2015 IL App (3d) 130232-U

Order filed February 19, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0232
v.	)	Circuit No. 11-CF-657
	)	
THEODORE PIANO,	)	Honorable Howard C. Ryan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was not proven guilty beyond a reasonable doubt of aggravated battery where the trial court found that no evidence was presented that defendant knew the victim to be 60 years of age or older. (2) The trial court did not err in ordering defendant to serve 85% of his sentence for home invasion.

¶ 2 Defendant, Theodore Piano, was convicted of home invasion (720 ILCS 5/12-11(a)(2) (West 2010)) and aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2010)) following a bench trial. Defendant was sentenced to: (1) 11 years' imprisonment in the Department of Corrections (DOC) with 3 years mandatory supervised release (MSR) on his home invasion conviction; and

(2) five years' imprisonment in the DOC with one year MSR on his aggravated battery conviction, to be served concurrently with his home invasion sentence. Defendant appeals. We affirm in part and modify in part.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with home invasion (720 ILCS 5/12-11(a)(2) (West 2010)) and aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2010)). With regard to the home invasion charge, the indictment alleged that on December 23, 2011, defendant, "not a peace officer acting in the line of duty, knowingly, and without authority, entered the dwelling place of Leonard Newlin *** having reason to know that Roger Madonna was present within that dwelling place, and intentionally caused injury to Leonard Newlin in that he struck Leonard Newlin in the face with his fist." With regard to the aggravated battery charge, the indictment alleged that on December 23, 2011, defendant "in committing a battery, in violation of section 12-3 of act 5 of chapter 720 of the Illinois Compiled Statutes, knowingly struck Leonard Newlin in the face with his fist, knowing Leonard Newlin to be an individual of 60 years of age or older, in violation of section 5/12-3.05(d)(1), chapter 720, Illinois Compiled Statutes."

¶ 5 The matter went to bench trial. At trial, Leonard testified that he was in his home on the evening of December 23, 2011, with his wife, Mary Newlin; Mary's son, Roger Madonna; Roger's girlfriend, Araceli Godina (Sally); Roger's two children; Roger's brother, David Madonna; David's wife; David's daughter; and David's fourteen-year-old son, Anthony. Roger and Sally resided at the Newlins' house. Around 11 p.m., Anthony came into the living room where Leonard was watching television. Anthony told Leonard someone had grabbed him and pushed him into the house. Leonard followed Anthony to the kitchen and saw defendant standing in the kitchen by the refrigerator. Leonard had never seen defendant before and had not

invited defendant into his house. Leonard told defendant to leave his home. Defendant said, "I'm going to kill you, you, and I'm going to start with you, old man." Defendant struck Leonard with his fist, breaking Leonard's glasses and knocking them off his head. Leonard told defendant to leave and struck him over eight times. Leonard knocked defendant through a screen door onto the front porch.

¶ 6 Leonard and defendant continued to fight. Defendant grabbed Leonard and threw him off the porch. Leonard grabbed defendant as they were falling. Leonard hit the concrete, and defendant fell on top of him. Leonard believed he broke his hip at that time. Roger came out of the house, and defendant began yelling at him. Roger let Leonard's dog out of the house, and the dog chased defendant away. Several police cars and an ambulance arrived on the scene. The ambulance took Leonard to the hospital.

¶ 7 Dr. Michael Shin, an orthopedic surgeon, testified that Leonard was his patient. On December 24, 2011, Shin diagnosed Leonard with a fracture of the hip joint.

¶ 8 Dr. Alejandro Bernal testified that he treated Leonard for his injuries on December 24, 2011. Leonard told Bernal that he was involved in an altercation where defendant was trying to attack his stepson. During the altercation, Leonard jumped on defendant, causing him to fall and injure his right hip.

¶ 9 Brent Hanson, a paramedic who treated Leonard on the evening of December 23, 2011, testified that Leonard told him that he injured his hip during an altercation with an individual who tried to enter his home when the individual fell on him while falling off the porch.

