

NOTICE  
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2011 IL App (4th) 090836-U

Filed 7/29/11

NO. 4-09-0836

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
DAVID P. GUZMAN,	)	No. 09CF172
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Justice Pope concurred in the judgment.  
Justice Appleton dissented.

**ORDER**

- ¶ 1 *Held:* (1) Where the evidence was closely balanced on whether defendant caused bodily harm to the victim, his convictions for aggravated battery and domestic battery must be reversed under the plain-error doctrine based on the trial court's failure to conduct a *Boose* hearing.
- ¶ 2 (2) Where the evidence was not closely balanced on defendant's other two convictions for aggravated battery and domestic battery, we will not review defendant's claim under the plain-error doctrine that it was error for the trial court not to hold a *Boose* hearing to determine if he should be placed in restraints during trial.
- ¶ 3 (3) Where we reversed the convictions on which defendant was sentenced, remand is necessary for a retrial or for sentencing on the convictions on which sentences were not imposed.
- ¶ 4 In September 2009, a jury found defendant, David P. Guzman, guilty of two counts of aggravated battery and two counts of domestic battery. In October 2009, the trial court

sentenced him to concurrent three-year terms on one count of aggravated battery and one count of domestic battery.

¶ 5 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt and (2) he was denied due process when he was shackled throughout his trial without a hearing to determine the manifest need for such restraints. We affirm in part, reverse in part, and remand for further proceedings.

¶ 6 I. BACKGROUND

¶ 7 In June 2009, the State charged defendant by information with four counts of aggravated battery (counts I through IV) (720 ILCS 5/12-4(b)(10) (West 2008)) and four counts of domestic battery (counts V through VIII) (720 ILCS 5/12-3.2(a)(1), (a)(2) (West 2008)). The counts claimed defendant used physical force against his 69-year-old mother, Peggy Guzman, alleging he slapped her in the face or grabbed her by the wrists and shook her. Some of the counts alleged he caused her bodily harm and others alleged he made physical contact of an insulting nature.

¶ 8 In September 2009, defendant's jury trial commenced. Karon Kokoszka testified she was 18 years old and defendant's daughter. On June 23, 2009, she lived in a house with defendant; his mother, Peggy Guzman; Kristie Genisio; Kristie's brother-in-law, Herbie; and Kristie's two children. Karon and defendant got into an argument and it was suggested that she leave to reduce the tension in the house.

¶ 9 On cross-examination, Karon testified the argument occurred in the living room. Peggy was sitting on the couch and Genisio sitting in the rocker. Karon left to pick up her brother. When she returned, Karon saw her dad leaving. She stated Peggy looked "stunned," and

Genisio was "upset," "screaming," and "being hysterical." Her father appeared to be angry.

¶ 10 Peggy Guzman testified she was 69 years old and defendant's mother. She did not remember much of what happened on the afternoon of June 23, 2009. On cross-examination, Peggy stated she did not remember defendant grabbing her arms or shaking her. She also stated defendant "never hit [her] in his life." Peggy stated she had diabetes and her blood sugar oftentimes gets out of the normal range. When that happens, she gets dizzy and can lose her balance.

¶ 11 Kristie Genisio testified defendant and Karon began arguing in the afternoon on June 23, 2009. Kristie told Karon to take her van and pick up Kristie's brother from work. After Karon left, defendant started arguing with his mother. Defendant told Peggy "it was either him or Karon." He then slapped her on the shoulder, grabbed her forearm and wrists, and shook her. Kristie stated defendant was loud when addressing his mother and said he was done with her and was going to put her in a nursing home. Defendant then left, and Kristie said he was "a little bit aggravated."

¶ 12 Pontiac police officer Jeffrey Franklin testified he arrived on the scene and found Kristie upset and Peggy seemed "upset and confused." Franklin spoke with defendant, who arrived 5 to 10 minutes after Franklin. Officer Franklin stated defendant's hands were shaking and he was fidgety. Franklin placed defendant under arrest. After they left the residence, defendant became "more and more upset" and said his mother was going to send him to jail. He also banged his head against the cage between the front and rear seats and the window. Franklin had to stop his car to hold defendant in place until another officer could arrive.

¶ 13 Mary Jo Boring, a correctional officer at the Livingston County jail, testified

regarding the jail's computerized telecommunications system. During booking, each inmate is given a five-digit personal identification number. Once the number is punched in, the system keeps track of and records the calls. Boring stated notes above the phones warns the caller that the conversations are recorded. Boring identified People's exhibit No. 1 as an audio recording of a call defendant made from the jail on June 30, 2009, to an individual he called "Peggy."

The conversation started with defendant stating, "Hello. Mom." Although it is apparent defendant was speaking with his mother, both he and Peggy attempted to throw off anyone who might be listening. Defendant referred to Peggy in the third person and addressed the woman on the line as Mom and Barzan. Defendant told his mother that he was looking at 48 years in prison based on the 8 charged counts. Peggy responded that those looking to put defendant away were "nuts" and "crazy." Defendant stated Peggy "should never [have] started this shit." Peggy stated she talked with the prosecutor and told him defendant did not hurt her and would never hurt her.

