2024 IL App (1st) 220760-U

No. 1-22-0760

THIRD DIVISION
March 29, 2024

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRIAN PECK, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 17 CR 1808601 Honorable Joseph Michael Cataldo, Judge Presiding.

JUSTICE D.B. WALKER delivered the judgment of the court.
Presiding Justice Reyes and Justice Van Tine concurred in the judgment.

ORDER

¶ 1 ***Held***: We affirm the trial court's decision where the court did not abuse its discretion in denying defendant's request for a second-degree murder instruction based on serious provocation.

¶ 2 Following a jury trial, defendant Brian Peck was convicted of first-degree murder, dismembering a human body, and concealing a homicidal death, and he was sentenced to consecutive terms of 50 years', 20 years', and 5 years' imprisonment, respectively. On appeal, defendant contends that the trial court erred in denying his request for a jury instruction for

second-degree murder predicated upon serious provocation. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by a multi-count superseding indictment with first-degree murder, dismemberment of a human body, and concealment of a homicidal death in the killing of his mother, Gail Peck.

¶ 5 Prior to trial, defendant filed a motion to suppress his videorecorded statements made at the Elgin Police Department during interviews between October 27 and October 30, 2017, based on claims of invocation of his right to an attorney and coercion.

¶ 6 Defendant claimed he invoked his right to an attorney. The State conceded that this invocation occurred on October 28, 2017, at 2:42 p.m. Accordingly, the State agreed to forego presenting any statements made by defendant after that invocation.

¶ 7 Additionally, defendant claimed he was coerced into making statements to the police. The trial court found that defendant voluntarily waived his *Miranda* rights, that the detectives were patient, that defendant did not appear physically or mentally distressed, and that defendant was not under duress. The court considered defendant's complaints of an arm injury and found that defendant stated repeatedly that his arm was injured from moving boxes, cleaning blood from a carpet, and a dog pulling on its leash. The trial court found there was insufficient evidence of coercion, and therefore found the pre-invocation statements to be admissible.

¶ 8 At trial, which commenced on January 24, 2022, evidence indicated that defendant was 55 years old at the time of his arrest, was 6 feet tall, and weighed 245 pounds. Gail was 76 years old, 5´4,´´ and weighed 140 pounds at the time she was killed. She previously had back, shoulder, and arm surgery, and was a breast cancer survivor. Defendant periodically lived with

his mother between 2010 and 2017 to save money and take care of her, and at the time of the murder, defendant lived in his mother's basement.

¶ 9 Elgin Police Officer Heather Lencioni testified that on October 27, 2017, a search was launched for Gail. This search began following a 911 call by defendant. Defendant reported that Gail left her home at 716 Littleton Trail in Elgin to walk her dog and did not return. A search comprising multiple officers, volunteers, as well as helicopters, aerial drones, and K-9 dogs was launched but was unsuccessful.

¶ 10 Elgin Police Detective Joshua Ziegler testified that around 5 p.m. on October 27 he arrived at Gail's home. Detective Ziegler asked about the disappearance, and defendant said his mother was probably kidnapped, suggesting the police should investigate "some male blacks that lived down the street."

¶ 11 Defendant gave consent to search the home. The search revealed a potential blood stain in Gail's bedroom. Detective Zeigler observed the stain, noticed someone had tried to clean the stain, and smelled cleaning products in the bedroom. Based on this, police began exploring the possibility of a domestic incident rather than Gail having gone missing on a dog walk.

¶ 12 Around 7 p.m. the same night, Lencioni arrived at Gail's home. She noticed the smell of cleaning products, observed a "reddish-orange" stain on Gail's bedroom carpet, and saw a bottle of Resolve carpet cleaner near the stain. Fresh vacuum tracks marked the stain. The defendant again suggested Gail was robbed and kidnapped after having been noticed wearing jewelry the night before. He explained that he and his mother had been out to dinner celebrating good news.

¶ 13 Detective Lencioni asked defendant to join her at the Elgin Police Department. Defendant agreed and was taken to an interview room where he spoke with Detective Lencioni. While defendant was at the station, search warrants were secured for the home and Gail's car.

¶ 14 Defendant discussed his mother's disappearance in a series of taped police interviews that were played at trial. At the interview he was given *Miranda* warnings, after which he signed a written waiver and agreed to speak with Detective Lencioni.