¶ 10 Roger and Sally both testified that Leonard and defendant fell off the porch while they were fighting.

¶ 11 Defendant testified he was 22 years old at the time of trial. He had a sexual relationship

with Sally in February 2011 and believed that he was the father of her child. Before the evening of December 23, 2011, defendant communicated with Roger, Sally's boyfriend, on Facebook. Roger gave defendant his address and said he could come by the house sometime to see the baby. On December 23, 2011, defendant called Sally. When she heard defendant on the phone, Sally handed the phone to Roger. Defendant told Roger he wanted to come and see the baby. Defendant stopped at a bar before going to Roger's house, and he was intoxicated when he arrived. Defendant did not know that Roger lived with Leonard; he believed the residence belonged to Roger.

¶ 12 When defendant arrived at the house, he knocked on the door. Four people came to the door: a young teenage girl, Sally, Roger, and Mary. From the porch, defendant asked if he could talk to Sally. Leonard came from behind and ran at defendant. Defendant stepped back, and Leonard fell down the porch steps and said he thought he broke his hip. Defendant walked away from the house, and the police found him about a block and a half from the home. Defendant never entered the house. He did not know Leonard before the incident on December 23, 2011.

¶ 13 After the bench trial, the court took the matter under advisement. When the trial court delivered its ruling, it found defendant guilty of both home invasion and aggravated battery. The court found, after weighing the credibility of the witnesses, that: (1) defendant was the aggressor, (2) the aggression began inside the residence, (3) the fractured hip constituted great bodily harm and occurred outside the residence, and (4) "the injury that [was] sustained by [Leonard] was the result of a continuation of the aggression that occurred inside, that transpired outside."

¶ 14 With regard to the aggravated battery conviction, the trial court found that the State adequately presented evidence that defendant inflicted a battery on Leonard that resulted in great bodily harm. However, the trial court found there was "absolutely no evidence in the record to

show that the defendant knew [Leonard] was over sixty years of age." The trial court proceeded to find defendant guilty of aggravated battery based on great bodily harm. However, in entering judgment on aggravated battery, the trial court cited section 12-3.05(d)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-3.05(d)(1) (West 2010)), which states that a defendant commits aggravated battery if he commits a battery against a victim he knew to be 60 years of age or older.

¶ 15 In finding defendant guilty of home invasion, the trial court stated:

> "From all the testimony presented by all the complaining witnesses, [defendant] did not have any authority to enter the dwelling place of [Leonard]. ***. *** [W]hen he did so, he caused injury to Leonard ***.
>
> Well, the injury is, as far as the home invasion, would be a blow to the head. Now that's not great bodily harm. But, on the other hand, it is injury. It's an injury to the head that occurred on the inside.
>
> The second injury that occurred as a result of this particular circumstance was the great bodily harm, which is a fractured hip in layman's term. That certainly is great bodily harm."

¶ 16 The trial court sentenced defendant to 11 years' imprisonment in the DOC with 3 years' MSR on his home invasion conviction. The court ordered defendant to serve 85% of his sentence on the basis that the conduct leading to defendant's home invasion conviction resulted in great bodily harm to Leonard. On the aggravated battery conviction, the trial court sentenced defendant to five years imprisonment in the DOC with one year MSR to be served concurrently with his home invasion sentence.

¶ 17 ANALYSIS

¶ 18 I. Sufficiency of The Evidence–Aggravated Battery

¶ 19 On appeal, defendant argues that the State's evidence at trial was insufficient to prove beyond a reasonable doubt that defendant committed a battery against Leonard, knowing Leonard to be 60 years of age or older. Defendant asks that his aggravated battery conviction be reduced to the uncharged offense of battery. 720 ILCS 5/12-3 (West 2010).