When discussing a statement made to the police, defendant stated, in part, as follows:

"Q: Mom, listen. Barzan, listen to me. Are you listening to me, Barzan?"

A: Yeah.

Q: Okay. Your big friend over there wrote a statement.

Are you understanding that?"

A: Yeah.

Q: Okay. Well, I am going to jail. I am going to prison for 48 years. This is no joke. This is no joke.

A: I know. What did they say in the statement?"

Q: They said exactly what you supposedly said, or what my mother supposedly said. They said that I beat my mom.

A: Oh, my god.

Q: That I slapped my mom, I beat my mom, I shook my mom. Yeah.

A: Shook my mom. Yeah, that is true. That is what she told me she said, that you shook me.

Q: No, no, no. I am just telling you what they said. Now, they are going to put me in prison for the rest of my life.

A: Well, that is not true what they are thinking then."

¶ 14 Defendant testified in his own defense. He stated he and his daughter had an argument on June 23, 2009, about her moving back in with him and Peggy. When Peggy got upset about the move, defendant "restrained [his] mom." Defendant stated she started swinging her arm. He then "grabbed her arm" and told her to quit so as not to hurt herself. He testified he did not shake, slap, or touch her.

¶ 15 Following closing arguments, the jury found defendant guilty on counts III, IV, VII, and VIII and not guilty on the remaining counts. In October 2009, the trial court found count IV merged with count III and count VIII merged with count VII. The court then sentenced defendant to concurrent terms of three years in prison on count III and three years in prison on count VII. This appeal followed.

¶ 16

## II. ANALYSIS

¶ 17

### A. Sufficiency of the Evidence

¶ 18 Defendant argues the State failed to prove him guilty of aggravated battery and domestic battery beyond a reasonable doubt. We disagree.

¶ 19 "When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 20 In this case, the jury found defendant guilty of two counts of aggravated battery in that he grabbed Peggy by the wrists and shook her. Count III alleged he caused bodily harm to Peggy, while count IV alleged he made contact of an insulting nature with Peggy. Likewise, the jury found defendant guilty of two counts of domestic battery in that he grabbed Peggy by the wrists and shook her. Count VII alleged he inflicted bodily harm to Peggy, while count VIII alleged he made contact of an insulting nature with Peggy.

¶ 21 Defendant argues the evidence was insufficient to convict based on Peggy's faulty memory, her denial on the jail recording that defendant hit her, defendant's testimony denying he slapped or shook Peggy, and Genisio's desire to incriminate him to stay out of trouble with the police or to continue stealing medicine from Peggy.

¶ 22 We find the evidence was sufficient to convict defendant of aggravated battery and domestic battery beyond a reasonable doubt. Genisio testified she saw defendant slap Peggy on the shoulder and grab her by the wrists and shake her. It was for the jury to determine if Genisio's testimony was credible. The jury could have reasonably inferred defendant's conduct was both insulting to Peggy and caused her physical pain amounting to bodily harm. On the way to the jail, defendant banged his head against the cage and window of the squad car, believing his mother was sending him to jail. It can be inferred defendant knew his actions had given her cause to send him to jail. Moreover, the jury could have viewed defendant's telephone conversation with Peggy from the jail as evidence of consciousness of guilt. Viewing the evidence in a light most favorable to the prosecution, we find a rational trier of fact could find the elements of the offenses to be proved beyond a reasonable doubt.

¶ 23 B. Shackling and Plain Error

¶ 24 Defendant argues he was denied due process when he was shackled throughout his trial without a hearing to determine the manifest need for such restraints. The State argues defendant has forfeited review of this issue by failing to object at trial and raise the issue in a posttrial motion. Although conceding his failure to properly preserve the issue, defendant asks this court to review the issue as a matter of plain error.

¶ 25 The plain-error doctrine allows a court to disregard a defendant's forfeiture and address the merits of the alleged error in two situations. *People v. Owens*, 394 Ill. App. 3d 147, 152, 914 N.E.2d 1280, 1285 (2009).

"(1) [A] clear and obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of

justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). As the first step in the analysis, we must determine whether any error occurred at all. *Lewis*, 234 Ill. 2d at 43, 912 N.E.2d at 1227.

¶ 26 Our supreme court has stated "shackling is generally disfavored because (1) it tends to prejudice the jury against the accused; (2) it restricts the defendant's ability to assist counsel during trial; and (3) it offends the dignity of the judicial process." *People v. Urdiales*, 225 Ill. 2d 354, 415, 871 N.E.2d 669, 705 (2007) (citing *People v. Boose*, 66 Ill. 2d 261, 265, 362 N.E.2d 303, 305 (1977)). A defendant may be restrained, however, where the trial court believes (1) the defendant may try to escape, (2) the defendant may pose a threat to the safety of those in the courtroom, and (3) restraint is necessary to maintain order during the trial. *Boose*, 66 Ill. 2d at 266, 362 N.E.2d at 305.