¶ 15 In the recordings, defendant stated that Gail suffered from spinal stenosis and had a spinal fusion, was a breast cancer survivor, used a cane, had a terrible back, was shrinking, and might have needed another spinal fusion.

¶ 16 Defendant stated that on October 24, he went out with his mother to dinner to celebrate their securing a new mortgage rate and their discovery of his eligibility for a $100,000 caregiver benefit for care he had given her over the years. Defendant reiterated his theory that others saw his mother dressed up and decided to kidnap her. He said that when they returned from the dinner, his mother felt sick, dropped a plate in her room, and cut her knee on a dropped fork and knife when she picked up the plate. He said that his mother called him upstairs to clean the blood.

¶ 17 Defendant stated that on October 25, he bought cleaning supplies to better clean the stain. He said his mother still felt sick and stayed in bed all day. He stated that on October 26, she still felt sick and gave defendant her cell phone to fix. He stated that Gail's friend, Sherry Orrico, texted about coming over, and that he called and persuaded her not to come.

¶ 18 During the interview, Detective Lencioni confronted defendant with inconsistencies between his story and evidence that had been collected. She asked defendant why there was so

much blood if his mother only received a small cut from the fork and knife. Defendant said he could not "do a song and dance" to explain what happened.

¶ 19 On October 28, Detective Lencioni received an update on the investigation, including that a cadaver dog joined the search and detected the scent of a cadaver in both Gail's garage and in her master bedroom. Detective Lencioni went to Gail's home to walk through collected evidence.

¶ 20 Elgin Police Officer James Bailey served as lead evidence technician. He and other evidence technicians recovered 175 items from the home, including tarps, bleach, a black cane, a Drano bottle, blood swabs from across the home, a black "survival-type knife" from the bedside table, a Bissell carpet cleaner, a segment of stained master bedroom carpet, and a black rope. During a later search, police collected a "Protégé" brand suitcase, tarps, brick pavers, and garbage bags. Gail's toothbrush was recovered for DNA testing.

¶ 21 On October 28, 2017, Raphael Aponte was fishing in the Lincoln Park Lagoon when he caught his line on a duffle bag. Inside, he found "big yellowish greasy meat or something." At 11:20 a.m., Chicago Police Sergeant Cynthia Duarte arrived, looked in the bag, and discovered two human legs, a handsaw, and a brick paver. Sergeant Duarte requested a marine team for a search. Sergeant Duarte shared this discovery with the Elgin Police when she learned about Elgin's missing person case.

¶ 22 Sergeant Mark Walsh testified that he performed a dive and recovered a black rolling suitcase. The suitcase had a "P" emblem and a "5-piece set" sticker on it, indicating it was a "Protégé" brand bag. In the bag was a human female torso with no head, arms, or legs as well as a brick paver. The body parts were sent to the medical examiner's office for an autopsy.

¶ 23 Elgin Police Detective Christopher Hughes testified that he went to a Walmart near Gail's home and reviewed transaction history and video footage showing defendant purchasing cleaning supplies, a duffle bag, a Bissell vacuum, and a Protégé five-piece suitcase set. Detective Hughes then went to a Home Depot nearby and found the transaction history and a video of defendant purchasing eight brick pavers, three tarps, and one rope roll.

¶ 24 Both parties stipulated that, if called to testify, William Biederman would testify that on November 7, 2017, he observed a severed human arm on the lakefront of the Montrose dog beach in Chicago. He would testify he spoke to an EMT who was parked close by and that later the Chicago Police Department was called.

¶ 25 Gail's left arm and head were never recovered.

¶ 26 Both parties stipulated that, if called to testify, expert in forensic DNA Laurie Lee from the Illinois State Police Forensic Science Center would confirm DNA samples from recovered evidence matched the defendant and decedent. Specifically, blood found on the Bissell carpet cleaner, the handle of the knife, the toilet, the master bedroom table, the hallway wall, and master bedroom carpet matched the female remains and the male defendant.

¶ 27 Cook County Assistant Medical Examiner Dr. Michael Eckhardt conducted a postmortem exam on Gail. He found that the head was severed from the torso, and that all limbs were traumatically removed from the torso. He found rib fractures, including fractures that were inconsistent with cardiopulmonary resuscitation (CPR). He opined the fatal injury occurred in the neck region and that the death was a homicide.