¶ 20 When presented with a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). When a challenge to the sufficiency of the evidence is presented, all reasonable inferences from the record are drawn in favor of the prosecution. *Id.*

¶ 21 A defendant may not be convicted of an offense that was never charged unless the uncharged offense is a lesser included offense of the charged offense. *People v. Baldwin*, 199 Ill. 2d 1, 6 (2002). "[A] lesser included offense is one composed of some, but not all, of the elements of the greater offense, and which does not have any element not included in the greater offense." *People v. Jones*, 149 Ill. 2d 288, 293 (1992); see also 720 ILCS 5/2-9 (West 2010). To commit aggravated battery, a defendant must commit a battery, and one of the statutory aggravating factors must also be present. 720 ILCS 5/12-3.05 (West 2010). Thus, battery is a lesser included offense of aggravated battery. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 36.

¶ 22 In this case, defendant was charged with aggravated battery under subsection (d)(1) of section 12-3.05 of the Code (720 ILCS 5/12-3.05(d)(1) (West 2010)). As such, the State was required to prove: (1) defendant committed a battery against Leonard; and (2) defendant knew

Leonard to be 60 years of age or older. The trial court found—and defendant concedes—that the State presented sufficient evidence to establish defendant committed a battery against Leonard. However, the trial court found that there was "absolutely no evidence in the record to show that the defendant knew [Leonard] was over sixty years of age" but convicted defendant of aggravated battery on the basis that the battery resulted in great bodily harm.

¶ 23 Aggravated battery based on great bodily harm (720 ILCS 5/12-3.05(a)(1) (West 2010)) is a separate statutory offense from aggravated battery based on knowing the victim to be over 60 years of age (720 ILCS 5/12-3.05(d)(1) (West 2010)). Aggravated battery based on great bodily harm is not a lesser included offense of aggravated battery based on knowledge that the victim was over 60 years old because it requires the State to establish an additional factor—namely, that the battery resulted in great bodily harm to the victim. Thus, because it was not a charged offense nor was it a lesser included offense of a charged offense, the trial court had no authority to convict defendant of aggravated battery based on great bodily harm.

¶ 24 Additionally, the trial court would have had no authority to amend the indictment to charge aggravated battery based on great bodily harm. "Any amendment to an indictment must originate with the grand jury unless such amendment corrects only a formal defect in the charge." *People v. Patterson*, 267 Ill. App. 3d 933, 938 (1994). An amendment to correct formal defect does not alter the nature and elements of the offense charged. *Id.* Amending the indictment to charge aggravated battery based on great bodily harm would change the elements of the offense as it would require the State to prove the additional element that the battery resulted in great bodily harm to Leonard.

¶ 25 The State argues that defendant's aggravated battery conviction should be affirmed because there was sufficient circumstantial evidence for a rational trier of fact to find that

defendant knew Leonard was 60 years of age or older based on Leonard's appearance and the fact that defendant referred to Leonard as "old man." However, after hearing the evidence and observing the appearance and demeanor of the witnesses, the trial court found that there was insufficient evidence that defendant knew Leonard to be 60 years old or older. The trial court's finding is supported by the record. Both Leonard and defendant testified that they had not seen each other before the incident. There was no evidence that anyone told defendant Leonard's age before the incident. Leonard was 61 years old at the time of the incident, while defendant was 22 years old. Given defendant's relatively young age and that Leonard was barely over 60 years old, it was rational for the trial court to find that defendant referring to Leonard as "old man" did not prove that defendant knew Leonard was over 60 year old.

¶ 26 In sum, the trial court found there was insufficient evidence that defendant knew Leonard to be 60 years of age or older at that time of the battery, and the trial court had no authority to convict defendant of the uncharged offense of aggravated battery based on great bodily harm. We therefore reduce defendant's aggravated battery conviction to the lesser included offense of battery. We exercise our authority under Illinois Supreme Court Rule 615(b)(4) to reduce defendant's sentence to 364 days' imprisonment—the maximum sentence available for battery (720 ILCS 5/12-3; 730 ILCS 5/5-4.5-55 (West 2010))—to run concurrently with his sentence for the offense of home invasion.

