

No. 1-12-2010

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THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 10 CR 11490
)	
ANDY CUNNINGHAM,)	Honorable
)	Nicholas Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly admitted the preliminary hearing testimony of a deceased witness. Trial counsel was not ineffective. Defendant's convictions for aggravated battery must be vacated.
- ¶ 2 Defendant Andy Cunningham was convicted of one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(A)(1) (West 2010)) and two counts of aggravated battery (720 ILCS 5/12-4(A) (West 2010)) following a bench trial. He was sentenced to three 8-year terms of imprisonment to run concurrently. Defendant now appeals and argues: (1) the court improperly admitted the preliminary hearing testimony of a deceased eyewitness; (2) defense counsel

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provided ineffective assistance when he withdrew his motion to admit evidence of the victim's prior convictions; and (3) his convictions for aggravated battery must be vacated under the one-act, one-crime rule. For the following reasons, we affirm the judgment of the trial court but vacate defendant's convictions for aggravated battery.

¶ 3

BACKGROUND

¶ 4 Defendant was charged by indictment with five counts of attempted murder, two counts of aggravated battery, and one count of aggravated battery with a firearm for shooting and injuring his roommate Clarence Fambro. After a bench trial, defendant was found guilty of one count of aggravated battery with a firearm and two counts of aggravated battery, and was sentenced to concurrent terms of eight years in prison.

¶ 5 Prior to trial, on January 31, 2012, the State informed the court that Fambro had died due to causes unrelated to the present case. Defendant filed a motion *in limine* to bar the admission of Fambro's preliminary hearing testimony. The state moved to admit Fambro's testimony from the preliminary hearing because he was unavailable to testify at trial and there had been adequate opportunity to cross-examine the victim during the preliminary hearing. Defense counsel objected, asserting that it had not had a chance to fully cross-examine Fambro. Specifically, defense counsel argued that discovery had not yet been completed; he did not have access to all of the medical records, and was unaware of Fambro's prior convictions for domestic battery. Additionally, defense counsel asserted he did not have an opportunity to question Fambro as to whether he was under the influence of alcohol at the time of the altercation.

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¶ 6 The court allowed the State's motion to admit Fambro's testimony from the preliminary hearing. In its ruling, the court stated that the cross-examination at the preliminary hearing was "adequate to the task of defending defendant's right to full cross-examination and not to be violated with the constitution." The court also noted that "motive, bias, and interest were adequately addressed."

¶ 7 At trial, James Vandalah testified that, on June 12, 2010, he was living with Clarence Fambro and in a five bedroom apartment at 5126 S. Michigan. On that day, defendant and Fambro were in the kitchen arguing about the radio. Vandalah stated he went back to his room, and subsequently heard "something that sounded like tussling." Vandalah testified that he then heard Fambro walking back towards his room and then heard fighting, bumping against walls, and stomping on the floor. Vandalah stated that Fambro entered his room with a three-foot stick in his hand. Fambro left the stick in Vandalah's room and went back out to talk to defendant. Vandalah testified he then heard a gunshot, and Fambro came back into his room and was bleeding near his chest. At this point, Vandalah called the police.

¶ 8 The court admitted Fambro's preliminary hearing testimony. At the preliminary hearing, Fambro testified that, on June 12, 2010, he saw defendant in the kitchen area at approximately 9 a.m. Defendant asked Fambro why he had been talking about him, and Fambro stated he responded by asking defendant why defendant had been talking about him. The argument escalated, and Fambro stated that the men "lip-exchanged" and then he went back to his room. Defense counsel asked Fambro what he meant when he stated that he and defendant exchanged

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words. The State objected to this, but it was overruled. Fambro answered that defendant confronted him asking why he was talking about him.

¶ 9 At this point, Fambro testified that defendant followed him and continued to call him names. Fambro stated he “lost it.” He told defendant he was not going to “take it” anymore and told defendant to stop talking to him. Defendant went back to his room. Fambro closed his door, leaving it cracked open. Defendant yelled through Fambro’s door and called Fambro names. Defense counsel asked Fambro if he said anything to defendant from inside of his room as defendant was yelling at him. The State’s objection was overruled. Fambro stated that he told defendant to get away from his room. Fambro came out of his room and asked defendant to stop talking to him. Subsequently, defendant came back with an “axe handle or baseball bat or something” and hit Fambro in the arm.

