2012 IL App (1st) 113581-U

FIFTH DIVISION
October 26, 2012

No. 1-11-3581

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 C4 40482
	)	
STEPHEN STRZALKA,	)	Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: Jury waiver executed immediately before amendment to indictment valid where defendant waived reexecution after amendment in open court; evidence sufficient to show that defendant did not act in self-defense; claim that trial counsel was ineffective did not conform to requirements of Rule 341(h)(7) and is forfeited; motion for leave to file "amended reply brief" denied.

¶ 2 Following a bench trial, defendant Stephen Strzalka was found guilty of aggravated battery of a senior citizen and sentenced to three years' imprisonment. On appeal, he maintains that he did not enter a valid jury waiver; that he was denied effective assistance of trial counsel; and that the evidence was insufficient to refute his claim of self-defense.

¶ 3 The record shows that defendant was charged with four counts of aggravated battery of

68-year-old Wlodzinierz Rakowski on April 18, 2010. In counts I and II, defendant was charged with striking Rakowski with a closed fist knowing him to be 60 years of age or older under section 12-4(b)(10) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-4(b)(10) (West 2010)), and in counts III and IV with aggravated battery causing permanent disfigurement under section 12-4(a) of the Code (720 ILCS 5/12-4(a) (West 2010)).

¶ 4 Before trial and in open court, defendant waived his right to a jury and executed a signed jury waiver in the presence of his counsel. The court noted that by signing that form defendant was giving up his right to have his case tried by a jury composed of 12 members of the community and asked him if he had discussed the matter with his counsel. Defendant acknowledged that he had, and that he signed the form freely and voluntarily with no threats or promises as to the outcome. The State then immediately asked leave to amend count III to add after the title of aggravated battery the language "of a senior citizen," and to change the citation to section 5/12-4.6 of the Code (720 ILCS 5/12-4.6 (West 2010)). Defense counsel "waive[d] re-swearing and re-execution" of the jury waiver, noted that he had no objection to the amendment and none was raised by defendant.

¶ 5 At trial, Jonna Eva Rakowska testified that she was married to Brian Carol and had a son, Oliver Peters Strzalka, with defendant. On April 18, 2010, Oliver was with defendant who was supposed to return him by 6 p.m. to her father, Wlodzinierz Rakowski, at 8250 West O'Connor Drive in River Grove. When that time passed and Oliver had not been returned, Rakowksa contacted police. At 7:45 p.m. she received a telephone call from her father, and then asked the police to go to her father's home. Rakowska also went to see her father and son and saw that Oliver's hands were covered in her father's blood.

¶ 6 Rakowski, who did not speak English, testified through a Polish interpreter. He related that on April 18, 2010, his grandson Oliver was three years old, and defendant was supposed to bring him to his home at 6 p.m. Defendant, however, did not arrive until 7:45 p.m., and

Rakowski was worried and angry that defendant was late. When defendant arrived, Rakowski went outside where he saw defendant in the car with his grandmother and Oliver. Oliver was asleep in the car and although he had a cold, he was not wearing a hat and his coat was unzipped. Defendant removed Oliver from the car and handed him to Rakowski, who placed Oliver over his shoulder and held him with both hands. Rakowski then told defendant that because he was late, he would have less time with Oliver during the next visit. Defendant told him that he was not going to boss him around and started punching Rakowski, who was still holding the child. Defendant punched Rakowski four times in the face but stopped when Oliver began to cry and blood poured down Rakowski's face onto Oliver.

¶ 7 Rakowski further testified that he held the child with both hands throughout the incident and never placed his "hands out." After the incident, Rakowski went inside his apartment and called his daughter, Rakowska. Police and an ambulance arrived and he was taken to the hospital where he received eight stitches under his left eye, leaving a scar.

¶ 8 Rakowski testified that defendant reported to police that Rakowski had scratched him, but he denied touching defendant on the date in question and stated that the scratch could have been from shaving. Rakowski noted that defendant was a head taller than him, and heavier.

¶ 9 Rakowski further testified that defendant had hit him three months before and also on Easter Sunday in 2007. Defendant filed a police report against Rakowski in that incident, but the matter was dismissed.

