

2011 IL App (2d) 100593-U  
No. 2-10-0593  
Order filed November 28, 2011

**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  
SECOND DISTRICT

---

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-2790
	)	
FRANCISCO MENDEZ,	)	Honorable
	)	Allen M. Anderson,
Defendant-Appellant.	)	Judge, Presiding.

---

JUSTICE BOWMAN delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Zenoff concurred in the judgment.

**ORDER**

*Held:* (1) The trial court did not abuse its discretion in admitting “other-crimes” evidence showing that, during the commission of the alleged batteries, defendant directed an associate to produce a gun, which was later found in his house: the evidence was admissible as part of the “continuing narrative” and to prove defendant’s intent; (2) the trial court erred in imposing a public defender reimbursement fee when the court had not provided the required notice of the hearing on defendant’s ability to pay; we vacated the fee and remanded for the notice and a new hearing, despite the expiration of the 90-day period in which such hearing could be held.

¶ 1 Following a jury trial, defendant, Francisco Mendez, was found guilty of two counts of battery (720 ILCS 5/12-3(a)(1) (West 2008)) and sentenced to 30 days in jail and 18 months’ conditional discharge. In addition, the trial court imposed a \$2,000 public defender fee. Defendant

timely appealed and now argues: (1) he was denied a fair trial when the trial court erroneously admitted into evidence testimony that another individual at the scene had a gun and that the police subsequently searched defendant's house and recovered a gun; and (2) the trial court erred in ordering defendant to pay \$2,000 to reimburse the public defender, because the fee was assessed without notice and without a hearing. For the reasons that follow, we affirm defendant's conviction, vacate the public defender fee, and remand for a hearing on the fee.

¶ 2

### I. BACKGROUND

¶ 3 Defendant was indicted on two counts of aggravated battery (720 ILCS 5/12-4(b)(1) (West 2008)) and four counts of battery (720 ILCS 5/12-3(a)(1) (West 2008)). The State later nol-prossed two of the battery counts. Prior to trial, defendant filed a motion *in limine* to suppress any testimony concerning a gun being present at the scene and later recovered from defendant's home by the police. The trial court denied the motion.

¶ 4 The evidence presented at defendant's jury trial established the following. On September 28, 2009, Guadalupe Cardoza picked up his nephew, Alejandro Cardoza, and Alejandro's friend, Julian Chavez, from West Aurora High School in his pickup truck. As they left the school, Guadalupe sat in the driver's seat, Alejandro sat in the front passenger seat, and Julian sat in between them. Guadalupe's dog was in the back of the truck. While they were stopped in traffic, they spotted a pit bull puppy on the corner of Elmwood and Charles Streets in Aurora. Alejandro exited the truck and picked up the puppy. As Alejandro was returning to the truck, carrying the puppy, defendant exited his house, saying that it was his dog.

¶ 5 According to Alejandro and Guadalupe, at that point, Alejandro put down the puppy. Defendant walked over to the driver-side window and punched Guadalupe in the face. Alejandro walked around the truck toward defendant. Defendant grabbed a pipe that was in the back of the

truck and swung it at Alejandro, striking him in the wrist. Julian ran to get the police. Guadalupe noticed his dog jump out of the truck, so he went to retrieve it. After securing his dog, Guadalupe saw that defendant and Alejandro were fighting. While he was fighting, Alejandro saw someone (later identified as Eli) exit defendant's house. Guadalupe tried to break up the fight between defendant and Alejandro and, as he did so, he heard defendant say, " 'Go get my gun.' " Alejandro did not hear defendant tell anyone to get a gun; however, Alejandro saw Eli return to the house and then exit carrying a silver pistol. Guadalupe also saw Eli exit defendant's house carrying a gun. Eli pointed the gun at Guadalupe and Alejandro, and Guadalupe told Alejandro that they should leave. Alejandro and Guadalupe got into the truck and drove off. Shortly after they drove away, they encountered police officers and told the officers what had happened. Guadalupe identified pictures showing injury to the left side of his face and pictures showing that he had no injuries on his hands. Alejandro identified pictures showing injuries to his hands, face, and right arm.

