

No. 1-13-3660

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 14580
)	
GERMAINE WALKER,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's convictions for aggravated kidnapping and aggravated battery affirmed over his contention that the prosecutor committed reversible error during closing argument and the trial court committed reversible error in failing to instruct the jury on simple battery; defendant's excess aggravated battery conviction vacated; and cause remanded to the trial court to determine which of defendant's convictions for aggravated kidnapping is the most serious offense and to vacate the less serious conviction.

¶ 2 Following a jury trial, defendant Germaine Walker was found guilty of aggravated kidnapping and aggravated battery. The trial court sentenced him to 15 years' imprisonment for aggravated kidnapping and 5 years' imprisonment for aggravated battery, to be served concurrently. On appeal, defendant contends that: (1) the prosecutor committed reversible error when she distorted the presumption of innocence, recommended that jurors contemplate a motive not in evidence, and misstated the evidence; (2) the trial court should have instructed the jury on the lesser-included offense of simple battery because the weapon allegedly used in the aggravated battery, a knife, was not found; (3) his two aggravated kidnapping convictions should merge under the one-act, one-crime doctrine; and (4) his mittimus should be corrected to reflect the conviction of aggravated kidnapping based on the commission of another felony. We affirm the jury's verdicts, but vacate defendant's excess aggravated battery conviction and remand the matter to the trial court to determine which of defendant's convictions for aggravated kidnapping is the most serious offense and to vacate the less serious conviction.

¶ 3 The State charged defendant with, and proceeded to trial against him on, two counts of aggravated kidnapping, one count based on committing an aggravated battery and the other based on being armed with a dangerous weapon, and two counts of aggravated battery, one based on using a deadly weapon and the other based on being on a public way.

¶ 4 At trial, the State presented the testimony of five witnesses: Stephanie Diftler, the victim, George Kearney, Tara Kearney, Laurie Findley and Chicago Police Officer Veronica Ross.

¶ 5 The evidence showed that at approximately 7 a.m. on July 22, 2012, a "bright" and "very sunny" day, 55-year-old Stephanie Diftler left her house on the 300 block of West Menomonee Street in Chicago alone to go for a run. As Diftler returned from her 30-minute run, running east on West Menomonee in the middle of the street, she "felt a whack in the back of [her] head" and

temporarily lost consciousness. When Diftler regained consciousness, she realized she was on the ground in a nearby alley. She believed she had been dragged there by the blood and scratches on the right side of her body. Diftler then noticed an individual behind her, identified at trial as defendant, with his arms around her chest.

¶ 6 As defendant attempted to drag Diftler "further into the alley," she tried to escape defendant's grip and screamed "fire," hoping someone nearby would hear her. Defendant told her three times, "[s]hut up, Bitch, or I'll f*** kill you." He then began to "suffocate" Diftler by putting his hand over her nose and mouth, so she could not breathe and squeezed her tightly. At some point during the struggle, Diftler felt a knife in her left hand and believed it cut her finger, although she never actually saw the knife. She told defendant that she did not have anything of value on her and "[t]hey're watching you," even though she did not actually see anyone. The latter statement caused defendant, who was wearing jeans and a white shirt, to run out of the alley. Diftler could not recall how long the struggle lasted because it "seemed endless."

¶ 7 While George and Tara Kearney were jogging east on West Menomonee with their two children in a stroller and had just crossed North Sedgwick, Tara heard a female voice shouting somewhere in front of her. A few seconds later, she saw a man, identified at trial as defendant, running toward her wearing blue jeans and a white shirt. She found this "striking" because he was running but not wearing running clothes. He came within two or three feet of Tara, so she was able to see his face and observed him running for 5 to 10 seconds. She did not recall seeing defendant carrying a knife. George also saw this man, whom he identified at trial as defendant, wearing blue jeans and a white shirt, running out of an alley past him. He saw defendant for approximately two seconds.

¶ 8 Soon after, Diftler exited the alley, saw George and Tara, and exclaimed "[t]hat man attacked me." Diftler observed defendant turn west on West Menomonee from the alley and then south on North Sedgwick. George described Diftler as bleeding from her head, arms and legs. He stated that Diftler pointed at defendant and said "[t]hat man, that man." Tara described Diftler as bleeding from her head, chest and hand. She stated that Diftler pointed at defendant and said "[t]hat man, that man attacked me."

¶ 9 George chased after defendant, running south on North Sedgwick, but briefly stopped, flagged down a vehicle, and asked the driver to call 911 because he did not have his cell phone. George, however, lost sight of defendant.