¶ 10 Erica Soderdahl, an assistant public defender, testified that she drove to a friend's apartment at 8250 West O'Connor Drive on the night in question. When she pulled up in front of that residence, she saw a car double parked in front of hers with its blinkers on. She also saw defendant exit the car and remove a sleeping child from the back seat. Soderdahl exited her car and, as she was removing her bags from the trunk, she heard a noise, described as a "thwack," "like flesh hitting flesh." When she looked up, she saw defendant and an elderly man, Rakowski,

in front of the building across from where she was parked. She also saw defendant punch Rakowski in the face. Rakowski did not defend himself and continued to hold the child, who woke up crying after the punch. Soderdahl never saw Rakowski touch defendant and heard defendant, Rakowski and an elderly woman yelling in Polish, which Soderdahl did not understand.

¶ 11 Jadwiga Lyszcz, who was 86 years of age, testified that defendant was her grandson, that she did not want to see anything bad happen to him, and that she had discussed the case with him many times. Lyszcz further testified that at 7:45 p.m. on August 18, 2010, she accompanied defendant to Rakowski's home where he was going to drop off Oliver. She testified that her son had called Rakowski, telling him they would be late, and when they arrived, Rakowski was outside, yelling. He screamed at defendant that he was "never getting the kid again," then hit him in the face with "a closed hand" and "tugged at him" with both hands all while defendant was holding the child. Lyszcz also stated that Rakowski hit defendant with an "open hand." When Lyszcz testified that Rakowski "hit [defendant] in the face like so," the court indicated that the record should reflect that Lyszcz put a right hand up to her right cheek under her eye. Lyszcz then indicated that Rakowski hit defendant with a closed fist and used open hands to tug at him. Lyszcz also testified that when Rakowski struck defendant in his face, defendant hit him back once. Defendant then handed the child to Rakowski, got back in the car and drove to the police station. When defendant reentered the car, she noticed that he had scratches on his neck and face that were not there before.

¶ 12 River Grove police officer Tony Ikis testified that defendant reported a battery to him on the night in question, and he, accordingly, listed defendant as the complainant in his report. Ikis took photographs of defendant which showed scratches on his neck that were not scarred and appeared "fairly new."

¶ 13 Officer Ikis further testified that after speaking with defendant, he spoke to Rakowski.

Ikis saw that Rakowski's left eye was "all screwed up and that he had blood coming from that area." After Ikis learned that defendant was the person who injured Rakowski, he handed the investigation over to detectives.

¶ 14 At the close of evidence, defense counsel argued that the reasonable inference to be drawn from the evidence was that the "thwack" the off-duty public defender heard was Rakowski hitting defendant, who in turn only punched Rakowski once. Counsel argued that defendant's response was "a justified act" of self-defense. Counsel maintained that the scratches on defendant's neck and Soderdahl's testimony that she heard a "thwack" established that Rakowski hit defendant.

¶ 15 In announcing its decision, the court found that the use of force by defendant was not necessary. The court also noted that "defendant could have walked away and the amount and kind of force which was used here was more than reasonably necessary to avoid the assailant's aggression." The court stated that, based on the grandmother's testimony,

> "[t]he complaining witness tugged the defendant's collar. Whether a slap may have occurred, it's unclear from the evidence, [Lyszcz] waffled on that. I find that her testimony is vague on this point."

The court found that defendant punched Rakowski up to four times and that the force used by defendant was not necessary to avert the danger to him, noting that defendant could have just driven away; "he did have the means of escape." The court stated that if Rakowski were younger, it might have found a misdemeanor battery, but based on his age, it found defendant guilty of the charged offenses: aggravated battery of Rakowski because defendant struck him with a closed fist, knowing that Rakowski was over 60 years old (counts I and II); aggravated battery of a senior citizen (count III); and aggravated battery of Rakowski causing permanent disfigurement (count IV). Counts I, II, and IV are Class 3 offenses (See 720 ILCS 5/12-4(e)(1) (West 2010)). Count III is a Class 2 offense (See 720 ILCS 5/12-4.6(b) (West 2010)). The court then merged

the offenses into count I.

¶ 16 Defendant filed a motion for a new trial. At the hearing on this motion, the trial court acknowledged that it had erred in merging the counts into count I and announced that they merged into count III, aggravated battery of a senior citizen. The court then denied the motion for a new trial.

¶ 17 On appeal, defendant first claims that his jury waiver was invalid and the bench trial was void because he did not execute a renewed jury waiver after the State amended count III to include "senior citizen" in the charge. He maintains that the amendment to the indictment was a serious change of circumstance, which required a new jury waiver.

¶ 18 The State responds that defendant has forfeited the issue for review because he failed to object at trial and raise the matter in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The State further claims that there was no error in allowing the State to amend count III, and thus there can be no plain error to overcome the default. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008).

