

2011 IL App (1st) 093415-U

FIFTH DIVISION
August 19, 2011

No. 1-09-3415

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 08 CR 9581 |
| |) | |
| RENE HERNANDEZ, |) | Honorable |
| |) | James B. Linn, |
| Defendant-Appellant. |) | Judge Presiding. |

JUDGE Epstein delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon
concurred in the judgment.

O R D E R

HELD: Defendant was properly convicted of aggravated battery when the evidence at trial established that the victim suffered great bodily harm. The trial court properly assessed the \$200 DNA analysis fee when the record did not indicate that defendant was registered in the database or had previously paid the fee.

¶ 1 After a bench trial, defendant Rene Hernandez was found guilty of aggravated battery and sentenced to two years of probation. On appeal, defendant contends that the State failed to establish that the victim suffered great bodily harm, and, consequently, his conviction must be reduced to battery. He also contests the imposition of certain fines and fees. We affirm and correct the fines and fees order.

¶ 2 The victim Maria M. testified that defendant, her former fiancé, took her cellular phone after she drove him home. When she followed him inside to get it back, defendant began questioning her about the phone's contents. She told him it was none of his business. After five minutes of yelling, defendant began hitting the victim with his fist. After seven or eight minutes, he began removing her clothing. Although the victim tried to stop defendant, he pinned her against a bed, tied her hands together, and inserted his penis into her vagina.

¶ 3 When the victim later tried to leave, defendant grabbed her by the hair and dragged her back to the bedroom while kicking her. Defendant then went to the kitchen and grabbed a "humongous" kitchen knife. He told the victim to defend herself, so that if he killed her it would be self-defense. After she threw the knife behind the bed, defendant began hitting her again, and, ultimately, inserted his penis into her vagina a second time.

¶ 4 Defendant eventually allowed her to leave because they were "back together." Once at home, she called her sister and brother-in-law. When her brother-in-law saw her, he called 911. After speaking to the police, the victim was taken to the hospital where she was treated for, among other injuries, a broken nose and given morphine. At trial, the victim catalogued her injuries, including bloody spots on her scalp where defendant pulled out her hair, bruises, and scratches, using contemporaneous photographs of herself.

¶ 5 Rosa M., the victim's sister, described the victim as bruised with her hair falling out. Another of the victim's sisters, Mariaelena Cisneros, testified that the victim had a red face, swollen nose, and "puffed up" eye. Both women testified that when they tried to hug the victim, the victim did not want to be touched because her body hurt.

¶ 6 The parties stipulated that Dr. Andreas Scoubis, if called to testify, would testify that his examination of the victim revealed a "displaced tiny minimally displaced fracture of the anterior inferior aspect" of the nasal bones and that the victim received follow-up treatment for that injury.

¶ 7 The parties also stipulated that Ralph Vucko, an investigator with the State's Attorney's Office, if called to testify would testify that he collected a DNA sample from defendant and sent it to the State Police Crime Lab for testing.

¶ 8 Defendant testified that the victim initiated their sexual encounter on the night in question. When the victim's vibrating cellular phone later woke him, he remembered certain rumors that she had been unfaithful. He assumed that she was contacting another man when she left the room to send a text.

¶ 9 When the victim returned to the bedroom, defendant told her to leave, broke off their engagement, and indicated they were "done." Although the victim claimed she had texted her sister, defendant called her a liar and a whore. The victim then looked at defendant like a "psycho," threatened to kill him, and began screaming as she lunged into the kitchen. Defendant tried to grab her, however, it took a few "swipes" before he succeeded. The victim broke away, opened a drawer and grabbed a knife. He initially tried to twist the victim's arm so that she would drop the knife, then he slapped her twice. After she dropped the knife, defendant told her to leave. As she left, the victim told him "[t]his is not over."

¶ 10 During closing argument, the State argued that the victim had suffered great bodily harm in that she suffered a broken nose and significant bruising. The defense responded that the tiny fracture to the victim's nose was consistent with being slapped and that she was the aggressor in this case, *i.e.*, the woman scorned.

