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2012 IL App (3d) 110101-U

Order filed January 19, 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 21st Judicial Circuit,
	) Kankakee County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-11-0101
v.	) Circuit No. 09-CM-1808
	)
DAVID AARON NEBLOCK,	) Honorable
	) Ronald J. Gerts,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE MCDADE delivered the judgment of the court.
Justices Lytton and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's waiver of a jury trial was valid where defendant was present when his counsel informed the court that defendant waived his right to a jury and defendant signed a written waiver. The State proved defendant guilty of battery beyond a reasonable doubt. Defendant was not denied effective assistance of counsel.

¶ 2 Following a bench trial, defendant, David Aaron Neblock, was found guilty of battery (720 ILCS 5/12-3(a)(1) (West 2008)). Defendant was sentenced to 10 weekends in the county jail and fined $1,000. Defendant appeals, arguing that: (1) the record failed to establish that he understandingly waived his right to a trial by jury; (2) the State failed to prove him guilty beyond

a reasonable doubt; and (3) he was denied effective assistance of counsel. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information with battery in that on December 4, 2009, he allegedly, without legal justification, knowingly caused bodily harm to Michelle Wrye by striking her about the face with his hands. At a status hearing on April 13, 2010, defendant's attorney indicated to the court that defendant wished to waive his right to a jury. The trial court stated "[a]ll right" and called the case by name and case number. The court then stated:

> "There you are. Can we have the other–could you–[bailiff], could you get [the State's attorney]?"

¶ 5 Defendant's attorney stated, "sign here." Discussions were then held off the record. After returning on the record, the trial court indicated that the case would be set for a bench trial. The record contains a jury waiver form signed by defendant the same day.

¶ 6 At defendant's bench trial, Wrye testified that on December 4, 2009, she had been at the Legacy bar in Bradley, Illinois. At 2 a.m., Wrye was in the bar parking lot sitting in the passenger seat of her friend's vehicle. Wrye's boyfriend, Kyle Lergner, was sitting in the backseat. Wrye testified that defendant approached the passenger's side door, opened the door, and pulled Wrye out of the car by her arm. Wrye fell to the ground. Wrye testified that she knew that she "got swung at" and that Lergner got out of the car and engaged in a physical altercation with defendant.

¶ 7 Wrye testified that right after the incident she gave a statement to police indicating that a male suddenly pulled her out of the car and punched her in the face and chin. In her statement, Wrye indicated that she did not know the male who hit her. Wrye testified that in her statement

she was referring to defendant and meant that he was a stranger to her.

¶ 8 She also testified that she did not recall being hit. The following colloquy took place between Wrye and the trial court:

> "Q. Ma'am, were you hit in the face or not?
>
> A. Not that I recall.
>
> Q. The person who pulled you out of the car, is that the same person who started fighting with the man named [Lergner]?
>
> A. Yes."

¶ 9 Wrye indicated that she identified the person who pulled her out of the vehicle to Officer Marlene Rittmanic. Wrye testified that defendant was in the back of a police car when Rittmanic asked her if that was "the right guy" and she responded "yes." The trial court asked Wrye if she remembered specifically what Rittmanic had asked her when it came to identifying defendant. Wrye indicated that she believed that "the officer asked me to verify that that was him in the back of the police car that pulled me out of the car," and she told Rittmanic, "yes, that was him." Wrye testified that she had drunk three or four beers in the 2½ hours prior to the incident.

¶ 10 Officer Willie Berry testified that when he arrived on scene, he broke up a fight between defendant and Lergner. Berry noticed that defendant's speech was heavily slurred and defendant appeared to be extremely intoxicated in that he had difficulty standing and walking. Rittmanic testified that when she arrived on the scene she spoke with Wrye, who was upset, crying, and speaking loudly. Wrye told Rittmanic that she was pulled out of the car and hit in the face, chin, and leg by a male that she did not know. Rittmanic observed a mark on Wrye's leg. Rittmanic did not notice any odor of alcohol coming from Wrye.

¶ 11 Lergner testified that when he and Wrye left the bar, Wrye's speech was extremely slurred and she could not walk by herself. According to Lergner, Wrye had four or five shots of Jagermeister, and the bartender had cut her off. Lergner testified that he had two or three beers. Lergner testified that in the parking lot a person dragged Wrye out of the car and Lergner went after him. According to Lergner, someone named Aaron tried to break up the fight, and Lergner "got the wrong guy" when he hit Aaron. Lergner identified "Aaron" as defendant. Lergner and Wrye broke up on the night of the incident and had not spoken since.

¶ 12 The trial court found defendant guilty. Defendant appealed.

¶ 13 ANALYSIS

¶ 14 I. Jury Waiver

¶ 15 On appeal, defendant contends that this court should remand this case for a new trial because the record fails to show that he understandingly waived his right to jury trial in open court. Defendant acknowledges that he has raised this issue for the first time on appeal. Usually, errors not objected to during trial or raised in a posttrial motion are considered waived for appellate review. *People v. Enoch*, 122 Ill. 2d 176 (1988). However, under Supreme Court Rule 615(a), a reviewing court may review plain error or defects affecting substantial rights, even if those errors were not identified during trial or presented in a posttrial motion. 134 Ill. 2d R. 615(a). The plain error doctrine allows the reviewing court to consider unpreserved errors when either: (1) the evidence was closely balanced, regardless of the seriousness of the error; or (2) the error was serious, regardless of whether the evidence was closely balanced. *People v. Herron*, 215 Ill. 2d 167 (2005). Because a criminal defendant's right to a trial by jury is fundamental, the issue of whether a defendant knowingly waived that right is reviewed under the

second prong of the plain error rule. See *People v. Turner*, 375 Ill. App. 3d 1101 (2007).