¶ 10 Fambro testified that he took the wooden stick from defendant and hit defendant a couple of times. Fambro stated that he did not remember where he hit defendant. Afterwards, Fambro ran into Vandalah’s room with the stick, closed the door, and told Vandalah to call the police. Fambro then exited the room and told defendant that the police were coming. Subsequently, Fambro testified that defendant pulled out a gun. Defendant raised his right hand from his leg to approximately his waist area and pointed the gun at Fambro. Defendant shot Fambro one time causing a collapsed lung and two broken ribs. Defense counsel asked Fambro if he had raised his voice or made any threats to defendants but the court sustained the State’s objections. Additionally, defense counsel asked Fambro if defendant blocked any of the exits to the building.

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Fambro stated that defendant did not block any of the exits. Fambro was also asked if he had ever tried to leave the building and he denied that he never tried to leave the building.

¶ 11 Officer Colleen Carcione and several other officers responded to the call of a man being shot. After going upstairs to the apartment, the officers went to the backyard and arrested defendant who had a cut on his forehead. The police recovered a gun containing four live rounds and one cartridge case. Both Fambro and defendant were taken to the hospital.

¶ 12 The parties stipulated that Dr. Thomas from Christ Hospital treated Fambro and that he sustained a punctured lung and damaged rib. There was a bullet entrance wound in his chest and an exit wound in his back.

¶ 13 After the State rested, defense counsel moved for a directed finding. The court ruled that there would be a finding of not guilty as to the charge of attempted murder and ordered the case to proceed on the aggravated battery counts. The defense rested without presenting any evidence. Prior to trial defense counsel had filed a motion to admit evidence of Fambro's prior convictions and arrests for domestic battery, which had occurred between 1999 and 2000, but withdrew that motion prior to trial. Counsel asserted that both Fambro and his wife were now deceased and would therefore be unable to testify concerning the prior incidents of domestic battery by Fambro.

¶ 14 In finding defendant guilty of aggravated battery with a firearm and two counts of aggravated battery, the court noted that this was a situation involving a lot of tension, which "erupted" with defendant assaulting the victim. The court determined that defendant was the

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initial aggressor. The court sentenced defendant to eight years' imprisonment on the three counts, and indicated that because the counts merged, the sentences would run concurrently.

¶ 15

ANALYSIS

¶ 16 Defendant argues that trial counsel was ineffective for withdrawing his motion to admit evidence of Fambro's prior convictions to show his violent and aggressive nature.

¶ 17 To succeed in his claim of ineffective assistance of counsel, defendant must show (1) counsel's performance was deficient and (2) this deficient performance prejudiced the defense. *Strickland v. Washington*, 104 S. Ct. 2052 (1984). Prejudice is established when defendant demonstrates that there is a reasonable probability, but for counsel's unprofessional errors, that the result of the proceeding would have been different. *Id.* If counsel's performance is not found to be prejudicial to the defense, then counsel's performance does not rise to the level of ineffective assistance of counsel. *Id.* In addition to the above two-pronged test, defendant must overcome the presumption that the challenged actions of trial counsel might be considered "sound trial strategy." *Id.*

¶ 18 On May 14, 2012, prior to trial, counsel filed a motion to admit Fambro's prior violent acts pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). In the motion, counsel averred that according to a 2000 Cook County police report, Fambro had two prior convictions for domestic battery and a conviction for violating an order of protection. The motion also alleged that on a prior occasion, Fambro had been arrested for threatening his wife and daughter. There was no ruling on the motion. On June 6, 2012, the day that trial began, counsel withdrew his motion to introduce prior convictions and arrests of Fambro before the court ruled on it, asserting that both

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Fambro and his wife were deceased and would therefore be unable to testify. Defendant claims defense counsel misapprehended the law and that, in withdrawing its motion, counsel provided ineffective assistance because the motion would have led to the admission of evidence of Fambro's prior convictions to show his violent and aggressive nature. Defendant claims that the evidence of the prior convictions was crucial to establishing that defendant was justified in his use of force.

