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2012 IL App (3d) 100944-UB

Order filed July 19, 2012.

Modified Upon Denial of Rehearing August 14, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 14th Judicial Circuit,
	) Rock Island County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-10-0944
v.	) Circuit No. 09-CF-1058
	)
C.T. BUCKLEY III,	) Honorable
	) F. Michael Meersman,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held:* (1) There was sufficient evidence in the record to support a finding of great bodily harm. (2) Defendant's multiple convictions for aggravated battery do not violate the one-act, one-crime doctrine. (3) The order requiring defendant to submit a DNA sample and pay a $200 DNA analysis fee should be vacated because defendant had a DNA sample on file at the time of sentencing.

¶ 2 Following a bench trial, defendant, C.T. Buckley III, was convicted of two counts of

aggravated battery (720 ILCS 5/12-4(b)(8), (b)(10) (West 2008)) and one count of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(1) (West 2008)). Defendant was sentenced to 5 years' imprisonment for each aggravated battery count and 15 years' imprisonment for aggravated vehicular hijacking, with all sentences to be served concurrently. Defendant appeals, arguing that: (1) the trial court erred when it ordered him to serve 85% of his sentence for vehicular hijacking where the court failed to make an explicit finding of great bodily harm; (2) his convictions for two counts of aggravated battery violated the one-act, one-crime doctrine; and (3) the sentencing order requiring him to submit a deoxyribonucleic acid (DNA) sample and pay a $200 analysis fee should be vacated. We affirm in part and vacate in part.

¶ 3 FACTS

¶ 4 Defendant was charged by information with two counts of aggravated battery and one count of aggravated vehicular hijacking. Count I alleged that defendant, in committing a battery, knowingly made physical contact of a provoking nature with Geraldine Swift, in that he pushed and shoved Swift into the passenger seat of her vehicle and grabbed her by the neck, knowing Swift to be 60 years of age or older. 720 ILCS 5/12-4(b)(10) (West 2008). Count II alleged that defendant, in committing a battery against Swift while she was on a public way, knowingly made physical contact of a provoking nature, in that he pushed and shoved Swift into the passenger seat of her vehicle. 720 ILCS 5/12-4(b)(8) (West 2008). Count III alleged that defendant took a motor vehicle from Swift by use of force, and Swift was a person 60 years of age or older. 720 ILCS 5/18-4(a)(1) (West 2008).

¶ 5 At the bench trial, the evidence indicated that on November 29, 2009, Swift, who was 77 years of age, went to Walgreens to go shopping. When Swift returned to her vehicle in the

parking lot, defendant approached her and asked if she needed help. Swift said "no," and she entered her vehicle. As Swift started to back out of her parking space, defendant stood at the rear of her vehicle, blocking it from moving. When Swift rolled down her window, defendant rushed over, took her keys, and forced his way into the vehicle. Defendant picked up Swift from the driver's seat and threw her into the front passenger seat. Swift started screaming, and defendant put his hands around her neck and started to choke her. Defendant also put his hands over her mouth and nose, and Swift was unable to breathe until defendant released his hands.

¶ 6 Swift struggled with defendant and tried to open the passenger door, but defendant prevented her from doing so. Defendant tried to force Swift into the backseat, but she braced herself against the front seat. Defendant then threw Swift down near the floor of the passenger seat, where she was trapped and unable to get herself out. Swift was facing the rear of the vehicle with her head underneath the glove compartment and her legs wedged between the seats. Swift started to cry, and defendant told her that he did not want to hurt her, but would if he had to. Defendant subsequently drove out of the Walgreens' parking lot.

¶ 7 James Bleuer, a witness to the incident, was driving his truck when he noticed Swift's vehicle in front of him driving slowly and weaving erratically. Bleuer drove next to the vehicle and observed defendant driving and Swift on the floor near the passenger seat. Bleuer saw Swift's vehicle speed up and turn down a street. Bleuer eventually stopped his vehicle in front of Swift's vehicle in an alley. Defendant exited the vehicle and gave Swift her keys. Bleuer asked defendant what was going on, and defendant told him he was trying to help out his crazy neighbor. Bleuer told defendant he did not believe him, and defendant ran off. Bleuer helped Swift free herself from the vehicle. Afterward, Swift drove home to lie down. Swift waited until

the next morning to call the police because she was afraid, sore, and feared that the trauma from the incident would cause a heart attack or stroke if she did not calm down.