¶ 16 Whether a defendant knowingly and understandingly waived his right to a jury trial is a question of law, and our review is *de novo*. *In re R.A.B.*, 197 Ill. 2d 358 (2001). A defendant validly waives the right to a jury trial only if he does so understandingly and in open court. 725 ILCS 5/103-6 (West 2010). Whether a defendant understandingly waived his rights to a trial by jury depends on the facts and circumstances of each case. *Turner*, 375 Ill. App. 3d 1101. A defendant is bound by a jury waiver made by defense counsel in defendant's presence without objection by defendant. *Id.* The presence of a written waiver supports a finding of a knowing waiver when accompanied by defense counsel's request for a bench trial in open court. *Id.*

¶ 17 We acknowledge that it is unclear from the record who had entered the courtroom when the trial court said, "There you are," following defense counsel's statement that defendant wished to waive his right to trial by jury. However, it appears that the trial court was speaking to the bailiff, defendant had been in the courtroom, and defendant made no objection when his counsel waived his right to a jury trial. Defendant has tendered no evidence to rebut that appearance and was thus bound by the jury waiver made by his defense counsel. Defendant's written waiver in addition to his defense counsel's request for a bench trial in open court further supports a finding of a knowing waiver.

¶ 18 In his appellate brief, defendant suggests that the record could be read as though he had walked into the courtroom after his defense counsel informed the court of his jury waiver, which would indicate that he was not present when the waiver was made. Where a defendant claims that he did not knowingly waive his right to a jury trial in open court, the record should be sufficient to cover all proceedings involving the waiver. *People v. Hart*, 371 Ill. App. 3d 470

(2007). Deprived of an adequate record, the reviewing court must assume that the indications in the record of a jury waiver are based on a valid waiver. *Id.* Here, defendant's contention raises a question about the adequacy of the record in determining whether defendant was present during defense counsel's jury waiver. Nonetheless, we must assume that the other indications in the record of a jury waiver, such as the docket entry and the written waiver, are based on a valid waiver.

¶ 19 II. Guilt Beyond a Reasonable Doubt

¶ 20 Defendant argues that the evidence was not sufficient to prove him guilty beyond a reasonable doubt. In a challenge to the sufficiency of the evidence, the court will view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Turner*, 375 Ill. App. 3d 1101. All reasonable inferences are to be made in favor of the prosecution. *People v. Russell*, 409 Ill. App. 3d 379 (2011). The trier of fact can make reasonable inferences and is not required to prove "each link in the chain of circumstances" beyond a reasonable doubt. *Turner*, 375 Ill. App. 3d 1101, 1103 (quoting *People v. Campbell*, 146 Ill. 2d 363, 380 (1992)). A reviewing court will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532 (1999).

¶ 21 To prove its charge of battery in this case, the State was required to prove that defendant knowingly, and without justification, caused bodily harm to Wrye. 720 ILCS 5/12-3(a)(1) (West 2008). While it is difficult to pinpoint what constitutes bodily harm under the statute, "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions" is required.

People v. Mays, 91 Ill. 2d 251, 256 (1982). However, direct evidence of the injury is not required, and the trier of fact may infer injury based upon circumstantial evidence in light of common experience. *People v. Durham*, 312 Ill. App. 3d 413 (2000).

¶ 22 In this case, the evidence viewed in the light most favorable to the prosecution showed that on December 4, 2009, defendant pulled Wrye from the car and she fell to the ground. He then struck her in the face, chin, and leg, which resulted in a mark to her leg. It can be inferred that Wrye suffered pain when she was dragged out of the car and fell to the ground or when she was struck in the face, chin, or leg. Consequently, the evidence was sufficient to prove beyond a reasonable doubt that defendant, without justification, caused bodily harm to Wrye.

¶ 23 In this case, defendant asserts that the identification process the police used when asking Wrye whether defendant was the "right guy" was improper. Defendant did not raise this issue at trial or in a posttrial motion. Therefore, the issue has been forfeited on appeal. See *People v. Allen*, 222 Ill. 2d 340 (2006) (providing that it is well established that in order to properly preserve an issue for appellate review, a defendant must object at trial and raise the issue in a posttrial motion). Defendant has not asked for plain error review of the forfeited issue.

¶ 24 Furthermore, even if the identification were improper, the evidence shows that the person who committed the battery to Wrye was the same person who fought with Lergner, and Lergner was fighting with defendant when police arrived. Thus, even without Wrye's identification of defendant, there was sufficient evidence in the record to identify defendant as the person who committed the battery to Wrye.

¶ 25 III. Effective Assistance of Counsel

¶ 26 Next, defendant argues he was denied effective assistance of counsel because his counsel

failed to file a motion to suppress Wrye's identification of him at the scene of the incident when he was in the back of a squad car. To prevail on an ineffective assistance claim, a party must show both that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted; and (2) the outcome of the trial would have been different had the evidence been suppressed. *People v. Bew*, 228 Ill. 2d 122 (2008).

¶ 27 Here, the outcome of the trial would not have been different even if Wrye's identification of defendant in the back of the squad car had been suppressed. As stated above, the evidence showed that Lergner got out of the car and fought with the person who had committed the battery to Wrye, and when police arrived Lergner was fighting with defendant. Therefore, even without Wrye's specific identification of defendant in the back of the squad car, the evidence was sufficient for the trial court to find that defendant committed the battery to Wrye. Therefore, defendant was not prejudiced by trial counsel's failure to file a motion to suppress, and his argument that his trial counsel provided ineffective assistance is without merit.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 30 Affirmed.