¶ 19 Although defendant has forfeited review of this issue, we note that under the plain error exception to the waiver rule, a reviewing court may consider a forfeited error when the evidence is closely balanced or the error is so fundamental and of such magnitude that the accused was denied his right to a fair trial. *People v. Harvey*, 211 Ill. 2d 368, 387 (2004). The first step in plain error review, however, is to determine whether error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Here, we believe it did not.

¶ 20 The determination of whether a jury waiver is valid turns on the particular facts and circumstances of each case. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). Although "decisions explicitly discussing the applicability of a jury waiver to later-filed charges are a rarity," (*People v. Hernandez*, 409 Ill. App. 3d 294, 297 (2011)), our review of the relevant caselaw has yielded three factors helpful in determining whether a defendant's jury waiver is valid for subsequently

amended charges. These three factors are: (1) whether the defendant was present during discussions of jury waiver; (2) the defendant's level of sophistication; and (3) whether the amended charge calls for the same strategy as the original charge. See *Hernandez*, 409 Ill. App. 3d at 297-301; *Bracey*, 213 Ill. 2d at 267-70; and *People v. Frey*, 103 Ill. 2d 327, 332-33 (1984).

¶ 21 Here, the record first shows that defendant was present during discussion of jury waiver, signed the waiver after being admonished by the court and acknowledged that waiver in the presence of counsel in open court. Immediately thereafter in defendant's presence, the State amended count III to include in its title "of senior citizen." Defense counsel waived re-execution and reswearing, noting that he had no objection, and defendant remained silent.

¶ 22 Second, defendant's level of sophistication also supports the conclusion that his jury waiver was valid. For example, in *Frey* the defendant was charged with two counts of reckless homicide and executed a jury waiver for those charges. *Frey*, 103 Ill. 2d at 329. After several continuances, the State filed an information, additionally charging defendant with driving under the influence (DUI) of an intoxicating liquor. *Frey*, 103 Ill. 2d at 329-30. The parties agreed that the reckless homicide charges would be tried first and that most of the evidence from that trial would be considered by the judge in the defendant's subsequent DUI trial. *Frey*, 103 Ill. 2d at 330. The defendant did not execute a separate jury waiver for the DUI charge. The defendant was acquitted of reckless homicide and convicted of DUI. *Frey*, 103 Ill. 2d at 331. The third District Appellate court reversed and ordered a new trial because it did not believe that the record supported a finding that the defendant waived a jury trial on the DUI charge. *Frey*, 103 Ill. 2d at 331-32. Our supreme court reversed the appellate court, finding that the defendant's jury waiver was valid. *Frey*, Ill. 2d at 333. In doing so, the *Frey* court noted:

> "[the] defendant was aware of his right to a jury trial and was present at some point prior to trial when the jury waiver was discussed. Too, we are not dealing with an unsophisticated, uneducated or simple-minded defendant to whom those

> discussions might be unclear, for the trial court described [the] defendant as a real estate syndicator and developer, and a man of intelligence, experience and considerable education." *Frey*, 103 Ill. 2d at 333.

¶ 23 Here, as in *Frey*, defendant was present during discussion of jury waiver and was a man of considerable education. The record shows defendant is a bilingual securities trader with a college a degree in Economics. He had completed a semester at the London School of Economics during his collegiate studies. The record also shows that defendant had experience with courtroom procedure, having pled guilty to a DUI in California in 2002. Under these circumstances, defendant may be deemed to have acquiesced in counsel's actions, which gave effect to the jury waiver he had just executed, thus rendering it valid as to the amended charge. See *Frey*, 103 Ill. 2d at 332-33; *People v. Lombardi*, 305 Ill. App. 3d 33, 40 (1999).

¶ 24 Finally, we note that the amended charge called for the same strategy as the original charges to which defendant executed a valid jury waiver. The record shows that in counts I and II, the State charged defendant under section 12-4(b)(10) of the Code (720 ILCS 5/12-4(b)(10) (West 2010)) with striking Rakowski with a closed fist, knowing him to be 60 years of age or older, and in counts III and IV with aggravated battery causing permanent disfigurement under section 12-4(a) of the Code (720 ILCS 5/12-4(a) (West 2010)). The State amended count III to add after the title of aggravated battery the language "of a senior citizen," and to change the citation to section 5/12-4.6 of the Code (720 ILCS 5/12-4.6 (West 2010)). To sustain defendant's conviction under this section the State was required to prove that defendant intentionally or knowingly caused "great bodily harm or permanent disability or disfigurement to an individual of 60 years of age or older[.]" 720 ILCS 5/12-4.6 (West 2010). As a result, the amended charge required the State to prove the exact same elements as were raised in the original charges against defendant. In light of the factors discussed above, we find defendant's jury waiver was valid. Accordingly, because there was no error there can be no plain error to excuse defendant's

forfeiture of this issue. *Piatkowski*, 225 Ill. 2d at 565.