¶ 11 In finding defendant guilty of aggravated battery, the court referenced the pictures of the victim taken at the hospital as evidence of the injuries she suffered while in the company of defendant. The court found the victim's testimony that she went to the hospital, was given pain medication, and had a broken nose and bruises all over her body, to be true and compelling. The court found defendant not guilty of criminal sexual assault, and, ultimately, sentenced him to two years of probation with the first 120 days to be served in jail.

¶ 12 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that the victim suffered "great bodily harm" because the parties stipulated that she only had a "tiny" fracture to the nose. Accordingly, he asks this court to reduce his conviction to battery.

¶ 13 In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272. A conviction will

be reversed only when the evidence was so unreasonable or unsatisfactory that reasonable doubt remains as to whether the defendant was guilty. *Ross*, 229 Ill. 2d at 272.

¶ 14 In the case at bar, defendant was convicted of aggravated battery. A person commits aggravated battery when, in committing a battery, he intentionally or knowingly causes great bodily harm or permanent disability or disfigurement. See 720 ILCS 5/12-4(a) (West 2008).

¶ 15 Although "great bodily harm" is an element of the offense of aggravated battery, the term does not have a legal definition; rather, "great bodily harm" requires that the injury be of a greater and more serious nature than one suffered as the result of a battery. *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991); see also *In re J.A.*, 336 Ill. App. 3d 814, 817 (2003) ("great bodily harm" is more serious than the lacerations, bruises, or abrasions that characterize "bodily harm").

¶ 16 Whether the victim's injuries rise to the level of "great bodily harm" is a question for the trier of fact, and rests upon the injuries suffered by the victim, not whether the victim was hospitalized or the permanent nature of the victim's disability or disfigurement. *Figures*, 216 Ill. App. 3d at 401-02 (the victim did not suffer "great bodily harm" when his foot was grazed by a bullet); *In re J.A.*, 336 Ill. App. 3d at 817 (the

victim did not suffer "great bodily harm" when he testified the singular stab wound felt like a pinch).

¶ 17 Here, the evidence at trial established that defendant punched and kicked the victim repeatedly. He also grabbed her by the hair and dragged her to the bedroom, tearing her hair from her scalp. The victim testified that she suffered a broken nose and was given morphine to manage her pain. Photographs taken after the incident showed bruising on the victim's torso and arms as well as blood on her scalp where defendant had pulled out her hair. The victim's sisters testified that the victim refused their hugs because it hurt to be touched. After reviewing the record in the light most favorable to the State, this court cannot say that no rational trier of fact could have found that the victim suffered great bodily harm. *Ross*, 229 Ill. 2d at 272.

¶ 18 Defendant, however, contends that the victim did not suffer great bodily harm when the bruises were "light," the scratches "minor," and the break to the nose "tiny." We disagree.

¶ 19 In addition to bruises and a bloody scalp, the victim's nose was broken. This court has previously determined that the combination of bruises and a broken nose constituted great bodily harm. *People v. Psichalinos*, 229 Ill. App. 3d 1058, 1068-69 (1992). While the victim in *Psichalinos* was a child

punched by an adult, contrary to defendant's assertion, nothing in that case indicates that the finding of great bodily harm rested upon the age of the victim rather than the fact that the victim suffered bruises and a broken nose.

¶ 20 Here, the victim suffered injuries more serious than the lacerations, bruises, or abrasions that characterize "bodily harm" (*In re J.A.*, 336 Ill. App. 3d at 817), when, in addition to bruises and scratches, her scalp bled as a result of hair loss and her nose was broken. Although defendant argues that broken noses "vary greatly in severity" and may "require no treatment at all," this court declines defendant's invitation to find the victim's broken nose was a "minor" injury when the record reflects that the victim was treated by a physician at least twice for the injury and prescribed morphine. See *Psichalinos*, 229 Ill. App. 3d at 1069 (the question of whether a victim suffered great bodily harm is independent of whether she received medical attention for her injuries).

¶ 21 This court is unpersuaded by defendant's reliance on *In re J.A.*, 336 Ill. App. 3d 814 (2003) and *In re T.G.*, 285 Ill. App. 3d 838 (1996). In both of those cases, the victims described their injuries in relation to common occurrences and neither indicated he had suffered an injury that warranted serious medical attention. See *In re J.A.*, 336 Ill. App. 3d at 817 (the victim described being stabbed as feeling like a pinch);

In re T.G., 285 Ill. App. 3d at 846 (although the victim received multiple stab wounds, he only felt the first, which felt like being poked with a pen). In the instant case, the victim did not compare her injuries to ordinary bumps or pokes; rather the record indicates that she was treated at least twice for a broken nose, received morphine, and refused to be hugged by her sisters because her whole body hurt.

¶ 22 Here, the victim suffered great bodily harm when, in addition to bruises, scrapes and a bloody scalp, her nose was broken. This court reverses a conviction only when the evidence at trial was so unsatisfactory that reasonable doubt remains as to a defendant's guilt; this is not one of those cases. *Ross*, 229 Ill. 2d at 272. Accordingly, this court affirms defendant's conviction for aggravated battery.

¶ 23 Defendant next contests the imposition of certain fines and fees. This court reviews the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 24 Defendant first contends, and the State concedes, that he is entitled to a \$5 per day credit for each of the 47 days he was in custody before sentencing, for a total of \$235. See 725 ILCS 5/110-14(a) (West 2008). Defendant has one fine against which he can apply this credit, the \$30 Child Advocacy Center assessment. See *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009). We therefore order that the \$30 Child Advocacy

Center assessment be offset by defendant's presentence custody credit. See 725 ILCS 5/110-14(a) (West 2008) (credit is applied against fines; in no case shall the amount credited exceed the amount of the fine).

¶ 25 This court rejects defendant's claim that he is entitled to similar credit for the \$200 DNA fee. We agree with *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006), which held that this fee is intended to compensate the State and is a collateral consequence of a defendant's conviction. See also *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006). The \$200 DNA fee is not subject to presentence custody credit. See *People v. Marshall*, No. 110765 (Ill. May 19, 2011) (analyzing the DNA analysis fee), *contra*, *People v. Long*, 398 Ill. App. 3d 1028, 1033-34 (2010).

¶ 26 Defendant next contends that he was improperly assessed a \$25 fine pursuant to section 10(c)(1) of the Violent Crime Victims Assistance Act (Act), when he was assessed another fine. See 725 ILCS 240/10(c)(1) (West 2008). Here, defendant was assessed the \$30 Child Advocacy Center assessment, which is a fine. See *Jones*, 397 Ill. App. 3d at 660. As another fine was imposed, defendant fell under section 10(b) of the Act (725 ILCS 240/10(b) (West 2008)), and should have been assessed a \$4 fine. Accordingly, we vacate the \$25 fine imposed pursuant to section

10(c)(1) of the Act, and impose a \$4 fine pursuant to section 10(b). See *Price*, 375 Ill. App. 3d at 697.

¶ 27 Defendant further contends that the State improperly imposed the \$190 "felony complaint filed" assessment because section 105/27.2a(w)(1)(A) of the Clerks of Courts Act (705 ILCS 105/27.2a(w)(1)(A) (West 2008)), limits the imposition of the fee to those defendants who are convicted of one of the charges alleged in the complaint. Defendant highlights that he not convicted of any charges in the felony complaint filed in this case, rather, he was convicted of a charge first alleged in a subsequent indictment.

¶ 28 Section 105/27.2a(w)(1)(A) states that the clerk is entitled to "costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision therein," including a maximum of \$190 for felony complaints. 705 ILCS 105/27.2a(w)(1)(A) (West 2008).

¶ 29 The construction of a statute is a question of law subject to *de novo* review. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). The words of a statute are given their plain and ordinary meaning and it is enforced as written when the language is clear and unambiguous. *Cardamone*, 232 Ill. 2d at 512.

¶ 30 Here, the language of section 105/27.2a(w)(1)(A) is clear, the clerk is entitled to costs in a criminal case from each person convicted therein, *i.e.*, in that criminal case.

Cardamone, 232 Ill. 2d at 512. This court declines defendant's invitation to limit the reach of this provision to those individuals who are convicted of a charge alleged in the felony complaint filed in a particular case; rather, we will enforce the statute as written. *Cardamone*, 232 Ill. 2d at 512.

¶ 31 In the instant proceeding, defendant was charged by both a felony complaint and an indictment before he was ultimately convicted. Accordingly, the trial court properly imposed the \$190 felony complaint filed assessment.

¶ 32 Finally, defendant argues that the trial court improperly assessed a \$200 DNA analysis fee when he submitted DNA during the pendency of this case. We disagree.

¶ 33 Here, the record reveals that the State filed a motion pursuant to Supreme Court Rule 413(a)(vii) (eff. July 1, 1982), seeking buccal samples from defendant, which the trial court granted. The parties also stipulated at trial that a DNA sample was taken from defendant and sent it to the State Police Crime Lab for testing.

¶ 34 Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3(a), (j) (West 2008)) requires that anyone convicted of a felony in Illinois must submit a blood, saliva, or tissue specimen to the Illinois State Police for analysis and pay an analysis fee of \$200. Our supreme court has held that section 5-4-3, "authorizes a trial court to order the taking, analysis

and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." *People v. Marshall*, No. 110765 (Ill. May 19, 2011), slip op. at 15.

¶ 35 Here, there is no indication that prior to defendant's conviction in this case he was registered in the state database or that he paid the analysis fee. See 730 ILCS 5/5-4-3(a), (j) (West 2008). Although defendant submitted a DNA sample during the pendency of this case, he was not required to submit DNA for inclusion in the database unless and until he was convicted of a felony. See 730 ILCS 5/5-4-3(a) (West 2008). He identifies no authority permitting a defendant's DNA to be registered in the database before that defendant is actually convicted. As the record does not show that defendant was registered in the database prior to his conviction in this case, the trial court was authorized to order the taking, analysis and indexing of defendant's DNA and the assessment of the analysis fee. See *Marshall*, No. 110765, slip op. at 15.

¶ 36 The record is unclear whether defendant's previously submitted DNA sample is suitable for analysis and indexing, *i.e.*, whether it could be used in lieu of a new sample. In any event, as defendant is not registered in the database and assessment is intended to cover the cost of the analysis, the trial court

properly imposed the \$200 DNA assessment. See *Marshall*, No. 110765, slip op. at 9-10.

¶ 37 This court is unpersuaded by defendant's reliance on *People v. Rigsby*, 405 Ill. App. 3d 916 (2010), and *People v. Evangelista*, 393 Ill. App. 3d 395 (2009), as those cases examined whether a defendant who had previously submitted a DNA sample and been assessed the fee because of a prior conviction could be ordered to submit another sample and pay another assessment. Here, absent any indication that defendant was registered in the database and had previously been assessed the \$200 DNA fee, the trial court properly ordered the sample taken and the assessment imposed. *Marshall*, No. 110765, slip op. at 15.

¶ 38 Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we order that the fines and fees order be corrected to reflect \$235 in presentence custody credit limited to offsetting the \$30 Child Advocacy Center assessment. We also vacate the \$25 fine imposed pursuant to section 10(c)(1) of the Act, while imposing a \$4 fine pursuant to section 10(b) of the Act. Thus, the total of the fines and fees order is now reduced to \$609. We affirm the judgment of the trial court in all other aspects.

¶ 39 Affirmed; fines and fees order corrected.