¶ 6 Salvadore Tinoco, a letter carrier with the United States Postal Service, testified that he was delivering mail in the area of defendant's home on the day of the incident. He observed defendant walk to the driver-side of the truck and hit the driver (Guadalupe). At that point, he saw one person (Alejandro) exit the truck and approach defendant. Tinoco saw defendant pick up a pipe and hit Alejandro. He also heard them arguing about a puppy. He testified that the fighting stopped when a man exited defendant's house carrying a silver pistol. Tinoco later spoke with the police and told them what he had observed.

¶ 7 Aurora police officer Ronald Miller testified that he was controlling traffic during dismissal at West Aurora High School on September 28, 2009, when he received a report of a fight in progress and a gun on the scene at Elmwood and Charles Streets. When he responded to the scene, he, along with about eight or nine other officers, set up a perimeter around defendant's house. Officer Miller

observed defendant through the window and asked him to exit the house. Defendant told Officer Miller to get a search warrant and closed the window. Ultimately, after about 5 to 10 minutes, defendant exited the house. He was identified by Tinoco as the person who started the fight.

¶ 8 Aurora police officer Ted Grommes testified that he responded to a report of a fight at defendant's house. After defendant exited his house, defendant reported to Officer Grommes that, earlier that afternoon, he was sitting in his house when he heard his puppy crying outside. When he looked outside, he saw someone running through his yard, carrying his puppy. He ran outside and grabbed his puppy. According to defendant, two of the individuals in the truck began to fight him in the street, and one of the individuals hit defendant in the head with a pipe. Officer Grommes identified photographs of defendant that revealed no injuries to defendant's face. He also identified photographs of defendant that revealed scrapes and scratches on the palms of defendant's hands.

¶ 9 Aurora police officer Crista Rees testified that she conducted a search of defendant's home and recovered a silver and black Smith & Wesson handgun. She also retrieved a six-foot-long metal pipe from the roadway in front of defendant's house.

¶ 10 Defendant testified on his own behalf. According to defendant, on the day of the incident, he was sitting inside of his house and his two pit bulls were outside in the back of the house. He heard one of his dogs start to cry on the side of the house. He looked out of his side window, and he saw Alejandro carrying one of his dogs and walking toward a truck. According to defendant, he saw that his other dog was already in the truck. Defendant ran outside and headed toward Alejandro. Defendant retrieved his dog from Alejandro. When he did so, Alejandro "threw an elbow." Defendant then headed toward the truck to retrieve his other dog. When he reached through the window of the truck to grab his dog, Guadalupe hit him. Defendant hit him back to defend himself. Defendant pulled his dog out and, when he turned around, Alejandro hit him with his elbow. They

were “scuffling,” and defendant got hit in the back of the head by a pipe. He grabbed the pipe to defend himself and tried to return to his yard but, by that time, he was on the ground. Defendant testified that he never yelled to his friend, Eli, to get a gun. He never saw a gun that day.

¶ 11 The jury was instructed on the offense of battery with respect to Guadalupe and on the offense of aggravated battery with respect to Alejandro. The jury was also instructed on defense of self and defense of property. The jury found defendant guilty of both counts of battery against Guadalupe and not guilty of both counts of aggravated battery against Alejandro.

¶ 12 Defendant filed a posttrial motion arguing, *inter alia*, that the trial court erred in denying his motion *in limine* to preclude evidence of the presence of a gun or use of a gun by someone other than defendant at the scene and evidence that the police recovered a gun from defendant’s house.