¶ 10 While Laurie Findley was walking her dog south on North Sedgwick that morning, she heard "short loud screaming noises" coming from "probably" a female voice. As Findley continued walking, she heard somebody running behind her, so she turned around. She saw a man, identified at trial as defendant, stop, pivot, jump over a fence and then run down a gangway between two buildings. Defendant, who was wearing blue jeans and a white shirt, "looked right at [Findley]" for approximately two seconds from a distance of 10 to 15 feet. On cross-examination, she stated she could not remember if she told a detective that she "did not get a good look at" defendant's face.

¶ 11 After defendant jumped the fence, Findley saw George, who had continued running south on North Sedgwick after flagging down the vehicle. George asked Findley if she had seen defendant, and she told him that defendant had just jumped into the gangway between two buildings off North Sedgwick. George looked down the gangway, but did not see defendant, so he returned to his wife and children. George did not see defendant carrying a knife and never saw him discard any objects during the chase. Findley also never saw defendant with a knife.

¶ 12 Tara, meanwhile, remained with Diftler and walked her back to her house until the police and an ambulance arrived. When the ambulance arrived, paramedics treated Diftler's injuries. When the police arrived, George gave them a description of defendant, and Tara gave them her and George's names and contact information.

¶ 13 Chicago Police Officer Veronica Ross received a radio dispatch about a robbery in progress on the 300 block of West Menomonee. The dispatch contained a description of the suspect and his last known direction of travel. She started driving in that direction and ended up at 1365 North Hudson,¹ which was approximately six or seven blocks away from where the alleged robbery in progress occurred. There, Ross observed an individual who matched the dispatch description running with "something white wrapped around his hand." As Ross approached the individual, identified at trial as defendant, she noticed blood on the item wrapped around his hand, his jeans and chest. Defendant was also "breathing hard" and "very sweaty."

¶ 14 Other police officers arrived shortly after Ross, and they handcuffed defendant. They did not recover a knife. Ross later realized the item wrapped around defendant's hand was a white shirt. Ross said another officer drove defendant back to the 300 block of West Menomonee.

¶ 15 While Diftler was in the ambulance, the police brought defendant back to the scene, and she identified him as the individual who attacked her. The ambulance transported Diftler to the hospital where her injuries were further treated. She sustained abrasions on her right knee, elbow and shoulder as well as her face. She received 9 or 10 stitches on her left middle finger and 2 or 3 stitches on her left ring finger, which she said was the result of defendant cutting her with a knife. She stated that one of her fingers was "still numb." She suffered a swollen and bruised left

¹ During Ross' testimony, initially, she stated she went to 1365 North Sedgwick, but later stated it was 1365 North Hudson.

eye. She also had a big bruise and bump on her head, which was sore for several days. She identified multiple photographs showing her various injuries, but could not remember if a photograph was taken of her head. She also could not recall if she told a detective that she was knocked unconscious.

¶ 16 George later went to the police station and identified defendant as the man he observed that day. Tara and Findley separately viewed lineups and identified defendant as the man they observed that day.

¶ 17 Defendant called Chicago Police Detective Lunsford, who interviewed Diftler at the hospital. According to his report, Diftler said she was attacked from behind and that her attacker "walk[ed] [her] to the alley." She also told Lunsford that a folding knife with a three-inch blade "suddenly appeared in her hand," but her attacker quickly regained control of the knife. Lunsford acknowledged that his report did not state that Diftler was knocked unconscious, dragged to the alley, or that her clothes were dirty or torn. Additionally, Lunsford never wrote in his report that Diftler was robbed, inappropriately touched or sexually assaulted, but he said that she told him "things" a police officer could consider as a sexual assault, such as defendant "grabbing [her] around the breast area." Lunsford said that the police tested blood found on defendant's pants and shirt, and it matched defendant's blood, but he could not recall if Diftler's blood appeared on either defendant's pants or shirt. He said the police did not recover a knife from defendant.

¶ 18 On cross-examination, Lunsford agreed that his reports were summaries and general information about the alleged crimes. He also stated that while defendant was in jail, he had to be placed in handcuffs "[f]or his protection" and "the protection of others" because he had written the word "bitch" on the wall with blood, "presumably" his own. The State introduced a

photograph showing the words "bitch" written in red on the wall with the word "kill" written beneath it also in red.

¶ 19 Defendant did not testify.

¶ 20 After argument, the jury found defendant guilty of aggravated kidnapping and aggravated battery, returning a single general verdict for each offense. The court denied defendant's motion for a new trial, and it subsequently sentenced him to 15 years in prison for aggravated kidnapping and 5 years in prison for aggravated battery, to be served concurrently. This appeal followed.

