2015 IL App (2d) 131247-U
No. 2-13-1247
Order filed November 2, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NICHOLAS J. MARTINEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 11-CF-78 Honorable C. Robert Tobin III, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's motion to suppress his statements, as defendant's statements, in light of the pertinent factors, were voluntary; (2) as defendant's convictions of attempted murder and aggravated discharge of a firearm violated the one-act, one-crime rule, we vacated the latter.

¶ 2 Defendant, Nicholas J. Martinez, appeals from the judgment of the circuit court of Boone County denying his motion to suppress statements he made to the police while hospitalized. Because the statements were voluntary, we affirm that ruling. However, because the trial court did not apportion the multiple acts of defendant to which the State confesses error, we vacate his conviction of aggravated discharge of a firearm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)) (count I), one count of armed violence (720 ILCS 5/33A-2 (West 2010)) (count II), and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)) (count III). Defendant filed a motion to suppress his statements to the police, which motion was denied. Following a jury trial, defendant was found guilty of all three offenses and sentenced to concurrent terms of 26 years' imprisonment for attempted murder, 15 years' imprisonment for armed violence, and 8 years' imprisonment for aggravated discharge of a firearm.

¶ 5 The following facts were established at the hearing on the motion to suppress and during the jury trial. See *People v. Robinson*, 391 Ill. App. 3d 822, 830 (2009) (in reviewing a ruling on a motion to suppress, a court may consider the entire record, including the trial evidence). On February 18, 2011, defendant was a passenger in a vehicle with two fellow gang members. As they drove in Belvidere, they saw a Ford Explorer that was being driven by Fermin Estrada.

¶ 6 Because defendant and his companions believed that Estrada belonged to a rival gang, they drove past the Explorer, made some comments, threw something at the Explorer, and drove off. The Explorer followed defendant's vehicle into a cul-de-sac. The two vehicles then faced each other.

¶ 7 Defendant exited the vehicle and fired several shots, hitting the Explorer but none of its occupants. Estrada then struck defendant with the Explorer. Defendant sustained a bruised lung and fractures of several ribs, both arms, and his left scapula, right leg, and right hip. Defendant was taken to OSF St. Anthony's Medical Center (St. Anthony's) in Rockford.

¶ 8 Dr. Kenneth Mihelich, defendant's primary physician, prescribed Dilaudid and Norco. Both medications are opiate-based pain killers. They both have side effects, including confusion and drowsiness. According to Dr. Mihelich, opiates affect individuals differently but any side effects are easily observed. Defendant received the Dilaudid intravenously.

¶ 9 On February 21, 2011, at around noon, Detective David Dammon and Detective Matthew Wallace of the Belvidere police department met with defendant in his room in the neurotrama intensive care unit at St. Anthony's. According to Dammon, there were no police officers guarding defendant's room and defendant was not under arrest. Defendant's room was near the nursing station and had a sliding glass door. When the detectives entered the room, defendant's girlfriend, Gabrielle Bynes, was there. According to Bynes, the detectives asked her to leave.

¶ 10 Nurse Melissa Re, who was assigned to care for defendant, checked on him hourly on February 21 and February 22, 2011. Defendant was awake and alert each time that she was in his room. Teresa Cook, a hospital social worker, testified that she told a nurse who was with Dammon that, if defendant had no medical issues, it would be okay for Dammon to speak with defendant. On the other hand, Maria Smith, defendant's mother, testified that defendant's demeanor the first few days in the hospital was "on and off" and that she believed, because he called her "babe," that he confused her with his Bynes. Smith added that defendant was not able to maintain a conversation from February 18 to February 23, 2011. According to Bynes, who visited defendant daily, defendant had difficulty conversing, because he would often fall asleep.

¶ 11 When the detectives entered the room, defendant was in bed, immobile, and being treated for his injuries. According to Dammon, defendant was able to speak, was alert, and was oriented to date, time, and place. Detective Wallace testified that defendant never fell asleep, lost consciousness, or slurred his speech during the interview. According to Wallace, although

defendant was obviously in pain, the detectives would have terminated the interview if "anything at all *** was out of the ordinary or less than acceptable."

¶ 12 Dammon read the *Miranda* warnings to defendant. Defendant responded to each of the warnings by stating that he understood and did not have any questions. After reading the warnings, Dammon asked defendant if he wanted to talk without a lawyer present, and defendant said yes. Defendant stated that he understood that he could stop talking and ask for a lawyer at any time.

¶ 13 When Dammon asked defendant about the February 18, 2011, incident, defendant initially fabricated a story. When Dammon asked defendant if there would be gunshot residue on the gloves defendant had been wearing, defendant said that he was going to stop lying.