¶ 25 Defendant maintains in his reply brief that the cases relied upon by the State are distinguishable because they do not involve amendments to the charges that increased the possible penalty upon conviction. In *Hernandez*, several months after the defendant waived his right to a jury trial, the State was allowed to amend the complaint to include obstruction of a peace officer charges, and the defendant was found guilty on those added charges. *Hernandez*, 409 Ill. App. 3d at 295-96. On appeal, the defendant argued that the obstruction charges were outside the scope of his jury waiver. *Hernandez*, 409 Ill. App. 3d at 296. The reviewing court held that the initial waiver did not constitute a waiver of the defendant's right to a jury trial on the added charges where, in its case, there was no suggestion that at the time of the waiver, the defendant was aware of, or intended his waiver to cover, any later-filed charges. *Hernandez*, 409 Ill. App. 3d at 297.

¶ 26 Here, by contrast, defendant executed a jury waiver on four counts of aggravated battery which included two counts specifying that defendant knew Rakowski was over the age of 60. The amendment, which added, "of a senior citizen," to the title of the aggravated battery count, was made immediately after the jury waiver was executed, and counsel, in defendant's presence, waived reexecution, specifically noting that he had no objection. Thus, unlike *Hernandez* and the cases cited therein, the circumstances described in this record permit us to rationally conclude that defendant acquiesced in counsel's representations to the court (*Frey*, 103 Ill. 2d at 332) and showed his intent to proceed with a bench trial as indicated in his jury waiver.

¶ 27 Defendant still claims that his mental problems, as disclosed in a letter from a medical doctor in an appendix to the brief, serve to discredit the State's claim that he was knowledgeable and would have appreciated the consequences of the situation. We note, however, that the document relied upon and attached to defendant's reply brief was not made part of the record and thus may not be considered on appeal. *People v. Gacho*, 122 Ill. 2d 221, 254-55 (1988).

¶ 28 The cases relied upon by defendant are also distinguishable and do not alter our conclusion that the waiver was valid. In *People v. Mixon*, 271 Ill. App. 3d 999, 1001-03 (1994), the reviewing court held that a jury waiver made prior to an initial trial no longer applies where a new trial is granted. Here, there was no new trial. Rather, the amendment to the indictment was made just prior to the start of trial, and defendant then raised no objection to proceeding with a bench trial after defense counsel waived reswearing and reexecution.

¶ 29 In *People v. Norris*, 62 Ill. App. 3d 228 (1978), error was found in the trial court's denial of the defendant's motion for a mistrial where the State presented testimony of a witness who was added after the defendant waived his right to a jury trial, thereby rendering his waiver unknowing and unintelligent. *Norris*, 62 Ill. App. 3d at 232-33. Here, unlike *Norris*, the amendment to I of the four counts to include the language "of a senior citizen" was not a material change in circumstances where two of the counts already identified the victim as a person over the age of 60 years.

¶ 30 In a related argument, defendant claims that trial counsel was ineffective for "not requir[ing] that the issue of jury waiver be renewed." This one-sentence claim, however, does not meet the minimum standards for argument under Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (*Department of Public Aid ex rel. Peavy v. Peavy*, 307 Ill. App. 3d 16, 23 (1999)), and results in waiver of the issue on appeal (*People v. Rockey*, 322 Ill. App. 3d 832, 839 (2001)). His forfeiture of this issue is not altered by the argument in his reply brief that "[i]t is ineffective assistance of counsel where counsel by himself makes a decision where it is solely the right of defendant to make that decision," and that counsel had no right to waive his right to a jury trial on the amended charge, which subjected him to a possible harsher sentence, and that his "due process right and right of choice to knowingly waive a jury was violated." Since defendant did not raise this argument in his opening brief, he has waived it for review. Ill. S. Ct. R.341(h)(7) (eff. July 1, 2008); *People v. Burney*, 2011 IL App (4th) 100343, ¶ 78.

¶ 31 Defendant next contends that "[t]here was not sufficient evidence to refute that [he] acted in self-defense." He further claims that the trial court's assertion "that [he] could not act in self-defense because after the attack by the aggressor the defendant could have fled is an erroneous assertion."