¶ 21 Defendant first contends that the State committed reversible error during rebuttal closing argument when the prosecutor "distort[ed]" defendant's presumption of innocence, "recommend[ed]" that jurors imagine a motive not in the evidence and "misstat[ed]" the evidence adduced at trial.

¶ 22 Initially, the State argues that defendant forfeited review of this contention. Generally, an issue is forfeited if it is not raised both at trial and in a posttrial motion. *People v. Leach*, 2012 IL 111534, ¶ 60. The State asserts that, while defendant contemporaneously objected to the statements at trial, his motion for a new trial states only "[t]he prosecution made improper closing arguments that biased the jury against defendant." We agree with the State that this nonspecific allegation in defendant's motion for a new trial is insufficient to preserve defendant's claim for review. See *People v. Martinez*, 386 Ill. App. 3d 153, 163-64 (2008) (finding a motion for a new trial's allegation of " 'prejudicial, inflammatory erroneous statements in closing argument' " insufficiently specific to preserve a claim of prosecutorial error during opening statements and closing arguments) *overruled on other grounds by People v. Johnson*, 237 Ill. 2d

81 (2010); see also *People v. Grant*, 232 Ill. App. 3d 93, 106 (1992); *People v. Sargent*, 184 Ill. App. 3d 1016, 1024-25 (1989). Therefore, defendant has forfeited this issue for review.

¶ 23 Defendant argues that even if he forfeited this contention, we may nevertheless review it for second-prong plain error, which applies when "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). If there is no error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Therefore, the first step in a plain-error analysis is to determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 24 Prosecutors are given wide latitude during closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). In closing arguments, a prosecutor may comment on the evidence presented and draw reasonable or fair inferences from that evidence, even if they reflect poorly on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The prosecutor may also respond to the arguments from defense counsel that clearly provokes a response. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). However, a prosecutor may not argue assumptions or facts that are not supported by the record. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). When viewing challenged comments, we must consider them in their full context and view the closing arguments in their totality. *Nicholas*, 218 Ill. 2d at 122.

¶ 25 The appropriate standard of review is currently uncertain. In *Wheeler*, 226 Ill. 2d at 121, our supreme court applied a *de novo* standard of review while in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), our supreme court applied an abuse of discretion standard. See *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 102 (acknowledging conflict regarding standard of review).

However, we need not resolve this conflict, as our holding would be the same under either standard.

¶ 26 Defendant first argues the prosecutor distorted his presumption of innocence during the outset of her rebuttal closing argument when she stated: "The presumption of innocence stays with [defendant] until we prove him guilty. And this courtroom [*sic*] that presumption is over. It's our duty. It's our –." After an overruled objection by defense counsel, the prosecutor concluded, "obligation and we have been successful."

¶ 27 It is fundamental that in a criminal trial, the defendant has the presumption of innocence, and the burden of proof of his guilt remains with the State at all times. *People v. McGee*, 2015 IL App (1st) 130367, ¶ 69. As such, a prosecutor may not misstate these fundamental concepts of law, as it may be grounds for reversal. *Id.* ¶ 64.

¶ 28 Here, the prosecutor's statement accurately restated defendant's presumption of innocence and the State's burden of proof to overcome that presumption. The prosecutor initially informed the jury that defendant had the presumption of innocence until such time the evidence presented at trial proved otherwise, which she argued had occurred in the instant case. See *People v. Tomes*, 284 Ill. App. 3d 514, 523 (1996) (finding no error in a prosecutor stating " '[i]t's correct that he (defendant) was presumed innocent before the trial began, he was cloaked in innocence as he sat over there. That was before you heard the evidence. The evidence is in ladies and gentleman' "). After this comment, the prosecutor proceeded to review the evidence with the jury and show how the State met its burden by proving many elements of the charged offenses. In essence, the prosecutor argued the State's evidence had overcome defendant's presumption of innocence. Therefore, the foregoing statements from the prosecutor were proper.

¶ 29 In reaching this conclusion, we reject defendant's reliance on *People v. Hudson*, 102 Ill. App. 3d 346 (1981) and *People v. Weinstein*, 35 Ill. 2d 467 (1966).

¶ 30 In *Hudson*, 102 Ill. App. 3d at 350, during rebuttal closing argument, the prosecutor improperly stated " [w]hen we started this trial, you were told that the defendant is presumed to be innocent until we, the People, show different. And once we begin to call witnesses to the witness stand, what happens is that the presumption begins to part.' " This statement could have reasonably misled a jury that the presumption of innocence disappeared, not when the State proved the defendant guilty beyond a reasonable doubt, but rather as it presented its first witness. Here, in contrast, the prosecutor informed the jury that the presumption of innocence only disappeared once the State had proved defendant guilty.