¶ 14 Defendant then admitted to firing a gun at the Explorer that struck him. Defendant said that he did so because the occupants were rival gang members, but that he wanted only to scare them.

¶ 15 According to Dammon, the February 21 interview lasted about 40 minutes. Dammon did not ask defendant to make a written statement, because defendant was scheduled for medical treatments that afternoon. Defendant was willing to provide a written statement the following day. Neither detective threatened defendant to obtain, or promised him leniency in exchange for, his waiver of his *Miranda* rights. Dammon described defendant as "totally cooperative."

¶ 16 On February 22, 2011, at about 2:55 p.m., Dammon and Wallace returned to defendant's hospital room. No one was in the room other than defendant. Although defendant was immobile in bed, he was able to speak and was oriented to time, date, and place.

¶ 17 Dammon reread the *Miranda* warnings. Because defendant's hands were heavily bandaged, Dammon placed a clipboard holding a *Miranda* waiver form on defendant's chest.

Defendant indicated that he understood each right by initialing it. Defendant also indicated that he spoke and wrote English, that he was advised of his rights, that he understood his rights, that his statement was free and voluntary, that he was not threatened or mistreated, and that he was not promised anything. According to Dammon, neither he nor Wallace promised leniency to defendant in exchange for his waiving his *Miranda* rights. Defendant never asked for an attorney, and he agreed to provide a written statement.

¶ 18 Dammon used a laptop computer to prepare defendant's statement. After printing the statement, Dammon had defendant read the statement out loud. Defendant did so, made no changes, and signed the bottom of each page.

¶ 19 Dammon described defendant as cooperative. Although he was aware that defendant was taking pain medication, he considered defendant to be both alert and oriented.

¶ 20 When Dammon asked defendant if he wanted to be a cooperating witness, defendant responded that he would think about it. When, on February 24, 2011, Dammon and Wallace returned to defendant's room, they saw a handwritten note posted outside his room and one next to his headboard that stated that he was invoking his Fifth Amendment rights and did not want to speak to the police. The note was dated February 21, 2011, and was signed by defendant and his mother. According to Dammon, the note was not present outside the room or on the headboard on either February 21, 2011, or February 22, 2011.

¶ 21 Nurse Re did not see the note posted in or around defendant's room on either of those days. Cindi Bennett, a nurse in charge of the neurotrauma unit, worked on February 22 and February 23, 2011. Bennett, who checked defendant's room several times, did not see the note on February 22. She first saw it at 7:10 a.m. on February 23, 2011. Cook, who worked from February 21, 2011, to February 23, 2011, first became aware of the note on February 23.

¶ 22 According to Smith, after speaking to a lawyer on February 21, 2011, she asked Bynes to write the note. On February 21, 2011, Smith and defendant signed the note and posted copies on defendant's door and headboard. According to Smith, the note was gone on February 22, 2011. Bynes testified that she wrote the note before the detectives came to defendant's room on February 21, 2011.

¶ 23 In denying the motion to suppress, the trial court found that Dammon and Wallace were credible in describing defendant as alert and oriented during their interviews. The court found that defendant knowingly and intelligently waived his right to remain silent and his right to counsel. The court found that defendant was neither under arrest nor otherwise in custody when he was questioned. The court ruled that the State's *prima facie* showing that defendant's statements were voluntary and knowing was not rebutted by the testimony of Smith, Bynes, or other witnesses. The court found that Smith's and Bynes's testimony was not credible as compared to the testimony of the detectives and hospital staff. The court found that there was no evidence that defendant was experiencing any side effects from the pain medications during the interviews. Finally, the court found, based on the testimony of Dammon, Wallace, Re, Bennett, and Cook, that the note invoking defendant's Fifth Amendment rights was not posted on the door or headboard on either February 21 or February 22, 2011.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant contends that, because of his physical and mental condition when he was questioned at the hospital, he was incapable of knowingly, intelligently, and voluntarily waiving his *Miranda* rights or making a voluntary statement. Alternatively, he maintains that his conviction of aggravated discharge of a firearm should be vacated, as it violates the one-act, one-crime rule.

¶ 26 A trial court's ruling on a motion to suppress is reviewed under a two-part standard. *In re D.L.H.*, 2015 IL 117341, ¶ 46. The court's factual findings will be reversed only if they are against the manifest weight of the evidence. *Id.* The court's ultimate legal ruling on whether suppression is warranted is reviewed *de novo*. *Id.*

¶ 27 We turn first to defendant's contention that his waiver of his *Miranda* rights was involuntary. We need not decide that issue, however, as defendant, citing to *People v. Vasquez*, 393 Ill. App. 3d 185 (2009), conceded at oral argument that he was not in custody when the police interviewed him. Considering that there were no guards posted at defendant's door or other indicia of custody, we accept that concession. Absent custody, *Miranda* warnings were not required. See *In re D.L.H.*, 2015 IL 117341, ¶ 50. Therefore, because *Miranda* warnings were not required, the issue of whether defendant voluntarily waived his *Miranda* rights need not be reached.