¶ 19 In *Lynch*, our supreme court held that when a defendant raises self-defense as a theory in his case, evidence showing the victim's aggressive and violent character is relevant to show: (1) the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior, or (2) to support the defendant's version of the facts when there are conflicting versions of events. *Id.* at 200. "Under the first approach, evidence is relevant only if the defendant knew of the victim's violent acts. Under the second approach, the defendant's knowledge is irrelevant." *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005).

¶ 20 Defendant is not contending that Fambro's prior convictions for domestic battery were relevant to show his knowledge of Fambro's aggressive and violent character which affected his perceptions and reactions to Fambro's behavior. Rather, defendant is claiming that Fambro's prior convictions were relevant to support his version of the facts where there were conflicting versions of the events. We reject this argument because there is no evidence of conflicting facts, nor did defendant provide any evidence of his version of the facts that would tend to establish he acted in self-defense.

¶ 21 The prosecution evidence in this case establishes that defendant was the initial aggressor.

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Fambro stated that he and defendant argued and defendant hit him in the arm with a stick.

Fambro took the stick and hit defendant with it a few times before he ran into Vandalah's room and closed the door and told Vandalah to call the police. When he exited Vandalah's room, defendant pulled out a gun and shot him. Vandalah testified that he went back to his room after Fambro and defendant began arguing about the radio. He heard "tussling", fighting, bumping and stomping but did not actually see anything until Fambro entered his room with a stick.

Vandalah testified that Fambro left the stick in his room and went back out to talk to defendant.

Vandalah heard a gunshot and then Fambro came back into his room, bleeding from his chest.

Defendant did not testify and did not present any witnesses. In short, defendant's argument that conflicting facts and his version of the incident support a claim of self-defense is not based upon the record or the evidence before the trial court. Defendant's argument is grounded on speculation, conjecture and defense counsel's vigorous argument about what might have occurred not what did occur as established by the evidence at trial.

¶ 22 *Lynch* establishes that the introduction of *Lynch* evidence is not proper until a defendant introduces evidence of self-defense. *Lynch*, 104 Ill. 2d at 104; see also *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005) (“a defendant may not introduce evidence of the victim's character until some evidence has been presented that the victim was, or appeared to be, the assailant, and that the defendant therefore acted in self-defense.”) The reason for the rule is to ensure that such character evidence is not admitted unless self-defense is at issue in the case. *People v. Allen*, (1972), 50 Ill.2d 280, 284 (1972).

¶ 23 Simply put, in this case, defendant did not introduce any evidence of self-defense. In

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order for a claim of self-defense to be proper, “a defendant must establish some evidence of each of the following elements: (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable.” *People v. Jefferies*, 164 Ill. 2d 104, 127–28 (1995). Defendant did not testify and presented no witnesses. Therefore, the fact that counsel withdrew the motion to admit evidence of Fambro's prior convictions was irrelevant where the convictions could not be properly admitted under *Lynch* without defendant presenting some evidence that he acted in self-defense. As such, defendant suffered no prejudice as a result of counsel's actions.

¶ 24 Defendant next claims that use of Fambro’s testimony from the preliminary hearing at trial denied him his constitutional right to confrontation because he never had a meaningful opportunity to cross-examine Fambro.

¶ 25 The State suggests we review a trial court's admission of former testimony for abuse of discretion. *People v. Sutherland*, 223 Ill. 2d 187, 272-73 (2006). Defendant agrees that a trial court's ruling on the admission of former testimony has been reviewed for abuse of discretion (*Id.*) but argues that in cases like this one, where no facts are in dispute, this court can review the error *de novo* (*People v. Downs*, 371 Ill. App. 3d 11887, 1188 (2007)). Recently, in *People v. Torres*, 2012 IL 111302, our supreme court dealt with the issue of adequate cross-examination under the confrontation clause and applied the abuse of discretion standard. See also *People v.*

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Lard, 2013 IL App (1st) 110836. We apply the same standard here, but note that under either standard, the result would be the same.

¶ 26 Both the Confrontation Clause of the Sixth Amendment and the Code of Criminal Procedure (Code) Illinois statute require an opportunity for cross-examination. In determining whether to allow prior testimony of a deceased witness, section 115-10.4 of the Code (725 ILCS 5/115-10.4 (West 2010)) requires courts to consider the following factors with respect to the prior testimony: (1) materiality; (2) probative value; (3) trustworthiness; (4) interests of justice; and (5) the prior opportunity for cross-examination. *People v. Melchor*, 376 Ill. App. 3d 444, 450 (2007). Defendant's argument here focuses solely on the prior opportunity for cross-examination, which is also a constitutional requisite for the admission of prior testimony. *Lard*, 2013 IL App (1st) 110836, ¶ 15.

