapon when they were arguing in the kitchen. Further,

defendant told Dr. Chapman that he and Teresa discussed their failing marriage for about an hour, at which point he became upset and angry and then "blacked out." Defendant and Teresa's verbal quarrel does not constitute serious provocation under the second degree murder statute. See *Garcia*, 165 Ill. 2d at 429-30. Therefore, even if the expert testimony was allowed and the trier of fact found that defendant acted based on "sudden and intense passion," there was no evidence of provocation to support a second degree murder defense. See 720 ILCS 5/9-2(a), (b) (West 2010).

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Peoria County is affirmed.

¶ 20 Affirmed.

¶ 21 JUSTICE HOLDRIDGE, specially concurring.

¶ 22 I agree that the defendant's conviction should be upheld. However, I do not agree with the majority's finding of no error. In my view, the trial court erred by barring the expert testimony of Drs. Ladd and Chapman *in limine*, before the defendant had an opportunity to present any evidence in support of his defense of second degree murder. The trial court excluded the expert testimony because it found that the defendant had presented insufficient evidence of "provocation" to support a second degree murder defense. That was error. Once the defendant asserted the legally viable defense of second degree murder, "the State and the trial court were without authority to question the propriety of that defense prior to trial." *People v. Brumfield*, 72 Ill. App. 3d 107, 112 (1979). Whether the defendant would have been able to substantiate his defense sufficiently to generate a jury question and to warrant a jury instruction on second degree murder could not have been known until all of the evidence was presented at trial. *Id.* at 113. Thus, it was improper and premature for the trial court to bar the defendant's proposed expert testimony *in limine* based on an assessment of

the strength of the defendant's evidence prior to trial. *Id.*; see also *People v. Strader*, 278 Ill. App. 3d 876, 885 (1996) (holding that the trial court erred by barring expert testimony that would have supported a defense of second degree murder even though "there was no evidence of provocation which the law recognizes as reasonable and adequate"). Like the trial court in *Strader*, the court here "erred by refusing to allow [the] defendant to fully develop his second degree murder defense." *Strader*, 278 Ill. App. 3d at 881. While trial courts may grant summary judgments in civil cases, they may not apply the same type of pretrial screening procedures in criminal cases without violating a criminal defendant's due process right to present his defense at trial. *Brumfield*, 72 Ill. App. 3d at 113.

¶ 23 Moreover, the proposed expert testimony was relevant to the defense of second degree murder because it tended to show that the defendant was acting under a "sudden and intense passion" at the time of the killing. 720 ILCS 5/9-2(a)(1) (West 2010). The fact that the expert testimony might not have also supported the existence of a legally-recognized "provocation" is immaterial. See Ill. R. Evid. 401 (eff. Jan. 1, 2011) (defining "relevant evidence" as evidence "having any tendency to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") (Emphasis added).

¶ 24 Nevertheless, the majority holds that the expert testimony at issue was properly excluded because the matters the experts would have testified to were entirely within the jury's common knowledge. *Supra*, ¶ 15. I disagree. Dr. Ladd, a psychologist who had been treating the defendant in the weeks prior to the murder, diagnosed the defendant with an "adjustment disorder with depressed moods and a possibility of major depressive disorder." After examining the defendant several months after the murder, Dr. Chapman diagnosed him as suffering from "adjustment disorder

with rage and depression" plus "generalized anxiety disorder." He also concluded that the defendant had been abusing several prescription and nonprescription substances, including Ambien, Atavan, Vicodin, and alcohol. In my view, the definitions of these medical diagnoses and an explanation of how the defendant's psychological condition(s) may have interacted with both the substances he had been abusing at the time of the murder (either alone or in concert) and the stressors he had been experiencing are all matters requiring scientific knowledge that are not within the common knowledge of the jury. See, *e.g.*, *Strader*, 278 Ill. App. 3d at 883-84 (holding that trial court erred in excluding psychologist's expert testimony regarding the defendant's "psychological profile" and "the manner in which [the defendant's] background and profile contributed to the defendant's loss of control at the time of the offense"). While the jurors in this case "may have had vast amounts of common sense about the general subject of psychology," I, like the *Strader* court, am "not prepared to say that the entire field of psychology is a matter of knowledge common to all." *Strader*, 278 Ill. App. 3d at 883.

¶ 25 Thus, in my view, the trial court erred by excluding the expert testimony of Drs. Ladd and Chapman prior to trial. However, as the majority notes, none of the evidence presented during the stipulated bench trial supports the existence of any provocation that is legally sufficient to support a defense of second degree murder.[1] Accordingly, although I find the trial court's error serious, it

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[1] As the majority correctly notes, there is no evidence in the record of "mutual quarrel or combat" sufficient to support a defense of second degree murder. *Supra*, ¶ 17. The only other potentially relevant provocation is adultery involving the defendant's spouse. See *People v. Garcia*, 165 Ill. 2d 409 (1995). However, our supreme court has held that this provocation "generally has been limited to those instances where the parties are discovered in the act of

was, in this case, harmless. For that reason, I agree with the majority that the defendant's conviction should be affirmed.

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adultery or immediately before or after such an act, and the killing immediately follows such discovery." *People v. Chevalier*, 131 Ill. 2d 66, 72 (1989). Mere words, including "[a] verbal communication that adultery has occurred" (*id.*), or the victim's statement that she intends to take the defendant's children and that the defendant will "never see his children again" (*People v. Cedeno*, 263 Ill. App. 3d 257, 260, 263 (1994)), are insufficient. *Chevalier*, 131 Ill. 2d at 72; *Cedeno*, 263 Ill. App. 3d at 263.