¶ 27 In determining whether to restrain a defendant, the trial court is to hold proceedings outside the jury's presence. *People v. Strickland*, 363 Ill. App. 3d 598, 602, 843 N.E.2d 897, 901 (2006). Therein, defense counsel should be given the opportunity to present reasons why the

defendant should not be restrained, and the court should state for the record the reasons for shackling the defendant in the courtroom. *Strickland*, 363 Ill. App. 3d at 602, 843 N.E.2d at 901.

¶ 28 In determining whether a defendant should be restrained, the trial court should consider the following factors:

" [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.' " *Boose*, 66 Ill. 2d at 266-67, 362 N.E.2d at 305-06 (quoting *State v. Tolley*, 226 S.E.2d 353, 368 (N.C. 1976)).

The decision whether to restrain a defendant falls within the court's discretion, and that decision will not be overturned on appeal absent an abuse of that discretion. *Urdiales*, 225 Ill. 2d at 416, 871 N.E.2d at 705.

¶ 29 In the case *sub judice*, the transcripts do not mention the shackling of defendant prior to trial. It was not until defendant was preparing to testify that the following exchange occurred:

"THE COURT: I assume the defendant has leg irons on.

MR. MASON [(defense counsel)]: Yes.

THE COURT: Okay. Well, rather than display that to the jury, I will take the bolt out on this one. Deputy, is there any reason that you can't remove those? Has he been a problem today?

CORRECTIONAL OFFICER BROOKE: It is your call.

He has not been a problem.

THE COURT: Mr. Guzman, I am going to have him remove these and pretty much they will remain off until we get an opportunity to reapply them. Okay?

THE DEFENDANT: Okay.

THE COURT: So on your best behavior.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Would you take those off, please. All right.

Hang on."

¶ 30 Here, the record indicates the trial court failed to conduct a *Boose* hearing to permit the shackling of defendant. Thus, error occurred. The question then becomes whether the error amounted to plain error.

¶ 31 Defendant does not claim he was denied a fair trial because of his leg restraints. Instead, defendant argues plain error occurred because the evidence was closely balanced. We do not believe the evidence was closely balanced on counts IV and VIII. Genisio testified she saw defendant slap Peggy on the shoulder and grab her by the wrists and shake her. Despite defendant's recollection of what happened, his banging his head against the interior of the squad

car shows he knew his actions had landed him in trouble with the law. The error in failing to conduct a *Boose* hearing cannot be said to have threatened to tip the scales of justice against defendant.

¶ 32 We do, however, believe the evidence was closely balanced on counts III and VII and the elements of bodily harm therein. Here, nothing in the testimony indicated Peggy suffered bodily harm by defendant's grabbing of her wrists and shaking her. It does not appear Peggy sought any medical treatment, and a review of Officer Franklin's testimony does not indicate he observed Peggy with any manifestations of physical injury.

¶ 33 Having found the evidence to be closely balanced on the element of bodily harm in counts III and VII (but not on any of the elements in counts IV and VIII), we take up the question of whether the shackling was plain error. The shackling could have put defendant at a disadvantage, and impaired his efforts to defend himself, by depriving him of his dignity and self-respect. See *In re Staley*, 67 Ill. 2d 33, 37, 364 N.E.2d 72, 73 (1977) (an accused has the right to stand trial " 'with the appearance, dignity, and self-respect of a free and innocent man' ") (quoting *Eaddy v. People*, 174 P.2d 717, 719 (Colo. 1946)). The unnecessary and unjustified shackling of a defendant during trial is no trivial matter, and this error might have been enough to tip the scales in favor of a conviction on counts III and VII.

¶ 34 The State argues that even if we find plain error by reason of closely balanced evidence, a new trial need not be the remedy. Rather, on the authority of *People v. Johnson*, 356 Ill. App. 3d 208, 211, 825 N.E.2d 765, 768 (2005), the State argues we can remand this case for a retrospective *Boose* hearing and if the hearing reveals an adequate basis for having used the restraint, defendant's conviction should stand, whereas if the hearing does not reveal an adequate

basis for using the restraint, a new trial would be necessary. We decline the State's invitation to remand for a retrospective *Boose* hearing because the trial court already impliedly decided the shackles were unnecessary. The problem is, the court first addressed the issue of shackling near the end of the trial instead of at the beginning.

¶ 35

### III. CONCLUSION

¶ 36 For the reasons stated, we affirm the convictions on counts IV and VIII, but we reverse the convictions on counts III and VII, and we remand this case with the following directions. If the State elects to retry counts III and VII and defendant is found guilty of those counts, the trial court then shall resentence him on those counts. On the other hand, if defendant is found not guilty of counts III and VII or if he is not retried on those counts, the court shall impose sentences for counts IV and VIII. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 37

Affirmed in part and reversed in part; cause remanded with directions.

¶ 38 JUSTICE APPLETON, dissenting:

¶ 39 I respectfully dissent. While I agree that defendant failed to preserve the clear error that occurred when the court failed to conduct a *Boose* hearing *before* the trial commenced, I disagree that the issue should not be reviewed under the plain-error doctrine as to all convictions. I would find the evidence to be closely balanced as to all the counts for which defendant was convicted.