¶ 27 The requirements for admission of former testimony are the unavailability of the witness from the prior hearing and the opportunity for adequate cross-examination of the witness at the prior hearing. *Sutherland*, 223 Ill. 2d at 273. Fambro's unavailability is not at issue here where the parties do not dispute that he died before trial. Thus, we consider the second requirement for admission, which is whether defendant had an adequate opportunity to cross-examine Fambro at the preliminary hearing.

¶ 28 Although the burden of proof is less at a preliminary hearing, the questioning of witnesses at a preliminary hearing and at trial focus on the same issues, that is, "whether the evidence supports a finding that the defendant committed the charged crime." *Torres*, 2012 ILCS 111302, ¶ 59. As noted in *Torres*, "[t]o the extent a witness testifies to facts supporting

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such a finding [of probable cause], the defense has a motive in questioning that witness to test the witnesses' credibility, powers of observation, and recall, and, if possible, undermine that testimony in the eyes of the factfinder." *Id.*

¶ 29 In *Torres*, after determining that the requirement of a prior adequate opportunity for cross-examination of an absent witness "is at once both an evidentiary and a constitutional requisite for admission of former testimony," our supreme court engaged in a lengthy discussion of what constitutes an adequate opportunity for cross-examination. *Torres*, 2012 IL 111302, ¶ 52. The court stated that in *People v. Rice*, 166 Ill. 2d 35, 39 (1995) and in *Sutherland*, 223 Ill. 2d at 273, it looked at the "motive and focus" of the cross-examination conducted at the initial proceeding when considering whether an adequate opportunity for cross-examination existed. "[T]he motive and focus of the cross-examination at the time of the initial proceeding must be the same or similar to that which guides the cross-examination during the subsequent proceeding." *Torres*, 2012 IL 111302, ¶ 58. The *Torres* court went on to acknowledge that while the "motive and focus" test is a useful tool in helping to determine whether an adequate opportunity for cross-examination existed, it should not be the "sole guide to a resolution" in every case. *Torres*, 2012 IL 111302, ¶ 60. The court went on to identify two other factors for consideration: unlimited cross-examination at the prior proceeding allowing for a full questioning of the witness "regarding critical areas of observation and recall, to test him for any bias and prejudice, and to otherwise probe for matters affecting his credibility"; and "what counsel knows while conducting the cross-examination." *Id.*

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¶ 30 Defendant argues that using the four factors identified in *Torres*, an analysis of the circumstances at the preliminary hearing proceeding requires a finding that Fambro's preliminary hearing testimony should not have been admitted as substantive evidence.

¶ 31 At the preliminary hearing, Fambro testified that when he saw defendant in the kitchen defendant asked Fambro why he had been talking about him. Fambro responded asking defendant the same question. They argued. Defense counsel asked Fambro what he meant when he stated that he and defendant exchanged words. The State objected to this, but it was overruled. Fambro answered that defendant confronted him asking why he was talking about him. Fambro testified that defendant followed him and continued to call him names and that he "lost it." He told defendant he was not going to "take it" anymore. Fambro closed his door, leaving it cracked open and defendant yelled through Fambro's door and called Fambro names. Fambro came out of his room and asked defendant to stop talking to him. Subsequently, defendant came back with an "axe handle or baseball bat or something" and hit Fambro in the arm. Fambro took the wooden stick from defendant and hit defendant a couple of times. Afterwards, Fambro ran into Vandalah's room with the stick, closed the door, and told Vandalah to call the police. Fambro then exited the room and told defendant that the police were coming and then defendant pulled out a gun. Defendant pointed the gun at Fambro and shot him one time. Fambro was injured and treated at the hospital.

