

No. 1-09-3511

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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. 09 CR 10077
	)	
TONY SANDERS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Karnezis concurred in the judgment.

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**ORDER**

¶ 1 HELD: Judgment on an uncharged aggravated battery offense, which was not a lesser-included offense of any crime charged in the indictment, was reversed; the evidence supported convictions on the remaining counts of aggravated battery of a peace officer; and defendant entered a valid jury waiver.

¶ 2 Following a bench trial, defendant Tony Sanders was convicted on three counts of aggravated battery of a peace officer, one count of aggravated battery causing great bodily harm, and one count of disarming a peace officer. Defendant was sentenced to concurrent prison terms of four years on one count of aggravated battery causing great bodily harm and five

years on each of the remaining four counts. On appeal, defendant contends: (1) his conviction for aggravated battery causing great bodily harm must be reversed where it was neither charged nor a lesser-included offense of a charged offense; (2) one conviction for aggravated battery of a peace officer must be reversed where the court found defendant did not cause the officer's injury; and (3) defendant must be granted a new trial where he did not knowingly and voluntarily waive his right to trial by jury. We reverse defendant's conviction for aggravated battery causing great bodily harm and affirm his remaining convictions.

¶ 3 The State proceeded to trial against defendant on five counts in a multi-count indictment. Counts 1, 3, 5 and 7 charged defendant with aggravated battery of peace officers Jake Mielnik, Daniel Hughes, Johnny Ivory, and Damon Ziemba. Count 9 charged defendant with disarming a peace officer in attempting to take a weapon from Officer Ivory.

¶ 4 Three months before trial, defendant appeared in open court with his trial counsel who represented: "[Defendant] says he now wants a bench. We were talking about his options." Two weeks later, defendant and his trial counsel again appeared and counsel stated: "I'm asking for a bench trial date. I did discuss it with [defendant], the options." Three weeks before trial, defendant was again present when his trial counsel advised the court: "This is set for a bench trial. We're ready for bench trial. I'm filing a written demand today." Addressing defendant directly, the court noted defendant was answering ready and demanding trial, but advised him that his case could not be heard immediately "[u]nless we – you want to farm it out? \*\*\* We could try and get it to a different judge." Defendant responded, "No, I want to stick with you." Immediately before the bench trial commenced, the court stated in defendant's presence, "Mr. Sanders has signed a jury waiver."

¶ 5 At trial, the State presented the testimony of four officers of the University of Illinois Chicago (UIC) Police Department. Officer Johnny Ivory testified that on May 19, 2009,

he was in police uniform, with gun, badge, and radio, when he responded to a call of a disruption at the emergency room reception desk at UIC Hospital on West Taylor Street in Chicago. He observed defendant and the receptionist in a verbal altercation. When Ivory identified himself to defendant as a police officer and hospital employee, defendant responded, "You must want to get hit." Ivory called for backup assistance on his radio. Observing that defendant was verbally disruptive and abusive to the receptionist, Ivory told defendant he was going to place him in custody. Defendant responded, "You must want to get your ass whipped." "You really want to get hit." As Ivory attempted to place him in custody, defendant grabbed Ivory's right pinky finger and tried to break it. Ivory struck defendant on the side of the face and grabbed him around the waist. Defendant attempted to grab Ivory's weapon and Ivory tried to remove defendant's hand from the weapon. Defendant grabbed Ivory's ammunition magazine, started to remove the bullets from the magazine, and dropped the magazine to the ground. Ivory held defendant in a bear hug until other officers arrived. Ivory was subsequently treated for a sprained wrist, sprained finger, and fractured pinky finger, and was off from work four months due to his injuries. When Ivory and other officers tried to remove defendant from the reception area, he grabbed the reception window and the entire window caved in, breaking the window and pulling out the frame.

¶ 6 At the conclusion of Ivory's direct examination, the court permitted the State to play a four-minute segment of a video from the UIC Hospital surveillance video system.