¶ 28 Defendant testified on his own behalf. He recounted his tumultuous relationship with his mother. Over the years, Gail filed for and received a restraining order against her son, mended the relationship, got into an altercation with him where he was arrested for and pled guilty to

domestic violence, and more. Defendant stated that when his mother began taking painkillers in 2010, her behavior changed. He claimed the painkillers caused his mother to swear, scream, and break things.

¶ 29 Regarding the night of his mother's death, defendant testified Gail had three drinks before dinner, a drink at dinner, and a drink once they returned home. He said Gail called him to her room and was so angry her face turned red. He stated Gail picked up a knife, asked "what the f*** do I need you for anymore?" and made a stabbing motion.

¶ 30 Defendant stated he was trapped between the bed and dresser. He testified he wanted to get away but could not because Gail was in the way. He stated Gail made a stabbing motion at him twice, which he evaded. He then grabbed her right wrist while she held the knife. He slapped her wrist and she elbowed him. Defendant tried to knock the knife out of her hand. When that failed, he swept her legs, causing Gail to fall "across the threshold to leave the room." When he tried to leave, Gail sat up and stabbed his left shin twice.

¶ 31 Defendant testified he stomped his foot on his mother's face, holding her head down to the floor. He told his mother to "stop it before someone gets hurt." He stated Gail continued trying to stab him. Although he pushed on her neck to disarm her, defendant testified that "I did not want to hurt my mother." He explained his idea was to choke her until she let go of the knife, and that he did not want to injure her beyond stopping the attack.

¶ 32 Defendant testified he did not try to put his foot on Gail's hand, wrist, or on the knife. He believed that she would drop the knife as he applied pressure to her neck. He applied pressure until Gail dropped the knife and her body went limp. He picked up the knife and then asked Gail if she was okay. She was unresponsive, so he began administering CPR.

¶ 33 After five minutes, he realized she was dead. He became hysterical and cried. Instead of calling 911, he slid Gail's body down the stairs to the basement utility room. Defendant tried to fit the body in a freezer, but Gail's body would not fit.

¶ 34 On cross-examination, Defendant claimed he stepped on his mother's neck to defend himself. Defendant explained that he used the minimal force possible to stop his mother because he loved her. Defendant said Gail "died accidentally when I was trying to get her to stop stabbing me with that knife." Defendant, when confronted with prior inconsistent statements, said "I've already admitted to lying. You want me to enumerate every single one of them, we'll be here all week."

¶ 35 Defendant stated that he did not want to go to prison, so he began cleaning the carpet to hide evidence of the killing. He admitted to buying supplies to better clean the carpet. He decided to hide the body, using an old wood saw to dismember his mother. He divided his mother's body parts between duffle bags and the "Protégé" suitcases, and then dumped them into water.

¶ 36 After the parties rested, the defense requested Illinois Pattern Jury Instruction Criminal No. 7.03 (Definition Of Mitigating Factor—Second Degree Murder—Provocation), which the trial court denied. Explaining the denial, the trial court stated that defendant's own testimony showed he was "pretty calm" and that defendant was "trying to diffuse [*sic*] the situation." The court stated, "[Defendant] was saying that he was just placing his foot on her neck and that he was placing it on her head and asking her calmly 'let's stop this before someone gets hurt.' I don't believe, based on [defendant's] testimony, that this was someone acting under sudden and intense passion." The trial court discussed the rationale for denying the provocation jury instruction, noting "[g]enerally, a sudden and intense passion is someone sees something like

he walks in on his wife having sex with somebody else and then loses it." The court differentiated this example from defendant, explaining that defendant appeared calm as he defended himself and tried to defuse the situation. The court did grant defendant's requested jury instructions on second-degree murder based on unreasonable self-defense, self-defense, and voluntary manslaughter.

¶ 37 During deliberations, the jury sent a note that sought "[d]efinition of mitigating factor and examples." The trial court, prosecution, and defense agreed on the response "you have all instructions, please refer to the instructions and continue to deliberate." The jury later returned a guilty verdict for first-degree murder, dismembering a human body, and concealment of a homicidal death.

¶ 38 The cause subsequently proceeded to a sentencing hearing on May 2, 2022, at the conclusion of which the trial court imposed consecutive sentences of 50 years', 20 years', and 5 years' imprisonment for the first-degree murder, dismemberment, and concealment of homicidal death convictions, respectively. This appeal follows.