¶ 8 Swift testified that as a result of the incident, she sustained bruising on her knees, thighs, heels, and feet. Photographs of the bruises, taken a few days after the incident, were admitted into evidence. A surveillance video from the Walgreens' parking lot was also played in court. The video depicted a black male approach Swift's vehicle and eventually get into it. It also showed the man put his hands on the woman's neck, and twice the passenger door opened and the man pulled it shut before driving away.

¶ 9 Defendant testified that on the day of the incident he went to Walgreens to pick up his medication because he suffered from seizures. While at Walgreens, defendant mistook Swift for Barbara Scoville, a woman he had previously lived with for eight years. Defendant approached this woman's vehicle to ask her for a ride to the fire station because he was starting to have a seizure. Defendant testified that the woman told him okay, but when he got into the driver's seat, the woman told him she was not Scoville and that he could not drive her car. Defendant subsequently drove Swift's vehicle and parked it near the fire station. Swift again told defendant that she was not Scoville. At this point, defendant realized he was not with Scoville, and he gave the keys to Swift and left.

¶ 10 After reviewing the evidence in the case, the trial court found defendant guilty on all three counts. In sentencing defendant, the trial judge indicated that Swift was "lucky she didn't get seriously hurt" when defendant threw Swift, a 77-year-old woman, from the driver's seat into the passenger seat and then onto the floor. Defendant was then ordered to serve 85% of his sentence for aggravated vehicular hijacking. Defendant was also ordered to submit a DNA sample and

pay a $200 analysis fee.

¶ 11 Defendant filed a motion to reconsider his sentence, alleging that the trial court did not properly consider factors in mitigation and that his sentence was excessive. The trial court denied defendant's motion. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 I. Great Bodily Harm

¶ 14 Defendant first argues that the trial court erred when it ordered him to serve 85% of his sentence for vehicular hijacking where the court failed to make an explicit finding of great bodily harm pursuant to section 5-4-1(c-1) of the Unified Code of Corrections. 730 ILCS 5/5-4-1(c-1) (West 2008).

¶ 15 A defendant convicted of aggravated vehicular hijacking must serve at least 85% of his sentence, if the trial judge finds that the conduct leading to the conviction resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2008); *People v. Salley*, 373 Ill. App. 3d 106 (2007). When making a finding as to great bodily harm, the trial judge "shall enter that finding and the basis for that finding in the record." 730 ILCS 5/5-4-1(c-1) (West 2008).

¶ 16 Whether the victim's injuries rise to the level of great bodily harm is a question of fact. *People v. Lopez-Bonilla*, 2011 IL App (2d) 100688. While our supreme court has not articulated a specific burden of proof at sentencing, the burden of proof at sentencing is lower than at the guilt phase of trial. *Id*. Thus, as long as the evidence was sufficient to support a finding of great bodily harm, the trial court's determination will be affirmed. *Id*.

¶ 17 In this case, although the trial court did not make an explicit finding of great bodily harm, we may nevertheless affirm the trial court's ruling upon any basis that is supported by the record.

See *People v. Chambers*, 2011 IL App (3d) 090949. Even though the trial judge indicated that Swift was "lucky she didn't get seriously hurt," based on our review of the record, we find that there was sufficient evidence to support a finding of great bodily harm to Swift. The State presented testimony and photographs regarding Swift's bruises and a surveillance video depicting the physical violence on Swift. Swift was thrown from the driver's seat of her vehicle into the passenger seat. Swift was subsequently choked by defendant and was unable to breathe. Swift was then shoved near the floor of the passenger seat. Additionally, although there was no evidence presented that Swift sought medical treatment for her injuries, we must focus on the injuries that Swift did receive and not what she did to treat them. See *Lopez-Bonilla*, 2011 IL App (2d) 100688. Based on the specific evidence regarding defendant attacking Swift and her resulting injuries, it was reasonable for the court to conclude that great bodily harm occurred. *Id.*

¶ 18 II. One-Act, One-Crime

¶ 19 Defendant next argues that his convictions for two counts of aggravated battery were in violation of the one-act, one-crime doctrine because both counts were based on the same physical act of pushing and shoving Swift.