¶ 32 On cross-examination, defense counsel asked Fambro if he said something to defendant when defendant was yelling at him through the closed door. Fambro stated that he asked defendant to get away from his room. Fambro was asked about where he was when defendant

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hit him with the axe handle. Fambro replied that defendant hit him from behind. Fambro turned around and tried to grab the ax handle "and gave him a couple of licks and ran to my next door neighbor's room." Fambro stated he hit defendant once or twice but couldn't remember where he hit defendant. When asked if defendant blocked the exits to the building, Fambro responded no. Fambro stated that he could have left the building but went to his neighbor's room and waited for the police. Defense counsel asked if there were any other people in the apartment at the time of the shooting. Fambro stated that there were two other people in the room. Fambro denied that defendant said anything to him as he raised the gun and pointed it at him. Defense counsel attempted to ask Fambro if he had raised his voice or made any threats to defendants, but the court sustained the State's objections.

¶ 33 Based on the foregoing, it is clear that defendant had a meaningful opportunity for cross-examination at the preliminary hearing where the cross-examination involved the same motive and focus as a similar cross-examination would have at trial.

¶ 34 Defendant also argues that defense counsel's cross-examination of Fambro at the preliminary hearing was inadequate because discovery had not been conducted and counsel had not yet learned of Fambro's prior arrests and convictions for domestic violence, which would have cast doubt on the State's version of the events and would have supported defense counsel's theory that defendant was not the initial aggressor.

¶ 35 As stated, the purpose of a preliminary hearing is to determine probable cause that a crime has been committed by a defendant to warrant further proceedings. "[W]hether probable cause exists is governed by commonsense considerations, and the calculation concerns the

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probability of criminal activity, rather than proof beyond a reasonable doubt. [Citation.] Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false. [Citation.]” (Emphasis omitted.) (Internal quotation marks omitted.) *In re Detention of Hardin*, 238 Ill.2d 33, 45 (2010).

¶ 36 Although defense counsel was unaware of Fambro's prior conviction at the time of the preliminary hearing, additional discovery would not have benefitted defendant at that time because only the probability of defendant's criminal activity was at issue and any purported theory of self-defense was not remotely intimated. There being a complete lack of an evidentiary connection between the defense posture at the preliminary hearing stage and the evidence at trial defendant's arguments fail. Furthermore, any evidence offered at trial of Fambro's prior convictions would be inadmissible under *Lynch* because defendant presented no evidence of self-defense.

¶ 37 Defendant also argues that his ability to cross-examine Fambro at the preliminary hearing was not unlimited because defense counsel was precluded from asking Fambro whether he threatened defendant or raised his voice during the altercation, as to the timing when the police were called, and whether he was under the influence of drugs or alcohol at the time of the incident.

¶ 38 The defendant in *Lard*, 2013 IL App (1st) 110836 made a similar argument that was rejected by the court. Specifically, the defendant argued that defense counsel was prevented from questioning the witness "about circumstances of the arrest, the possible presence of burglary tools, whether anyone else was present at the time, Lard's particular role in the incident,

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or any other matter that could have been relevant to a defense at trial." *Id.* ¶ 21. The court found that the defendant had provided no support for his argument that the confrontation clause requires that counsel have the same opportunity at the preliminary hearing to ask about every fact that may be relevant at trial. *Id.* Citing *Torres*, the *Lard* court stated that what matters is that defense counsel had a " 'fair opportunity' to inquire into a witness's observation, interest, bias, prejudice and motive." *Torres*, 2012 IL 111302, ¶ 66. Similar to *Lard*, defense counsel here had an adequate opportunity to question Fambro at the preliminary hearing and challenge his testimony.

¶ 39 Finally, defendant contends that his convictions for aggravated battery with a firearm and two counts of aggravated battery violate the one-act, one-crime doctrine because they were both based on the same act. The State agrees that defendant's aggravated battery convictions are lesser included offenses and should be vacated under the one-act, one-crime doctrine.

¶ 40 Under the one-act one-crime rule, multiple convictions arising out of a single physical act are prohibited. *People v. King*, 66 Ill. 2d 551, 566 (1977). Because aggravated battery has a lower statutory classification than aggravated battery with a firearm, it is the lesser offense and should be vacated. *People v. Johnson*, 237 Ill. 2d. 81 (2010). We therefore vacate defendant's convictions for aggravated battery.

¶ 41 **CONCLUSION**

¶ 42 Based on the foregoing, the judgment of the trial court is affirmed but we vacate defendant's convictions for aggravated battery.

¶ 43 Affirmed in part; vacated in part.