¶ 28 Even if *Miranda* warnings are not required, a confession must still be voluntary. *People v. Slater*, 228 Ill. 2d 137, 159-60 (2008). The test for voluntariness is whether the defendant made the statement without compulsion or inducement of any sort, or whether his will was overcome when he confessed. *Id.* at 160. In making that determination, the court must consider the totality of the circumstances surrounding the statement, including: (1) the defendant's age, intelligence, education, experience, and physical condition; (2) the duration of the questioning; (3) the presence of *Miranda* warnings; (4) any physical or mental abuse; and (5) the legality and duration of any detention. *Id.* The State has the burden of proving, by a preponderance of the evidence, that the confession was voluntary. *Id.*

¶ 29 Here, the relevant factors, viewed in their totality, demonstrate that defendant's statements were voluntary. There is nothing in the record to indicate that defendant's age,

intelligence, education, or experience in any way rendered his statements involuntary. He was 19 and had completed three years of high school. He appeared to have understood the detectives and was able to read aloud his printed statement without difficulty.

¶ 30 As for defendant's physical condition, it is undisputed that he was recovering from serious injuries and was experiencing pain. He was also taking opiate-based medications to alleviate his pain. However, the evidence supports the trial court's finding that he was alert and oriented during questioning. Dammon and Wallace testified that during both interviews defendant was alert and oriented to time, date, and place. According to Re, defendant was alert each time she did her hourly check. There is no indication in the record that defendant was experiencing any side effects such as drowsiness or confusion when he was questioned. Although Smith and Bynes testified that defendant had been sleepy and unable to converse, neither testified to his condition during the interviews. Moreover, the trial court found that the detectives were credible and that Smith and Bynes lacked credibility. See *People v. Gott*, 346 Ill. App. 3d 236, 241 (2003) (trial court's function at hearing on motion to suppress is to determine credibility of witnesses).

¶ 31 The duration of the questioning was relatively brief. It lasted only 40 minutes the first day and about two hours the second day. There was also an approximately 24-hour break between interviews.

¶ 32 Defendant was given *Miranda* warnings before each questioning session. He acknowledged that he understood those warnings, he specifically acknowledged that he understood that he did not have to talk without an attorney present, and he signed a written waiver.

¶ 33 The record does not indicate any physical or mental abuse. Nor did the detectives make any promises or threats to defendant.

¶ 34 Finally, as noted, defendant was not detained, as there were no guards at his door or other indicia of custody.

¶ 35 Although defendant relies on *Mincey v. Arizona*, 437 U.S. 385 (1978), that case is factually distinguishable from our case. In *Mincey*, the defendant had been severely wounded only a few hours before being questioned, had been extremely depressed, and was in unbearable pain when questioned. *Id.* At 398. Some of his answers to the questions were incoherent and reflected his confusion and inability to think clearly. *Id.* at 398-99. Moreover, although the defendant expressed several times that he did not want to be interrogated and that he wanted an attorney, the police persisted in questioning him. *Id.* at 400. The Supreme Court described the questioning as "virtually continuous." *Id.* at 401.

¶ 36 Here, although defendant was seriously injured and required pain medication, there is no indication that he was incoherent or confused during the questioning. He also had been in the hospital for several days and his condition was not as emergent as that of the defendant in *Mincey*. More importantly, defendant did not express any desire to not be questioned or to have an attorney present. Although defendant points to the note on his door and headboard invoking his Fifth Amendment rights, the trial court's finding that the note was not posted until after he was questioned was not against the manifest weight of the evidence. Nor was the questioning, which lasted 40 minutes one day and two hours the next, "virtually continuous." The facts in our case are far less compelling than those in *Mincey*.

¶ 37 When we examine all of the relevant circumstances surrounding the questioning, we conclude that defendant was not coerced into making either statement. Thus, the trial court correctly denied the motion to suppress.

¶ 38 That leaves the issue of whether defendant's conviction of aggravated discharge of a firearm violates the one-act, one-crime rule. Although defendant forfeited the issue by not raising it in the trial court, it is reviewable under the plain-error doctrine. See *People v. Artis*, 232 Ill. 2d 156, 165-66 (2009). The State properly concedes that it did not apportion the multiple acts of defendant between count I and count III. See *People v. Crespo*, 203 Ill. 2d 335, 342-45 (2001). Therefore, we vacate the conviction of aggravated discharge of a firearm.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Boone County, except we vacate his conviction of aggravated discharge of a firearm. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. See 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 41 Affirmed in part and vacated in part.