¶ 39 II. ANALYSIS

¶ 40 Defendant contends that the trial court erroneously denied his proffered jury instruction of second-degree murder based upon serious provocation. In particular, defendant argues that his testimony that his mother attacked him with a knife warranted this instruction. Initially, however, we must resolve the parties' disagreement as to the proper standard of review.

¶ 41 This court reviews decisions on whether to provide a jury instruction for abuse of discretion. *People v. Lopez*, 371 Ill. App. 3d 920, 934 (2007); *People v. Jones*, 219 Ill. 2d 1, 31 (2006). In his appeal, defendant correctly acknowledges this standard of review. However, defendant argues that the trial court misunderstood the law, and because of this

misunderstanding, the trial court made an "unintentional omission" of the provocation jury instruction. Defendant describes this as a failure to exercise discretion at all. He argues that this court should therefore review the decision *de novo*. *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004).

¶ 42 Defendant contends that the trial court erroneously believed that a provocation instruction *only* applies to adultery with an offender's spouse. To support this contention, defendant points to the following statement by the trial court: "Generally, a sudden and intense passion is someone sees something like he walks in on his wife having sex with somebody else and then loses it." Defendant argues this statement demonstrates that the trial court did not understand the law of provocation and therefore failed to exercise discretion.

¶ 43 Defendant is mistaken. The record plainly shows that the trial court demonstrated its use of discretion through both explaining the law of provocation and its intentional decision to not provide the serious provocation jury instruction.

¶ 44 First, the trial court stated that defendant's own testimony portrayed him as "pretty calm" and as "trying to diffuse [*sic*] the situation." The court also stated "[defendant] was saying that he was just placing his foot on her neck and that he was placing it on her head and told her calmly 'let's stop this before someone gets hurt.' I don't believe, based on [defendant's] testimony, that this was someone acting under sudden and intense passion." The trial court's consideration of provocation outside of the adultery context shows the court understood that a sudden and intense passion could occur beyond that context, and it displays the trial court's intentional use of discretion. This was an exercise of discretion, not an abdication of discretion as in *Whirl*.

¶ 45 Asserting that the trial court exercised "no discretion" and that its failing to provide the provocation instruction was "unintentional" unreasonably stretches the meanings of "discretion" and "unintentional."

¶ 46 Therefore, because the trial court exercised discretion, this court will review that decision for abuse of discretion. *Lopez*, 371 Ill. App. 3d at 934; *Jones*, 219 Ill. 2d at 31. A trial court abuses its discretion when its decision is "fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree." *People v. Rivera*, 2013 IL 112467, ¶ 37. We now turn to the substance of defendant's claim on appeal.

¶ 47 Defendant contends that he was denied the right to a fair trial when the trial court refused to instruct the jury on a serious provocation theory of second-degree murder. The trial court granted requests for jury instructions on unreasonable self-defense, self-defense, and involuntary manslaughter. Defendant argues, however, that the trial court should have also provided the serious provocation jury instruction for serious physical assault because defendant testified that his mother attacked him with a knife.

¶ 48 A defendant is entitled to a jury instruction on his theory if some evidence exists in the record to support the theory. *People v. Davis*, 213 Ill. 2d 459, 478 (2004); *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). However, a trial court must be careful to not "permit a defendant to demand unlimited instructions based upon the merest factual reference or witness' comment." *People v. Everette*, 141 Ill. 2d 147, 157 (1990).

¶ 49 Trial courts should provide a second-degree serious provocation instruction when there is some evidence of serious provocation. *People v. Cook*, 352 Ill. App. 3d 108, 130 (2004). Serious provocation consists of "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2014). Defendants must demonstrate both an objective

serious provocation and subjective passion to receive a second-degree murder instruction. *People v. Bennett*, 2017 IL App (1st) 151619, ¶ 43. To meet the objective prong, the provocation must fit into one of the following four categories: (1) mutual combat; (2) substantial physical injury or assault; (3) illegal arrest; or (4) adultery involving a spouse. *Cook*, 352 Ill. App. 3d at 130-31. If the objective prong of serious bodily injury is met, the defendant then must demonstrate subjective passion by showing that the killing occurred due to "a violent irresistible passion incited by the decedent's attempt to inflict a serious bodily injury on the person who kills." *People v. Pierce*, 52 Ill. 2d 7, 10-11 (1972).