¶ 20 The defendant concedes that he did not raise this issue before the trial court, but requests that we review the issue for plain error. Under the plain error rule, a reviewing court may consider errors when either: (1) the evidence is closely balanced; or (2) the error is so serious that the defendant was denied a substantial right. *People v. Herron,* 215 Ill. 2d 167 (2005). Our supreme court has held that a violation of the one-act, one-crime rule results in a surplus conviction and sentence and affects the integrity of the judicial process, and thus satisfies the second prong of the plain error doctrine. *People v. Nunez*, 236 Ill. 2d 488 (2010). Therefore, we

will consider whether any of defendant's multiple convictions must be vacated under the one-act, one-crime doctrine.

¶ 21 To determine whether the one-act, one-crime doctrine has been violated, we must first look at whether multiple convictions were based on the same physical act, and second, if the conduct involved multiple acts, whether one of the offenses is a lesser included offense of the other. *People v. Miller*, 238 Ill. 2d 161 (2010). We review this issue *de novo*. *Nunez*, 236 Ill. 2d 488. We limit our analysis to the first step of the one-act, one-crime doctrine, as neither party raised a lesser-included offense argument.

¶ 22 Multiple convictions and concurrent sentences are permissible where a defendant commits several acts, even if interrelated. *People v. King*, 66 Ill. 2d 551 (1977). An "act" is defined as "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566. For the State to properly obtain multiple convictions for closely related acts, the State must provide defendant notice of its intent to treat the conduct as separate acts by apportioning the acts to the offenses in the charging instrument and at trial. *People v. Crespo*, 203 Ill. 2d 335 (2001).

¶ 23 In this case, the State charged defendant with two counts of aggravated battery. A review of the information in this case reveals that although both counts alleged that defendant pushed and shoved Swift, count I charged defendant with the additional act of grabbing Swift's neck. As such, the State was not trying to portray defendant's actions as a single course of conduct, but instead differentiated between the two acts. See *Crespo*, 203 Ill. 2d 335.

¶ 24 In addition, at trial, the State presented evidence about each individual act, thereby further differentiating between defendant pushing Swift into the passenger seat and subsequently

choking her. We must also note that this was a bench trial, and the trial court would have understood the need to allocate defendant's separate acts to the two separate charges for aggravated battery. See *People v. Span*, 2011 IL App (1st) 083037. Thus, because the State treated defendant's conduct as two separate acts, multiple convictions were proper. See *Crespo*, 203 Ill. 2d 335.

¶ 25 III. DNA Analysis

¶ 26 Finally, defendant argues that the sentencing order requiring him to submit a DNA sample and pay a $200 analysis fee should be vacated because he had a DNA sample on file at the time of sentencing. The State concedes.

¶ 27 Any individual convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, is required to submit to the taking, analysis, and indexing of the offender's DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2008). However, a defendant is only required to submit and pay for a DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Furthermore, even if a defendant did not raise this issue in a postsentencing motion, it is not subject to forfeiture because a sentence that does not conform to a statutory requirement is void and may be corrected at any time. *Id.*

¶ 28 In the present case, the presentence investigation report indicated that defendant had been convicted of several felonies since 1998. Therefore, we can presume that the trial court ordered defendant to submit his DNA to be analyzed and registered in the database. See *People v. Leach*, 2011 IL App (1st) 090339 (appellate court presumes from evidence of defendant's prior felony conviction, after the DNA analysis statute became effective, that the trial court imposed the

requirements of the statute as part of defendant's sentencing). Accordingly, we vacate the portion of the trial court's sentencing order that directed defendant to undergo and pay for a second DNA analysis.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we vacate the order requiring defendant to undergo and pay for DNA analysis, and the judgment of the circuit court of Rock Island County is otherwise affirmed.

¶ 31 Affirmed in part and vacated in part.

32. JUSTICE HOLDRIDGE, specially concurring:

33. I write separately to point out that the convictions for two counts of aggravated battery were appropriate without reference to either prong of the so-called plain error doctrine. The first step in plain error analysis is to determine whether an error has occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). If there is no error at all, we need not reach the question of reversible error. *Id.* In other words, if there is no error at all, there can be no reversible error. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006).

34. Here, as the majority points out, there was no error at all. Multiple convictions were permissible since the State treated the defendant's conduct as two separate acts, pushing Swift into passenger seat and subsequently chocking her. Since there was no error, there could be no reversible error and, thus, no need to determine whether either prong of the plain error doctrine was at issue.