¶ 7 Officer Danny Hughes testified that he was in full uniform when he and his partner arrived at the hospital emergency room. Hughes observed Ivory struggling with defendant at the reception window and trying to gain control over him. Defendant was flailing his arms and was verbally abusive, and Hughes seized defendant's arm. Defendant grabbed the glass window, he, Hughes and Ivory fell down backwards, and the glass window broke as

defendant pulled on it. The struggle on the ground continued for about five minutes until officers were able to handcuff defendant. Hughes was treated at the emergency room for a fracture and ligament damage to his thumb and lacerations to his arm.

¶ 8 Sergeant Jake Mielnik arrived at the emergency room at about the same time as Officer Hughes. Mielnik was not wearing a police uniform. He saw Ivory struggling with defendant, who was flailing, fighting, and attempting to disarm one of the officers. During the struggle, Mielnik sustained a torn ligament in his wrist. At the time of trial, five months after the incident, Mielnik was still wearing a cast on his wrist and had been unable to return to work.

¶ 9 Officer Damon Ziembra went to the emergency room in response to an officer-in-distress message. He was wearing plain clothes that day, but his gun and badge were clearly visible. He noticed other officers struggling on the ground with defendant. When Ziembra and the other officers tried to place defendant in custody, he refused to bring his hand behind his back and was pulling and fighting. When Ziembra and two other officers walked defendant from the emergency room to their vehicle and were trying to move him from the curb down to the pavement, "which is a bit of a drop," defendant nudged Ziembra by pushing him with his shoulders. Ziembra fell from the curb to the ground, spraining his right ankle.

¶ 10 After the State rested its case in chief, defendant moved the court for a directed finding on each count. The court denied the motion except as to Count 1, aggravated battery on Officer Mielnik, finding that no evidence was introduced to show Mielnik had been wearing a uniform, badge or weapon to identify him as a peace officer. The court ruled: "As to that charge, certainly there is a prima facie for aggravated battery, but there is no prima facie evidence [as to] aggravated battery of a police officer. So as to the police officer element, that is stricken. But the other element shall stand."

¶ 11 Defendant testified that on May 19, 2009, at about 1:45 p.m., he was at UIC Hospital because his mother had been taken to the hospital's emergency room. A doctor at the emergency room told him that he needed to have a visitor's pass. He went to the reception desk to get a pass. When the receptionist told defendant he had to wait 30 minutes to an hour to get a pass, defendant told her he needed to speak to her supervisor. She replied that it was not a supervisor matter, and he told her she was being careless and irresponsible. "Then she jumped on the phone, and instead of calling the supervisor, she called the police." Defendant required the use of a cane because of a deformed foot and fused ankle. He had placed his cane on the ledge at the reception desk and both of his hands were resting on the ledge.

¶ 12 Officer Ivory approached him from behind and asked him what the problem was. He replied that he was waiting to speak to a supervisor. He was upset about his mother, but he answered the officer's questions. He did not take his hands off the ledge or try to strike the officer. When the officer grabbed him, defendant told the officer he could not walk without his cane and he grabbed the reception desk window to catch his balance. He was scared. Ivory "got real aggressive," but defendant did not try to punch Ivory or reach for his gun. Then "a bunch of officers" came from behind and grabbed him. He did nothing to prevent the officers from handcuffing him. Defendant sustained injuries to his throat, jaw, and leg.

¶ 13 At the conclusion of the trial, the court stated that, as to Count 1, the evidence showed that Officer Mielnik had not been in uniform and that the State proved "aggravated battery, but not aggravated battery on a police officer. They proved great bodily harm." The court found defendant guilty on counts 3, 5, 7, and 9, as the State had proved "each and every element of these offenses beyond a reasonable doubt."

¶ 14 At the subsequent sentencing hearing, the prosecutor argued that all of the officers "had to miss work for a significant amount of time. They had significant injuries \*\*\* at

the hands of the defendant." The court responded: "I heard the evidence. One guy stepped off a curb. So if you are claiming that Mr. Sanders is a curb, then how can he be charged, he didn't even cause that injury." When the prosecutor mentioned specific injuries to the other officers, including Officer Ivory, the court asked, "How long was he off of work due to his pinky finger?" The court sentenced defendant to four years in prison on Count 1 and five years on each of the four remaining counts, with all terms to be served concurrently.

¶ 15 Defendant's first assignment of error is that his conviction for aggravated battery causing great bodily harm to Officer Mielnik cannot stand where that offense was neither charged in the indictment nor a lesser-included offense of aggravated battery on a peace officer as charged in Count 1. The State responds that defendant has forfeited this claim by failing to object when the court modified Count I of the indictment from aggravated battery of a peace officer to aggravated battery causing great bodily harm and defendant failed to include the putative error in his posttrial motion. Defendant concedes the issue was not preserved for review but asks that we review the issue as plain error.

¶ 16 "The plain error doctrine permits a reviewing court to consider a trial error not properly preserved when (1) the evidence in a criminal case is closely balanced or (2) the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial." *People v. Byron*, 164 Ill. 2d 279, 293 (1995). The second prong of the plain-error rule may be invoked in those situations where application of the rule is necessary to preserve the integrity and reputation of the judicial process. *People v. Harvey*, 211 Ill. 2d 368, 387 (2004). Because conviction of a crime that is neither charged nor the lesser-included offense of a charged offense affects the integrity of the judicial process (*People v. McDonald*, 321 Ill. App. 3d 470, 472 (2001)), we shall address the issue of whether the uncharged offense of aggravated battery causing great bodily harm is a lesser included offense of aggravated battery on a peace officer.

¶ 17 A defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006), citing *People v. Novak*, 163 Ill. 2d 93, 108 (1994). Here, defendant was charged with aggravated battery on a peace officer. The court entered a finding of aggravated battery causing great bodily harm rather than aggravated battery on a peace officer as charged because the evidence showed Mielnik was not wearing a police uniform or accouterments of his office.

¶ 18 Under *Kolton*, 219 Ill. 2d 353, 368-69 (2006), we look first to the statutory definition of the uncharged crime, aggravated battery causing great bodily harm, defined in section 12-4(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-4(a) (West 2008)): "A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement, commits aggravated battery." We then look to the charged offense in the indictment to determine whether the facts alleged there contain a broad foundation or main outline of the uncharged offense. Count 1 of the indictment alleged that defendant committed aggravated battery "in that he, in committing a battery, intentionally or knowingly, without lawful justification caused bodily harm to Jake Mielnik, to wit: grabbed Jake Mielnik about the body, knowing Jake Mielnik to be a peace officer \*\*\*\*" in violation of section 12-4(b)(18) of the Code (720 ILCS 5/12-4(b)(18) (West 2008)).

¶ 19 Both the charged and uncharged offense contain the element "in committing a battery." Section 12-3 of the Code (720 ILCS 5/12-3 (West 2008)) provides: "A person commits a battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." Both charges contain the element "intentionally or knowingly caused" some

level of harm. The question is whether the indictment allegation of causing "bodily harm" provides a broad foundation or main outline of the offense of aggravated battery causing "great bodily harm." We conclude it does not.

¶ 20 We observe that the aggravated battery statute enacted by our General Assembly may be separated into two general categories. One category, embodied in subsection 12-4(a), creates the offense of aggravated battery by both the nature of the act and its result -- "causes great bodily harm, or permanent disability or disfigurement" -- and it is that result which elevates the battery to an aggravated battery. A second category, embodied in subsections 12-4(b), 4(c), 4 (d), 4(d-3), and 4(d-5), centers only on the nature of the act -- a "simple battery" in subsection 12-4(b) and other acts specified in subsections 4(c), 4 (d), 4(d-3), and 4(d-5) -- together with surrounding circumstances, such as the location of the offense or the age, occupation, or physical state of the victim, which elevate the crime to an aggravated battery. The element of aggravated battery causing great bodily harm in subsection 12-4(a), as defined by our legislature, requires proof of an injury of a greater and more serious nature than simple battery (*In re J.A.*, 336 Ill. App. 3d 814, 815 (2003)) and centers on the injuries the victim actually received (*People v. Mimes*, No. 1-08-2747, slip op. at 11 (Ill. App. June 20, 2011)). In each subsection within the second category, however, the offense rises to "aggravated battery" only because of the circumstances surrounding the act and not its result. As the infliction of great bodily harm is an essential element of aggravated battery only under subsection 12-4(a) and not an essential element of aggravated battery of a peace officer under subsection 4(b)(18) as charged in Count 1, we conclude it is not reasonable to infer that simple "bodily harm" in the offense charged in Count 1 of the indictment would include the element of "great bodily harm." We also note that, under Illinois law, when a victim suffers bodily harm rather than great bodily harm, a conviction for aggravated battery predicated upon great bodily harm must be vacated. *In re J.A.*,

336 Ill. App. 3d 814, 816 (2003). Therefore, aggravated battery causing great bodily harm is not a lesser offense of aggravated battery of a peace officer. Defendant's conviction for aggravated battery causing great bodily harm must be reversed.

¶ 21 In reaching this conclusion, we reject the State's attempt to save the conviction on Count 1 based on the mittimus, which erroneously reflects the offense as aggravated battery in a public place under section 12-4(b)(8) of the Code (720 ILCS 5/12-4(b)(8)). The report of proceedings clearly demonstrates that the court pronounced defendant guilty of aggravated battery causing great bodily harm on Count 1. When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007).

¶ 22 Defendant's second contention on appeal is that his conviction on Count 7 for aggravated battery of Officer Ziemba must be reversed where the court's comment at sentencing that defendant "didn't even cause that injury" establishes that each element of aggravated battery of a peace officer in that count was not proved beyond a reasonable doubt. When a court reviews a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in a 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. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 23 Officer Ziemba testified that when he and two other officers walked defendant from the emergency room to their vehicle and were trying to move him from the curb down to the pavement, "which is a bit of a drop," defendant nudged Ziemba by pushing him with his shoulders. Ziemba fell from the curb to the ground, spraining his right ankle. Ziemba's clearly visible badge and gun identified him as a police officer, he was engaged in official duties at the time he encountered defendant, and his injury was the result of defendant forcing him off the

curb. This evidence was sufficient to establish that defendant did cause the ankle injury to Ziemba. See *In re Joel L.*, 345 Ill. App. 3d 830, 833-34 (2004).

¶ 24 At the sentencing hearing, immediately after the court denied defendant's posttrial motion, the prosecutor presented evidence in aggravation of sentence, arguing that all of the officers "had to miss work for a significant amount of time. They had significant injuries \*\*\* at the hands of the defendant." The court responded: "I heard the evidence. One guy stepped off a curb. So if you are claiming that Mr. Sanders is a curb, then how can he be charged, he didn't even cause that injury." Apparently, the court was referring to Officer Ziemba. The court went on to ask the prosecutor how long Officer Ivory was off from work for his "pinky finger." We note that those comments by the court were sandwiched between its findings at the close of trial, that "the State has proved each and every element" of aggravated battery on Counts 3, 5, 7 and 9 beyond a reasonable doubt," and its statement upon imposing sentence that defendant had inflicted "substantial injuries." The court imposed sentence separately on each count, including the five-year sentences imposed on Counts 5 (Ivory) and 7 (Ziemba). We believe the court's comment, that defendant "didn't even cause [Ziemba's] injury," was not intended as a retraction of its earlier finding at the conclusion of the trial that the State had proved every element of aggravated battery of a peace officer on Counts 3, 5, 7, and 9. Rather, the comment about the injuries to Ziemba and Ivory, when read in context, was a momentary reaction to the prosecutor's assertion that all of the officers had sustained "significant" injuries, despite the fact that section 12-4(b)(18) required the State to prove only that the officers had sustained bodily harm, not great bodily harm.

¶ 25 Defendant's final contention is that his convictions must be reversed and remanded for a new trial where the record does not affirmatively show that he knowingly and voluntarily waived his right to trial by jury. The State asserts, and defendant concedes, that this

issue was not preserved for review, but defendant asks that we review his claim under the plain-error doctrine. Application of that doctrine is unnecessary here, however, as no error occurred. See *People v. Willhite*, 399 Ill. App. 3d 1191, 1197 (2010)

¶ 26 The right to a jury trial is a fundamental right guaranteed by our federal and state constitutions. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). To be valid, a jury waiver must be knowingly and understandingly made. *In re R.A.B.*, 197 Ill. 2d 358, 364 (2001).

Whether a jury waiver is valid cannot rest on any precise formula and necessarily turns on the particular facts and circumstances of each case. *Bracey*, 213 Ill. 2d at 364. "When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand--with its attendant consequences--is that the facts of the case will be determined by a judge and not a jury." *People v. Bannister*, 232 Ill. 2d 52, 69 (2008).

¶ 27 Our supreme court has long held that the rule, that trial by jury must be understandingly waived by defendant in open court, does not necessarily require that the accused must personally announce a waiver of his right to a jury trial. *People v. Novotny*, 41 Ill. 2d 401, 408 (1968). Rather, a jury waiver may be valid if made by defense counsel in the defendant's presence and the defendant does not object. *Bracey*, 213 Ill. 2d at 270; *R.A.B.*, 197 Ill. 2d at 364; *People v. Smith*, 106 Ill. 2d 327, 334 (1985) and cases cited therein; *People v. Murrell*, 60 Ill. 2d 287, 290 (1975), citing *People v. Sailor*, 43 Ill. 2d 256, 260 (1969). This precept is based on the courts' recognition "that the accused typically speaks and acts through his attorney." *People v. Frey*, 103 Ill. 2d 327, 332 (1984).

¶ 28 In the instant case, defendant asserts that counsel's representation of defendant's desire to opt for a bench trial was insufficient to establish a valid jury waiver. He relies on two authorities, both of which are inapposite where their factual scenarios differ from that presented here. In *People v. Scott*, 186 Ill. 2d 283, 285-86 (1999), the defendant did not

object when his counsel and the court both indicated and in the defendant's presence that the trial set for that day would be a bench trial. The written jury waiver presented to the court was the only sign of an intent by defendant to waive a trial by jury. However, the waiver was revocable only to a specified date, and that date had passed. In finding the jury waiver invalid, the supreme court concluded that the defendant's silence at the mention of a bench trial could have been the result of his surmise that it was simply too late to revoke his jury waiver. *Scott*, 186 Ill. 2d 283, 285-86 (1999). In *People v. Ruiz*, 367 Ill. App. 3d 236 (2006), in addition to a written jury waiver, the only other relevant reference was to defense counsel's request for a trial date for a bench trial--a statement that spoke to scheduling and not to the defendant's desire to waive trial by jury.

¶ 29 In the case at bar, the subject of defendant's choice of a bench trial was raised on three occasions in the three months preceding trial. On the first of those court dates, defense counsel advised the court in defendant's presence: "Mr. Sanders is not accepting the court's offer. He says he now wants a bench. We were talking about all his options. I would be happy to visit him in the jail \*\*\* to have a chat with him about his decision." On the next date, counsel represented, again in defendant's presence: "I'm asking for a bench trial date. I did discuss it with Mr. Sanders, the options." On the last court date before the trial date, counsel again advised the court the case was set for a bench trial and stated that a trial demand was being filed that day. When the court suggested to defendant that he might get a more speedy trial if the case were transferred to a different judge, defendant replied, "No, I want to stick with you." Counsel clearly represented to the court that she and defendant had discussed his "options," and that defendant had opted for a bench trial. Defendant had already rejected a plea offer; his only options at that point were either a jury trial or a bench trial. We find that the representation by defendant's attorney that she had discussed the options with defendant and he desired a bench

trial, coupled with defendant's confirmation of that fact and his signed jury waiver, sufficiently established a valid jury waiver. An opposite ruling would fly in the face of the long-held principle that a trial court is entitled to rely on the defendant's counsel to execute his professional responsibilities. *Sailor*, 43 Ill. 2d at 261, citing *People v. Melero*, 99 Ill. App. 2d 208, 211-12 (1968). The record before us establishes that defendant expressed a preference, directly or through his trial counsel in his presence, to be tried by the court. We conclude defendant entered a valid jury waiver.

¶ 30 For the reasons stated above, we reverse defendant's conviction on Count 1 for aggravated battery causing great bodily harm pursuant to section 12-4(a) of the Code (erroneously entered on the mittimus as "AGG BATTERY/PUBLIC PLACE" pursuant to section 12-4(b)(8) of the Code) and the sentence entered thereon, and we affirm the judgment of the trial court in all other respects.

¶ 31 Affirmed in part; reversed in part.