¶ 50 A defendant must demonstrate both experiencing an objectively serious provocation as well as feeling subjective passion during a killing to receive mitigation to second-degree murder. *Bennett*, 2017 IL App (1st) 151619, ¶ 43.

¶ 51 Serious physical assault is a category of conduct recognized as objectively reasonable to be a serious provocation. *People v. Kidd*, 295 Ill. App. 3d 160, 167 (1998). To find the provocation to be objectively reasonable, courts look for evidence of serious injury. *People v. Strader*, 278 Ill. App. 3d 876, 884 (1996) (finding pushing and slapping to not be serious injury). Being knocked to the ground, struck in the face, and kicked during an altercation is sufficient to prove serious injury. *People v. Beathea*, 24 Ill. App. 3d 460, 465 (1974). However, "[s]truggling with an attacker in an effort to ward off or defend one's self against an attack is not sufficient to warrant a conviction for a second-degree murder based on provocation." *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 92. If a defendant's actions are "merely defensive," the trial court may refuse a provocation jury instruction. *People v. Cox*, 121 Ill. App. 3d 118, 122 (1984).

¶ 52 Defendant argues that there was evidence of a serious physical assault based on the altercation with his mother. However, defendant described himself struggling with his mother and trying to subdue her attack. Defendant described an attack where he was defending himself, grabbing his mother's wrist, sweeping her legs, and then choking her to get her to drop the knife she was holding. Defendant claims he received cuts that led to two minor scars on his left shin in the process of defending himself. Defendant's testimony might suffice for serious injury under *Beathea*. However, the actions he described are merely defensive. Thus, under *Cox*, the trial court was not required to give a provocation jury instruction based on lacking the objective prong.

¶ 53 Even if the objective prong were met, defendant must also prove he felt a subjective passion during the killing in response to the provocation. Defendant must show that the killing occurred due to "a violent irresistible passion incited by the decedent's attempt to inflict a serious bodily injury on the person who kills." *Pierce*, 52 Ill. 2d at 10-11. When a defendant testifies that he was not mad at the decedent, he undermines claims of subjective passion. *People v. Sawczenko-Dub*, 345 Ill. App. 3d 522, 539 (2003). If the record lacks indicia of subjective passion, the subjective passion requirement is not met and a provocation instruction is unwarranted. *People v. Schorle*, 206 Ill. App. 3d 748, 820 (1990).

¶ 54 Defendant himself testified that he told his mother they should both "stop it before someone gets hurt." When his mother attacked, he evaded her attacks. He stated that Gail then continued trying to stab him. He swept her legs, and once she was on the ground, he tried to leave the room. He failed to leave the room because she blocked his path, so he went to his next option, disarming her. Describing how he decided to push on her neck to disarm her, defendant testified "I did not want to hurt my mother." He explained his idea was to choke her until she

let go of the knife, that he did not want to injure her as he stopped the attack. Defendant testified he thought he could end the attack by moving his foot to Gail's neck, so he pressed down until she went limp and died. During his direct examination and cross examination, defendant did not express rage or a desire for violence. Instead he displayed a desire to not kill his mother, and to stop the fighting before serious injury occurred. He tried to evade, escape, and stop the attack.

¶ 55 Defendant's testimony did not confirm anger or blind rage. Instead defendant stated, "I did not want to hurt my mother" and that he and his mother should "stop it before someone gets hurt." This undermines any claim of feeling a subjective passion. *Sawczenko-Dub*, 345 Ill. App. 3d at 539. Therefore, defendant did not display a "violent irresistible passion incited by the decedent's attempt to inflict a serious personal injury on the person who kills" as *Pierce* seeks.

¶ 56 We find that the evidence at trial did not support a jury instruction for second-degree murder based on serious provocation where defendant did not establish he felt the subjective passion necessary for serious provocation.

¶ 57 Therefore, the trial court did not abuse its discretion by refusing to provide a serious provocation jury instruction.

¶ 58 Had a jury instruction for serious provocation been given, the result of the trial would not have been different because there was no evidence of subjective passion required for mitigation to second-degree murder. See *Bennett*, 2017 IL App (1st) 151619, ¶ 43.

¶ 59 III. CONCLUSION

¶ 60 The trial court did not abuse its discretion when it denied defendant's request for a second-degree murder instruction based on serious provocation. Accordingly, the judgment of the trial court is affirmed.

¶ 61 Affirmed.