¶ 27 II. Requirement that Defendant Serve 85% of his Sentence

¶ 28 In his second issue on appeal, defendant argues that the trial court erred in ordering him to serve 85% of his sentence for home invasion based on a finding that the conduct leading to defendant's home invasion conviction resulted in great bodily harm to Leonard pursuant to section 3-6-3 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/3-6-3(a)(2)(iii)

(West 2010)). As defendant presents an issue of statutory construction, our review is *de novo*. *People v. Ramirez*, 214 Ill. 2d 176, 179 (2005).

¶ 29 Defendant concedes that he failed to preserve this issue by not raising it in the circuit court. Nevertheless, defendant asks us to review this issue because: (1) the circuit court lacked authority to order defendant to serve 85% of his sentence; (2) the circuit court committed plain error in ordering him to serve 85% of his sentence; or (3) defendant's trial counsel was ineffective for failing to object to the requirement that defendant serve 85% of his sentence.

¶ 30 First, defendant argues the requirement that he serve 85% of his home invasion sentence is void because the circuit court lacked authority to impose such a requirement. Any portion of a sentence not authorized by statute is void and may be attacked at any time or in any court. *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004).

¶ 31 Section 3-6-3(a)(2)(iii) of the Unified Code provides in pertinent part:

> "The rules and regulations on early release shall provide ***
>
> * * *
>
> (iii) that a prisoner serving a sentence for home invasion, *** when the court has made and entered a finding *** that the conduct leading to conviction for the enumerated offense resulted in great bodily harm to a victim, shall receive no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment." 730 ILCS 5/3-6-3(a)(2)(iii) (West 2010).

¶ 32 Defendant argues it was improper for the trial court to order him to serve 85% of his home invasion sentence under section 3-6-3(a)(2)(iii) of the Unified Code because the conduct leading to his conviction did not result in great bodily harm to Leonard. The trial court found

that defendant's initial strike to Leonard's face did not constitute great bodily harm. Rather, Leonard suffered great bodily harm when he broke his hip. Defendant argues that since the indictment alleged he committed home invasion by entering Leonard's residence and intentionally injuring Leonard by striking him in the face with his fist, Leonard's fractured hip—which occurred after the initial strike to the face—was not part of the "enumerated offense" of home invasion as charged by the State.

¶ 33 A variance between the facts alleged in the indictment and the proof at trial is not fatal if the facts in question are not essential elements of the offense charged. *People v. Thomas*, 137 Ill. 2d 500, 522 (1990). "In order for a variance between an indictment and proof at trial to be fatal, the difference must be material and of such a character as to mislead defendant in his defense or expose him to double jeopardy." *People v. Burdine*, 362 Ill. App. 3d 19, 24 (2005).

¶ 34 The State need not plead evidentiary details. *People v. Meras*, 284 Ill. App. 3d 157, 164 (1996). "Where an indictment charges all of the essential elements of the offense under a statute, other matters unnecessarily added may be rejected as surplusage." *Id.* When a crime can be committed by several acts, a variance between the act named in the indictment and the act proved is not fatal. *Burdine*, 362 Ill. App. 3d at 24 (holding that there was no fatal variance where the indictment alleged the defendant struck the victim about the body and the evidence at trial showed the defendant bit the victim); see also *Meras*, 284 Ill. App. 3d at 165 (no fatal variance where the indictment alleged that the defendant murdered the victim using a blunt object but the evidence at trial showed that the defendant used his fists and feet); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 70 (no fatal variance where the indictment alleged that the defendant struck the victim about the body and the evidence at trial showed the defendant caused the victim to be struck about the body).