¶ 31 In *Weinstein*, 35 Ill. 2d at 469, the prosecutor made numerous arguments to the jury that in order for it to acquit the defendant of murder, the defendant "must create a reasonable doubt of her guilt." Thus, the prosecutor improperly shifted the burden of proof from the State and onto defendant. *Id.* at 470. Here, in contrast, the prosecutor's comment did not shift the burden of proof.

¶ 32 Defendant next argues the prosecutor made an improper statement when she invited jurors to speculate about a motive "entirely unsupported by the evidence" in order to convict him. In the comment at issue, the prosecutor stated:

"We didn't prove a motive here? We don't have to prove a motive. That's not required by the law. But if the Defense wants you to think about the motive, here's an idea, Ms. Diftler was screaming, I don't have anything. I don't have anything. She's running in a tank top and shorts, jogging shorts with no purse, no wallet, no money, no I-phone, no I-pod and she's screaming her head off that I don't have anything. A male knocked her on

the back of the head, pushes her down on the ground, drags her into the alley and when she won't shut up, he begins stabbing her. Think about what the motive is. Use your imagination all you want."

¶ 33 There is nothing improper about this statement. The prosecutor merely informed the jury that motive was irrelevant in this case, and she correctly stated the State was not required to prove a motive in order to convict defendant of aggravated kidnapping and aggravated battery. See 720 ILCS 5/10-1, 10-2 (West 2012) (motive not an element of aggravated kidnapping); 720 ILCS 5/12-3, 12-3.05 (West 2012) (motive not an element of aggravated battery). Following her assertion concerning motive being unnecessary, everything the prosecutor mentioned was evidence presented at trial or reasonable inferences therefrom.

¶ 34 Moreover, the prosecutor's comments were direct responses to defense counsel's argument that no motive existed for defendant to attack Diftler. During defense counsel's argument, he asked:

"How did this start? All of a sudden attacked for no reason. There's no motive of robbery. There's nothing to show that this is motivated by sexual assault. How does this begin. She doesn't see him. She is in the middle of the street and all of a sudden from nowhere somebody comes out and attacks for no reason."

Later during argument, defense counsel stated "[t]here's got to be something that precipitates this. There's got to be something that comes out. There's some kind of – there's some sort of intersection, a glance of the eye, something that happens. It doesn't happen isolated in a vacuum as described here."

¶ 35 While there was nothing improper about the statements on their own, as discussed, defendant also cannot argue these statements were erroneous when they were invited responses

from defense counsel's argument. See *People v. Nieves*, 193 Ill. 2d 513, 534 (2000) (stating "because the prosecutor's comments were invited, they cannot be relied upon as error on appeal"). Therefore, the foregoing statements from the prosecutor were proper.

¶ 36 Defendant lastly argues the prosecutor made an improper statement when she stated: "And if you are going to contemplate this murder, think about what he wrote in the cell in his own blood, kill the bitch." Defendant asserts the prosecutor made this statement in an effort to inflame the jury's passions by making a confusing reference to a murder with no apparent relationship to the facts of the case, and the evidence at trial contradicted the statement.

¶ 37 The prosecutor's use of the word "murder" appears to be out of context with the rest of her rebuttal closing argument. Consequently, it is difficult to determine what the prosecutor meant by "murder" or whether it was a transcription error or simple misstatement, especially in light of her repeated use of the word "motive" during rebuttal closing. Regardless of the word spoken, and taken in context, the prosecutor's comments were responsive to defense counsel's argument that defendant lacked a motive to commit the crimes. While it is true the photograph introduced into evidence contained only the words "kill" and "bitch," it was a reasonable inference for the prosecutor to connect the two words during argument when she stated "kill the bitch." Therefore, the foregoing statements from the prosecutor were proper.

¶ 38 In sum, all of the contested statements were proper, and consequently, where there is no error, there can be no plain error. See *Bannister*, 232 Ill. 2d at 79.