¶ 32 To establish self-defense, the defendant must show that: (1) unlawful force was threatened against him; (2) he believed the danger of harm was imminent; (3) he was not the aggressor; (4) the force used was necessary to avert the danger; and (5) his beliefs were reasonable. *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002). Once a defendant offers some evidence on each of these elements, the State must prove beyond a reasonable doubt that he did not act in self-defense. *Rodriguez*, 336 Ill. App. 3d at 15. The State may satisfy its burden, however, by negating any one of the elements of self-defense. *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995).

¶ 33 In this case, as the trial court noted, it is "unclear" from the record whether Rakowski slapped defendant. That said, we observe that the record does show that defendant punched Rakowski, who was 68 years old and holding a three-year-old child in his arms. The record also shows that Rakowski was smaller and lighter than defendant (*People v. Giovanetti*, 70 Ill. App. 3d 275, 286-87 (1979)), and was injured to the point where he needed eight stitches to close the injury to his face, leaving a scar. The fact that defendant was practically unscathed compared to Rakowski (*In re Jessica M.*, 399 Ill. App. 3d 730, 737-38 (2010); *People v. Grayson*, 321 Ill. App. 3d 397, 402 (2001)), and the circumstances in which the encounter took place support the trial court's conclusion that the force used by defendant was unnecessary to avert any aggression by Rakowski, thus refuting defendant's claim of self-defense.

¶ 34 In reaching this conclusion, we have considered *People v. White*, 265 Ill. App. 3d 642 (1994), cited by defendant for the proposition that a person who is not the initial aggressor need not retreat. In *White*, the defendant was convicted of first degree murder and unsuccessfully

alleged at trial that he had fired the gun in self-defense. On appeal, the defendant argued, *inter alia*, that his trial counsel was ineffective for failing to request an instruction that the person who is not the initial aggressor has no duty to retreat. *White*, 265 Ill. App. 3d at 650-51. The reviewing court observed that in Illinois, a person who is not the initial aggressor has no duty to retreat, but it ultimately concluded that counsel was not ineffective because the result of the trial would not have been different with such an instruction. *White*, 265 Ill. App. 3d at 651-52. The lack of a duty to retreat, however, was noted in the context where the defendant was allegedly placed in danger of his life or severe bodily injury. *White*, 265 Ill. App. 3d at 651-52.

¶ 35 Here, unlike *White*, defendant was not placed in danger of his life or severe bodily injury from Rakowski, who allegedly slapped or scratched him or tugged at his collar. This aside, even if Rakowski were the initial aggressor, the severity of his injuries demonstrated that defendant's response was wholly out of proportion to that necessary to defend himself from Rakowski. See *People v. Nunn*, 184 Ill. App. 3d 253, 269-70 (1989). Accordingly, the evidence supports the court's conclusion that defendant did not act in self-defense. *Jeffries*, 164 Ill. 2d at 128.

¶ 36 Finally, we note that defendant has filed a motion for leave to file an amended reply brief *instanter*, claiming that after he filed his reply brief, a relevant case, *People v. Jasoni*, 2012 IL App (2d) 110217, was filed. He maintains that *Jasoni* "is very relevant to whether [he] knew the victim was a senior citizen, an issue in this case." In the amended reply brief, defendant alleges for the first time that "[t]here is insufficient evidence that [he] committed a battery of a senior citizen." Defendant then quotes *Jasoni*, 2012 IL App (2d) 110217, ¶¶ 16, 18, which held that the 2006 amended aggravated battery statute (Pub. Act 94-327, § 5 (eff. Jan. 1, 2006)) requires the State to prove that the defendant had knowledge that the victim was 60 years of age or older. After setting forth the quoted material from *Jasoni*, defendant simply states, "[t]he decision in [*Jasoni*] surely must guide the [appellate] Court in this case and should be considered."

¶ 37 This conclusory and cursory argument lacks any legal analysis and fails to provide an

explanation as to how *Jasoni* applies to this case. *Rockey*, 322 Ill. App. 3d at 839. Arguing an issue in such a conclusory fashion and failing to adequately brief the issue waives it for review. *Rockey*, 322 Ill. App. 3d at 839. Furthermore, the statute at issue was amended in 2006, and defendant could have raised the issue in his opening brief. Therefore, we deny defendant leave to file the amended reply brief *(People v. Pertz*, 242 Ill. App. 3d 864, 914 (1993)), and affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed.