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2015 IL App (3d) 130463-U

Order filed August 24, 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 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0463
STERLING M. NICHOLSON,)	Circuit No. 12-CF-24
Defendant-Appellant.)	Honorable Paul L. Mangieri, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in denying the defendant's motion for funds for the appointment of an expert witness where the expert was not necessary in proving a crucial issue in the case; (2) the trial court did not abuse its discretion in admitting evidence that the defendant took some coins from the victim's bedroom on the night of the attack; and (3) the defendant's conviction for aggravated battery violated one-act, one-crime principles, necessitating vacatur of that conviction.

¶ 2 A jury found the defendant, Sterling M. Nicholson, guilty of aggravated domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)) and aggravated battery (720 ILCS 5/12-3.05(a)(1) (West

2012)). The jury acquitted the defendant of attempt first degree murder (720 ILCS 5/8-4, 9-1(a)(1-3) (West 2012)). The trial court entered convictions on each battery count.

¶ 3 On appeal, the defendant argues that: (1) the trial court abused its discretion in denying the defendant's request to appoint an expert; (2) the trial court abused its discretion in admitting other-crimes evidence against the defendant; and (3) one-act, one-crime principles mandate that the conviction for aggravated battery be vacated. For the reasons set forth below, we affirm the defendant's conviction for aggravated domestic battery and vacate the defendant's conviction for aggravated battery.

¶ 4 **FACTS**

¶ 5 With regard to the aggravated domestic battery count, the indictment alleged that the defendant "intentionally caused great bodily harm to Mary Cannon, a girlfriend of the defendant, in that he struck Cannon about the body with his fists, causing a brain bleed and multiple skull fractures." Similarly, the aggravated battery count alleged that the defendant "intentionally caused great bodily harm to Mary Cannon, in that he struck Cannon about the body with his fists, causing a brain bleed and multiple skull fractures."

¶ 6 Prior to trial, the court found the defendant indigent and appointed the Knox County public defender to represent him. The defendant moved for the appointment of a neurological expert. The defendant posited that the State would present an expert who would testify that someone with injuries similar to those suffered by Cannon could suffer from short-term memory loss. He argued that counsel would be unable to effectively cross-examine the State's expert unless an expert was appointed to advise counsel what, if any, memory deficit was present in Cannon. Specifically, the defendant contended that Cannon contacted the defendant on multiple occasions following the alleged attack, and an expert on neurological functioning would be able

to testify to the likelihood that Cannon was aware of that contact. At a hearing on the motion, defense counsel stated that he "[did not] anticipate [the proffered expert] to meet with the victim or talk to the victim at all." Still, counsel opined that an expert witness could testify that it was "quite possible or probable *** that there may be some malingering."

¶ 7 The trial court denied the defendant's motion. In so ruling, the court found that the expected testimony of the State's expert, that memory loss was possible, was equivocal. The court found that defense counsel would still be able to argue that Cannon was malingering, and that an additional expert was not necessary to assist the trier of fact in making that determination. The defendant's jury trial commenced on October 17, 2012.

¶ 8 In opening statements, the State introduced its theory that the defendant had, *inter alia*, struck Cannon in the face while in a red Dodge Caliber with Ollie Howell. In his opening statement, defense counsel argued that the evidence would show that it was Howell who struck Cannon in the face while in the car. Defense counsel also suggested that Cannon would testify that, because of her injuries, she could not remember the attack or her contacts with the defendant in the months after the attack. However, defense counsel pointed out, other evidence would show that injuries such as Cannon's do not always result in memory loss.

¶ 9 The evidence adduced at trial tended to establish that Cannon began dating the defendant in the fall of 2011, when she was still living with her then-boyfriend, Kevin McElmurray. Cannon moved into her own house in January of 2012. The defendant stayed with Cannon in that house multiple nights per week and had his own key.

¶ 10 On the night of January 20, 2012, the defendant, Cannon, and Howell were at a bar. Howell testified that the three of them left the bar in a red car, with the defendant driving and Cannon in the front passenger seat. After an argument, the defendant stopped the car and struck

Cannon in the face with his fist. Howell and the defendant then exited the vehicle and began walking. During the altercation, Howell heard the defendant say "[g]o to your boyfriend." Howell denied striking Cannon.

¶ 11 The defendant testified¹ that he drove Cannon and Howell home from a bar on January 20, 2012. In the car, the defendant got into an argument with Cannon over her drug use. The defendant then saw Howell strike Cannon in the mouth with his fist. The defendant stopped the car and tried to intervene. He then got out of the car and began to walk away. Cannon, with Howell in the car, drove after him and tried to run him over.

¶ 12 The defendant testified that he began walking to his mother's house, but decided not to go in because it was late at night and he did not want to wake her. Instead, the defendant decided to walk to Cannon's house to make sure she had gotten home. He arrived at Cannon's house around 4 or 4:30 a.m. After entering through the unlocked door, the defendant saw Cannon on her knees in front of the couch. The defendant observed a case of beer and a CD with a white substance on it. Cannon was incoherent, and still bleeding. She was not, however, badly injured. The defendant testified that Cannon then tried to attack him, so he left. He was only in Cannon's house for approximately five minutes, and he did not go anywhere else in the house aside from the living room.

¶ 13 On cross-examination, the State questioned the defendant about some unique coins he had when he was arrested, including a Mexican peso and a roll of pennies. When asked if he got those coins from a jar in Cannon's house, the defendant replied, "I might have been looking at

¹ The defendant testified in his own defense, after the State had closed its case-in-chief. However, for the purpose of clarity, we summarize the evidence here in an order different from that presented at trial.

them, yeah." The defendant admitted that the jar was in Cannon's bedroom. He then explained that he was in Cannon's house earlier that day, looking at the coins, and the coins "[p]robably just got into my pocket." The defendant admitted that the coins were not his.

¶ 14 McElmurray testified that he called Cannon on January 21, 2012, to discuss bringing a dog kennel to her. Cannon told him he could come over, but called him back later and sounded nervous. McElmurray went to Cannon's house. He testified that Cannon's face was beaten and swollen and that there was blood on the living room floor and couch, as well as in the kitchen and the bedroom. He called 911.

¶ 15 Myrna Braun, Cannon's mother, testified that Cannon called her on January 21, 2012. Braun struggled to understand Cannon, because Cannon's speech was slurred and she was crying. When Braun asked her what was wrong, Cannon replied, "Sterling beat me up real bad."

¶ 16 Officer Donovan Godsil observed blood smeared on the living room floor and couch. He also observed a shirt and rug with blood on them in the bedroom. Godsil encountered McElmurray at the house, and did not notice any blood, cuts, or bruises on him. Godsil later spoke with Cannon at the hospital. He testified that after explaining who he was, Cannon "asked if we'd caught Sterling yet."

¶ 17 Dr. Veerasikku Bommasamy determined that Cannon should be air-lifted to Peoria for treatment. When Bommasamy asked Cannon how she was injured, she said that she was beat up in a car and that "her boyfriend or somebody" did it. Although Cannon did not initially provide the name of her attacker to Bommasamy, she later indicated that it was the defendant. Bommasamy further testified that when he spoke with Cannon, her memory was fine.

¶ 18 Cannon testified that she could not recall what happened to her on the night in question. She recalled going to McElmurray's house that evening, where she did laundry and drank beer.

McElmurray was not at home. The next thing Cannon remembered was riding home from Peoria a week later. Her memories of the following days and weeks were scattered, and she continued having memory problems through at least March of 2012.

¶ 19 Cannon testified that she did not remember writing to the defendant or speaking to him on the telephone in February or March of 2012. She did not recall telling him that she had pills in her system or that she did not want anyone to get in trouble. Cannon also did not recall telling the defendant that she was "confused" at the hospital, that she had "smoked a couple of joints" at her cousin's on the night in question. She did not remember saying to the defendant, "I told them I don't believe you did this." The parties stipulated that Cannon made each of those statements in recorded telephone conversations with the defendant. Cannon also identified letters written to the defendant in her handwriting, but denied that she remembered writing them.

¶ 20 Dr. Maria Karbowska-Jankowska, a neurologist with a subspeciality in neurorehabilitation, testified that Cannon suffered traumatic brain injury, bilateral subdural hematomas, and multiple facial fractures. Karbowska-Jankowska testified that upon examining Cannon on January 24, 2012, Cannon "was able to state what she ate for her breakfast. She was able to recall immediately three objects out of three and after five minutes, and she was able to recite the months of the year and in reverse and spell 'world' backwards." Cannon did not, however, remember who had attacked her. Karbowska-Jankowska testified that it was possible that Cannon's injuries would result in her inability to remember writing letters or speaking on the telephone in February or March.

¶ 21 On cross-examination, defense counsel asked Karbowska-Jankowska if it was possible that Cannon was malingering, or faking her memory loss. Karbowska-Jankowska responded: "It's very hard for me to say because the patient's [sic] had typical traumatic brain injury and ***

it's possible not to have *** short-term memory and recollection up to a year." Karbowska-Jankowska admitted that it was possible Cannon was malingering, but she did not suspect that was the case. She testified that a neuropsychological evaluation may be able to determine whether a person was faking their memory loss.

¶ 22 In closing arguments, the State urged the jury that the evidence of the defendant striking Cannon while in the car was enough to sustain convictions for aggravated domestic battery and aggravated battery. The jury acquitted the defendant on all counts of attempted first degree murder, but found him guilty of aggravated domestic battery and aggravated battery. The court entered convictions on each of those counts, and sentenced the defendant to 25 years' imprisonment for aggravated domestic battery and 10 years' imprisonment for aggravated battery, to be served consecutively.

¶ 23 ANALYSIS

¶ 24 On appeal, the defendant argues that: (1) the trial court abused its discretion in denying the defendant's request to appoint an expert for the defense; (2) the trial court abused its discretion in admitting other-crimes evidence against the defendant; and (3) one-act, one-crime principles mandate that the conviction for aggravated battery be vacated. We find that neither the trial court's denial of the defendant's request for an expert nor its admission of other-crimes evidence constituted an abuse of discretion. We do, however, agree that the defendant's conviction and sentence for aggravated battery must be vacated.

¶ 25 I. Expert Witness

¶ 26 The defendant argues that the trial court abused its discretion in denying his motion for funds to appoint an expert witness. Specifically, the defendant maintains that Cannon's

malingering was a crucial issue in the case and that the testimony of a neuropsychiatrist was necessary to prove that Cannon was malingering. We disagree.

¶ 27 When the State initiates criminal proceedings against an indigent defendant, "it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). Under some circumstances, fundamental fairness may dictate that the State disperse funds for the appointment of an expert witness for the indigent defendant. See *id.* at 76-86. "In Illinois, it is well established that a denial of funds to an indigent for the securing of expert witnesses in defense of criminal charges may violate constitutional protections in certain circumstances." *People v. Lawson*, 163 Ill. 2d 187, 220 (1994). For a defendant to obtain funds for the appointment of an expert, "there must be some showing that the requested expert assistance is necessary in proving a crucial issue in the case." *Id.* at 221.

¶ 28 The defendant insists on appeal—as he did at trial—that evidence that Cannon was malingering would serve to impeach Cannon's testimony. Even accepting defendant's argument that Cannon was malingering, it is unclear how impeachment of any of Cannon's testimony would have benefited the defendant. Cannon did not testify that the defendant attacked her. Instead, Cannon testified that she did not remember the attack at all, and she did not know who attacked her. On at least three separate occasions in the immediate aftermath of her attack, however, Cannon named the defendant—either explicitly or implicitly—as her attacker. As a result, her testimony that she did not remember who attacked her was actually beneficial to the defendant. Impeachment through evidence of malingering would serve no purpose.

¶ 29 Likewise, impeachment of Cannon's testimony that she did not recall her contacts with the defendant in the months following the attack would not bolster the defendant's defense.

Foremost, the letters and phone calls themselves—the substance of which were admitted into evidence—did not tend to exonerate the defendant. Neither Cannon's admission to drug use nor her wish that no one get in trouble would indicate that the defendant did not attack her. Though Cannon stated she did not *believe* the defendant was her attacker, having a mere belief is wholly consistent with Cannon's testimony that she did not actually know who attacked her.

Furthermore, because the State did not dispute that Cannon made those statements to the defendant, it is unclear how Cannon's ability to recall those statements would impact their probative value.

¶ 30 In order to show on appeal that Cannon's malingering was a crucial issue in the case, the defendant posits that "it would be significant if [Cannon] was faking her memory loss in order to protect the actual perpetrator and conceal what actually happened by falsely testifying that she did not remember the evening." This argument suffers a key flaw. It is wholly conjecture that if Cannon actually remembered the attack, then she was protecting the actual attacker by pretending not to. Indeed, this position is contradicted by the fact that Cannon named the defendant as her attacker multiple times in the immediate aftermath of the attack.

¶ 31 The issue of Cannon's malingering was not a crucial issue in the case.² Accordingly, the trial court did not abuse its discretion by denying the defendant's motion for funds for expert assistance. See *Lawson*, 163 Ill. 2d at 230.

¶ 32 II. Other-Crimes Evidence

² In light of our finding that Cannon's malingering was not a crucial issue, we need not consider whether an expert would have been necessary in proving that she was malingering. See *Lawson*, 163 Ill. 2d at 200.

¶ 33 The defendant contends that the evidence that he took pennies and other coins from Cannon's bedroom constitutes improper other-crimes evidence. The defendant insists that the implication to the jury that he had committed a theft by stealing money from the house was unduly prejudicial. We disagree.

¶ 34 At the outset, we note that the defendant has conceded that he failed to preserve this issue in a posttrial motion. The defendant thus urges that this court review the issue under the rubric of plain error. The first step in plain error analysis is determining whether an error occurred at all. *People v. Walker*, 232 Ill. 2d 113 (2009). This error must be "clear or obvious" in order for the analysis to proceed to further steps. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 35 "Evidence regarding other crimes is generally inadmissible to demonstrate propensity to commit the charged crime." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Other-crimes evidence is generally prohibited so that a jury will not simply convict a defendant because they find him or her to be a bad person deserving of punishment. *Id.* "Other-crimes evidence is admissible, however, to prove intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case." *Id.* Other-crimes evidence that would otherwise be admissible under those exceptions may nevertheless be excluded if its prejudicial effect substantially outweighs its probative value. *Id.*; see also Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 36 In the present case, the evidence that the defendant took coins from Cannon's bedroom was not propensity evidence. That is, the evidence was not admitted to prove that the defendant had a natural tendency to commit crimes. Rather, the evidence was admitted for purposes of impeachment. The defendant had previously testified that he had only been in Cannon's house on the night in question for five minutes and that he had not gone anywhere other than the living

room. Evidence that the defendant went to Cannon's bedroom and took coins tends to establish that the defendant's previous testimony was false. See *People v. Collins*, 106 Ill. 2d 237, 269 (1985) ("Generally, any permissible kind of impeaching matter may be developed on cross-examination, since one of the purposes of cross-examination is to test the credibility of the witnesses.").

¶ 37 Because the other-crimes evidence at issue was not admitted to show propensity, it is subject to the standard balancing test for the admissibility of evidence. *Donoho*, 204 Ill. 2d at 170; Ill. R. Evid. 403 (eff. Jan. 1, 2011). Here the probative value of the evidence was high. Because the defendant's primary defense was to proffer his own version of events on the night in question, evidence that tended to impact his credibility was particularly relevant. Moreover, we find that the prejudicial effect of such evidence in the case at hand is low. The standard concern with other-crimes evidence is that it may convince a jury that the defendant is a bad person deserving of punishment. *Donoho*, 204 Ill. 2d at 170. Here, however, the defendant was on trial for attempted first degree murder, accused of savagely beating Cannon. It strains credulity to believe that evidence that the defendant stole some coins of apparently little value would sway a jury to find him guilty of the heinous attack.

¶ 38 The evidence that the defendant took coins from Cannon's bedroom was not admitted for propensity purposes, and its probative value substantially outweighed its prejudicial effect. Consequently, the trial court did not abuse its discretion by admitting the evidence. Because we find that no error was committed, we need not proceed further in our plain error analysis.

¶ 39 III. Aggravated Battery Conviction

¶ 40 Finally, the defendant argues that his conviction for aggravated battery violates one-act, one-crime principles. The defendant contends that, but for the allegation of a domestic

relationship, the indictments for aggravated domestic battery and aggravated battery were identical. Further, the defendant points out that the State urged the jury to find him guilty of both battery charges based on the single act committed in the car.

¶ 41 It is well-settled that where only one act is involved, only one conviction can stand. *People v. Artis*, 232 Ill. 2d 156, 161 (2009). Where more than one offense arises from a series of closely related acts, multiple convictions can be entered, but only if the State treats them as separate acts at the trial level. *People v. Crespo*, 203 Ill. 2d 335, 342-43 (2001). On appeal, the State admits that it failed to charge multiple acts in the indictment or to argue them as such before the jury. Accordingly, the State concedes that the defendant's conviction should be vacated. We accept the State's concession, and vacate the defendant's sentence for aggravated battery.³

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of Knox County is affirmed in part and vacated in part.

¶ 44 Affirmed in part; vacated in part.

³ *Vacatur* of the defendant's lesser conviction moots the defendant's argument that the combined sentences exceeds the statutorily authorized maximum aggregate term of imprisonment. Though the defendant argues that the matter should nevertheless be remanded for resentencing because "the considerations of the circuit court might be different," we decline to grant this relief. See *People v. Lee*, 376 Ill. App. 3d 951, 957 (2007).