¶ 39 Defendant next contends that the trial court committed reversible error when it failed to instruct the jury, over his request, on the lesser-included offense of simple battery where the knife allegedly used in the attack against Diftler was never recovered. Defendant does not dispute, however, that the battery occurred on a public way. The State responds that under the

one-good-count rule, because the jury returned a single general verdict of guilty on his two aggravated battery charges, no reversible error occurred. The State also asserts that because of the single general verdict of guilty, defendant may only be convicted and sentenced on one count of aggravated battery. See *People v. Denson*, 407 Ill. App. 3d 1039, 1041 (2011). Although the State does not concede that defendant did not use a deadly weapon while committing his crimes, it urges us to vacate his aggravated battery conviction based on a deadly weapon and keep his conviction based on being on a public way because there is no instructional dispute concerning the latter conviction. In light of the one-good-count rule, defendant replies conceding that his lesser-included instruction argument is now moot and agreeing with the State on its proposed remedy. We accept the parties' concession.

¶ 40 During the trial court's oral pronouncement of defendant's sentence, it is unclear whether the court sentenced him on all four counts charged or one count each for aggravated kidnapping and aggravated battery, as reflected by the jury's general verdict to each offense. The mittimus, however, clearly reflects convictions and sentences on all four counts charged. Therefore, pursuant to our ability to vacate a conviction without remand (see *People v. Lee*, 2012 IL App (1st) 101851, ¶ 55; Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we vacate defendant's conviction for aggravated battery based on using a deadly weapon.

¶ 41 Similarly, the parties next agree that both of defendant's convictions for aggravated kidnapping cannot simultaneously stand but for different reasons. Defendant argues they cannot simultaneously stand pursuant to the one-act, one-crime doctrine, whereas the State argues it is because the jury returned a single general verdict of guilty for aggravated kidnapping based on two charges with alternate theories. We agree with the State.

¶ 42 When the trial court provides the jury with a single general verdict form concerning an offense, only one conviction may result from the jury's guilty verdict. *Denson*, 407 Ill. App. 3d at 1041. Here, the trial court provided the jury with a single general verdict form concerning aggravated kidnapping, *i.e.*, guilty of aggravated kidnapping and not guilty of aggravated kidnapping. Consequently, defendant could only be convicted of one count of aggravated kidnapping against Diftler. *Id.* Therefore, we must vacate one of defendant's convictions for aggravating kidnapping.

¶ 43 The parties do not, however, provide us any guidance as to which conviction should be vacated and simply ask us to select one. We disagree that we, as the reviewing court, should decide.

¶ 44 Generally, when there are multiple counts for the same offense but a single general verdict returned for the offense, defendant can only be convicted and sentenced on the most serious offense. See *People v. Cardona*, 158 Ill. 2d 403, 411-13 (1994); *People v. Griffin*, 375 Ill. App. 3d 564, 571-72 (2007); *People v. Sample*, 326 Ill. App. 3d 914, 929 (2001). Here, however, because both of defendant's aggravated kidnappings are Class X felonies (see 720 ILCS 5/10-2(a)(3), (5), (b) (West 2012)), it is not clear which is the most serious offense.

¶ 45 A parallel situation arises when a defendant is convicted of multiple crimes arising out of the same act. When this occurs, our supreme court has instructed us to examine the offenses at issue and keep the conviction on the most serious offense while vacating the convictions on the less serious offenses. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). The court has stated the first step in comparing the seriousness of offenses is to consider their punishments (*id.*), and here, as discussed, both aggravated kidnappings are Class X felonies. See 720 ILCS 5/10-2(a)(3), (5), (b) (West 2012). Our supreme court has also considered which offense has the more culpable mental

state. *Artis*, 232 Ill. 2d at 170-71. Here, both offenses require a knowing mental state. See 720 ILCS 5/10-1(a), 10-2(a) (West 2012). As such, "[w]hen it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination." *Artis*, 232 Ill. 2d at 177. Although arising in the one-act, one-crime context, we find this analysis applicable to the instant situation where the jury returned a single general verdict on aggravated kidnapping. Accordingly, because we cannot determine which aggravated kidnapping conviction is the more serious offense, we remand the matter to the trial court for that determination and to vacate the less serious conviction.

¶ 46 Finally, defendant contends, and the State concedes, that his mittimus must be corrected to reflect his aggravating kidnapping conviction based upon the commission of another felony, not for inflicting great bodily harm, as his mittimus currently states. However, because we have remanded the matter to the trial court to vacate the less serious aggravated kidnapping conviction, we need not resolve this issue because the court will be required to issue a new mittimus, which we presume will accurately reflect defendant's convictions.

¶ 47 For the foregoing reasons, we affirm the judgment of the circuit of Cook County, but vacate defendant's conviction for aggravated battery based on using a deadly weapon. We also remand the matter to the trial court to determine which of defendant's aggravated kidnapping convictions is the most serious offense and to vacate the less serious conviction.

¶ 48 Affirmed in part; vacated in part; and remanded with directions.