¶ 13 A hearing took place on June 3, 2010. When defendant’s case was initially called for hearing, it was transcribed, but the case was passed. When the hearing later resumed, it was not transcribed. Thus, the parties entered an agreed statement of facts, which indicated that the court heard arguments on defendant’s posttrial motion and denied it. With respect to sentencing, the agreed statement of facts provides, in relevant part, as follows:

“On June 3, 2010 the Court heard arguments of Defendant and the State’s Attorney as to sentencing on counts 5 and 6, both [C]lass A Battery offenses. The Court first found the convictions on Counts 5 and 6 merged for sentencing. The Court then sentenced Defendant to a period of 18 months of Reporting Conditional Discharge and assessed a fine of \$490 (reflecting \$10 pretrial detention credit), costs of \$210, and a Public Defender Fee of \$2000. The Court also ordered Defendant to serve 30 days incarceration in the Kane County Jail with credit against that sentences for 2 days pretrial incarceration.”

With regard to the \$2,000 public defender fee, the judgment order indicates: “Hearing Held.”

¶ 14 Defendant timely appealed.

¶ 15 II. ANALYSIS

¶ 16 A. Admissibility of Evidence Concerning the Gun

¶ 17 Defendant argues that he was denied a fair trial when the trial court erroneously admitted into evidence testimony that another individual at the scene had a gun and that the police subsequently searched defendant's house and recovered a gun. Defendant argues that the evidence concerning the gun was inadmissible "other-crimes" evidence. In response, the State maintains that the evidence was admissible under the "continuing narrative" exception to the general rule barring admission of other-crimes evidence. We find that the evidence was properly admitted.

¶ 18 "Evidence generally is admissible if it is relevant, meaning the 'fact or circumstance offered tends to prove or disprove a disputed fact or to render the matter at issue more or less probable.'" *People v. Begay*, 377 Ill. App. 3d 417, 421 (2007) (quoting *People v. Jones*, 269 Ill. App. 3d 797, 803 (1994)). However, the probative value of the evidence must outweigh its prejudicial effect. *People v. Decaluwe*, 405 Ill. App. 3d 256, 267 (2010). It is within the trial court's discretion to determine whether evidence is relevant and admissible, and the trial court's decision will not be reversed absent an abuse of that discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). This court may sustain the trial court's evidentiary rulings on any basis supported by the record, regardless of the trial court's reasoning. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 19 Here, the trial court did not expressly treat evidence concerning the gun as other-crimes evidence; however, both parties maintain that it should be treated as such. "Evidence that a defendant has committed crimes other than the one for which he is on trial may not be admitted for the purpose of demonstrating his propensity to commit crimes. [Citation.] Such evidence, however,

may be admitted for a proper purpose such as proving *modus operandi*, intent, identity, motive, or absence of mistake. [Citation.]” *People v. Adkins*, 239 Ill. 2d 1, 22-23 (2010). Other-crimes evidence may also be admitted under the “continuing-narrative exception.” *Adkins*, 239 Ill. 2d at 33. This exception permits the introduction of evidence of other crimes where “ ‘[t]he facts concerning the [other crimes] are all a part of the continuing narrative which concern the circumstances attending the entire transaction and they do not concern separate, distinct and disconnected crimes.’ ” *Adkins*, 239 Ill. 2d at 32 (quoting *People v. Marose*, 10 Ill. 2d 340, 343 (1957)).

¶ 20 We agree with the State that the evidence concerning the gun was admissible as part of the continuing narrative of events. We reject defendant’s argument that the gun’s appearance at the scene is unconnected to him because it was in someone else’s hands and because the charged offense had already been completed. According to Guadalupe’s testimony, it was while Guadalupe was attempting to break up the fight between Alejandro and defendant that he heard defendant say, “ ‘Go get my gun,’ ” whereupon Eli obliged and returned from defendant’s home with the weapon. At that point, the victims left the scene. Thus, the presence of the gun was not only deliberate on defendant’s part; it was part of the “circumstances attending the entire transaction,” as defendant made the request for the gun during the commission of the offense. Moreover, where a defendant in an aggravated battery case denies the intent to cause great bodily harm, the State must prove intent to harm through circumstantial evidence. *Begay*, 377 Ill. App. 3d at 421. Here, defendant’s behavior during the fight, including his request for the gun, was relevant as circumstantial evidence of defendant’s intent to do harm, which was both an element of the offense and material to defendant’s affirmative defenses. Given that the testimony concerning the presence of the gun at

the scene was properly admitted, the testimony concerning the recovery of a gun was relevant as it tended to corroborate the testimony that there was a gun on the scene.