¶ 35 In this case, the home invasion indictment was required to allege that defendant intentionally caused injury to Leonard. The manner in which the injury was inflicted is not a material element of the offense of home invasion. Additionally, the injury inflicted in a home invasion need not have occurred within the dwelling. *People v. Mata*, 316 Ill. App. 3d 849, 854 (2000); see also *People v. Kolls*, 179 Ill. App. 3d 652, 656 (1989). As the variance between the manner of injury alleged in the indictment (defendant striking Leonard in the face) and the manner of injury proven at trial (Leonard breaking his hip as a result of the fight with defendant) did not involve an essential element of the offense, the variance was not material.

¶ 36 Further, the indictment is sufficient to serve as a bar from future prosecution; defendant could not be retried for home invasion based on the same entry to Leonard's home if the State merely alleged a different injury to Leonard. See *Lattimore*, 2011 IL App (1st) 093238, ¶ 71.

¶ 37 Defendant argues that the State's failure to mention Leonard's broken hip in the indictment prejudiced him in making his defense. If the indictment had mentioned Leonard's broken hip, defendant contends, he would have been able to argue that the evidence did not establish that he intentionally threw Leonard off the porch. Defendant's argument is unpersuasive. Defendant's theory at trial was that he never entered Leonard's house but only stood on the porch. Leonard was the aggressor; he jumped on defendant and fell off the porch, breaking his hip. As defendant's theory at trial was that he did not cause Leonard's injuries, we are not persuaded that defendant would have argued his case differently had Leonard's broken hip been mentioned in the indictment.

¶ 38 Defendant argues that the State's entire theory of the case at trial was that defendant injured Leonard by striking him in the face. According to defendant, if we were to uphold the trial court's order that defendant serve 85% of his sentence, defendant would not have known

until appeal that the State intended to prosecute him for home invasion based on Leonard's fall from the porch. Defendant cites *People v. Crespo*, 203 Ill. 2d 335, 343-45 (2001), for its holding that the State could not apportion multiple stab wounds to one victim among different offenses for the first time on appeal where the indictment did not apportion the stab wounds and the State treated the stabbing as a single act at trial. However, unlike *Crespo*, this case does not involve multiple convictions for closely related acts that were not charged separately in the indictment. Rather, this case involves a variance in the extent of injury alleged in the indictment and the extent of injury proven at trial. The *Crespo* holding has not been extended to such a situation.

¶ 39 Additionally, we do not find persuasive defendant's argument that he is learning for the first time on appeal that the State considered Leonard's broken hip to be part of the injury he suffered as a result of the home invasion. The State's theory at trial was that a fight ensued as an immediate result of defendant's initial blow to Leonard and resulted in Leonard's broken hip. While Leonard was the only one who testified that defendant threw him off the porch, the other witnesses who observed the fall from the porch stated that it occurred during the fight. The trial court found, based on the trial evidence, that defendant was the aggressor and that the fight on the porch was a continuation of the aggression that began inside the house.

¶ 40 In support of his position that the home invasion was complete after defendant's initial blow to Leonard and no further injury can be considered part of the offense, defendant cites *People v. Yarbrough*, 156 Ill. App. 3d 643 (1987), for its holding that the offense of home invasion was complete after the defendant initially injured the victim and that further injury inflicted upon the victim was not inherent to the offense. However, *Yarbrough* did not hold that the home invasion did not continue when the defendant further injured the victim. Rather, *Yarbrough* held that evidence of additional injury inflicted on the victim was not necessary to

convict the defendant of home invasion. *Id.*

¶ 41 The trial court properly found from the evidence that the conduct leading to defendant's home invasion conviction included the altercation between defendant and Leonard on the porch, which resulted in Leonard's broken hip. The fact that the indictment alleged that the injury suffered during the home invasion was a strike to Leonard's face did not preclude this finding. Thus, the trial court did not lack authority to order defendant to serve 85% of his sentence. For the same reasons that the court had authority to order defendant to serve 85% of his sentence, no error occurred when the trial court ordered defendant to serve 85% of his sentence. Since we find that no error occurred, we need not review this issue for plain error, and we find that counsel was not ineffective for failing to object.

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of La Salle County is affirmed in part and modified in part.

¶ 44 Affirmed in part and modified in part.