¶ 21 We reject defendant's argument that the evidence was improperly admitted because it was highly prejudicial. We note that "relevant evidence is inadmissible only if the prejudicial effect \*\*\* *substantially outweighs* any probative value." (Emphasis in original.) *People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010). The State agrees that the evidence was certainly not favorable to defendant. However, as noted above, the evidence was admissible as part of the continuing narrative of the circumstances of the offenses and relevant to establish defendant's intent. We cannot say that the prejudicial effect was such that it substantially outweighed the probative value.

¶ 22 We note that defendant also argues that the trial court erred in allowing testimony concerning the circumstances of his arrest, specifically testimony that the officers surrounded defendant's home with their guns drawn. However, defendant failed to raise this argument in his posttrial motion and thus it is forfeited. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (a defendant forfeits review of errors unless he makes an objection during trial and raises the issue in a posttrial motion).

¶ 23 **B. Public Defender Fee**

¶ 24 We next consider defendant's argument that the trial court erred in ordering him to pay \$2,000 to reimburse the public defender, because the fee was assessed without notice and without a hearing.

¶ 25 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2008)) authorizes the trial court to order a criminal defendant for whom counsel has been appointed to pay a reasonable amount to reimburse the county or the state. However, prior to ordering reimbursement, the trial court must conduct a hearing regarding the defendant's financial resources. *People v. Love*, 177 Ill. 2d 550, 559 (1997); *People v. Spotts*, 305 Ill. App. 3d 702, 703 (1999). "The

hearing must, at a minimum, provide defendant with notice that the trial court is considering imposing a payment order and give defendant an opportunity to present evidence of his ability to pay and other relevant circumstances.” *Spotts*, 305 Ill. App. 3d at 703-04.

¶ 26 The State maintains that the record does not support defendant’s argument that he did not receive the requisite notice. As this court noted in *Spotts*, “ ‘[n]otice’ includes informing defendant of the court’s intention to hold such a hearing, what action the court may take as a result of the hearing, and the opportunity defendant will have to present evidence or otherwise be heard.” *Spotts*, 305 Ill. App. 3d at 704. According to the State, the agreed statement of facts mentions only that the public defender fee was imposed; it does not indicate that defendant failed to receive notice. Moreover, according to the State, because the sentencing order affirmatively establishes that a hearing was held, we must “presume[] that the order entered by the trial court was in conformity with the law” (*Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984)); that is, we must presume that defendant received the requisite notice. We disagree. While we may presume that a hearing was held, we cannot similarly presume that notice was received by defendant. In *Spotts*, we found that, even though defendant was “technically on notice” (due to the State’s motion) that the State would be seeking a public defender fee, and even though the defendant had the opportunity to present evidence, the proceedings did not comply with due process, because the defendant had no notice that the matter would be addressed during the sentencing hearing. So too here. There is simply nothing in the record upon which we can base a finding that notice was received; indeed, the record must be taken to establish the contrary.

¶ 27 Defendant notes that section 113-3.1 of the Code provides that the hearing shall be held “no later than 90 days after the entry of a final order disposing of the case at the trial level.” 725 ILCS 5/113-3.1(a) (West 2008). Defendant contends that, because the 90-day period has now expired, the

case should not be remanded for a hearing. However, in *Love* our supreme court remanded for a hearing even though more than 90 days had passed since the disposition of the case in the trial court, and we do the same here. See *People v. Gutierrez*, 405 Ill. App. 3d 1000, 1003 (2010), *appeal allowed*, No. 111590 (Mar. 30, 2011).

¶ 28

### III. CONCLUSION

¶ 29 In light of the foregoing, we affirm defendant's conviction and sentence, we vacate the \$2,000 public defender fee, and we remand for notice and a hearing on the fee.

¶ 30 Affirmed in part and vacated in part; cause remanded.