2016 IL App (1st) 140376-U

FOURTH DIVISION
June 23, 2016

No. 1-14-0376

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 18148
	)	
JAMES MARTIN,	)	The Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence sufficient to prove that defendant inflicted great bodily harm on victim where victim suffered ruptured eardrum and hearing loss for two months after defendant slapped her. Trial court did not abuse its discretion in sentencing defendant to 20 years' incarceration where nature of offense and defendant's lack of remorse supported lengthier sentence. Defendant's mittimus corrected in accord with one-act, one-crime rule.

¶ 2 Following a bench trial, defendant James Martin was found guilty of aggravated kidnapping, kidnapping, aggravated domestic battery, aggravated battery, domestic battery, and unlawful restraint. He was sentenced to 20 years in prison for aggravated kidnapping, 7 years for

kidnapping, 7 years for aggravated domestic battery, 5 years for aggravated battery, 3 years for domestic battery, and 3 years for unlawful restraint. The trial court ordered all of the sentences to run concurrently.

¶ 3 On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that the victim suffered great bodily harm because he only slapped the victim twice and there were no "permanent" injuries. He further contends that the trial court abused its discretion in sentencing him to 20 years in prison for aggravated kidnapping because he had no prior felony convictions and his conduct did not result in permanent injury to the victim. Defendant finally contends that certain convictions must be vacated pursuant to the one-act, one-crime rule and to conform to the trial court's oral pronouncement at sentencing. We affirm and correct the mittimus.

¶ 4 Defendant's arrest and prosecution arose out of an incident during which the victim, L.W., was struck twice in the face and confined to a bedroom in defendant's home.

¶ 5 At trial, Toni Hill testified that she and defendant were previously involved in a dating relationship. On May 4, 2010, defendant was at her home, and a conversation between them became "confrontational." Hill asked defendant to leave several times. When defendant refused to leave, she attempted to contact the police. Defendant tried to take the phone by pulling and twisting the phone while she held it. Although defendant was able to take the phone away, Hill ultimately was able to complete the call. They continued to argue. Defendant was present when the police arrived.

¶ 6 L.W. testified that she and defendant were previously in a relationship and had two children together. On May 27, 2010, defendant came to her house in Rockford, even though she had obtained an order of protection against defendant which prohibited defendant from having

any contact with her. When she saw defendant, she "snuck out" the side door of her apartment, "jumped" in her car and called the police.

¶ 7 As L.W. drove, she saw defendant driving behind her. She pulled into a Burger King, and defendant pulled in behind her. L.W. rolled down her car window and said that she had called the police. Defendant drove away.

¶ 8 Two days later, defendant called L.W. on her cell phone six times over the course of 15 to 20 minutes. L.W. did not answer the phone. The doorbell then rang and L.W.'s mother answered the door. When L.W. heard defendant's voice, she called 911.

¶ 9 On September 3, 2012, L.W. was living in Chicago. She went to defendant's apartment to drop off their daughters, who were three and nine years old. The children brought their bicycles with them to defendant's house. When they arrived, L.W. spoke with defendant and walked with him into an alley. As the children rode their bikes in the alley, defendant asked where L.W. got the money to buy their younger daughter's bike. L.W. testified that she would not "give him a direct answer," so defendant grew agitated.

¶ 10 After five minutes of defendant questioning L.W., she explained that she used money left over from money that defendant had given her for the children. She also told defendant that she used money from a gentleman she was dating at that time. Defendant then "open hand slapped" L.W. across the left side of her face. She testified that, after defendant hit her, she felt her left ear "pop and start ringing." She also said that she felt a "stinging, burning sensation" on her face.

¶ 11 L.W. tried to hit with her backpack, but could not see well because her glasses had fallen off. Defendant "danced around the alley," yelled at the victim, and then hit her a second time with an open hand on the right side of her face. By this point, defendant's uncle and neighbors were on their back porches watching what was going on in the alley. Defendant yelled at his uncle to take the children inside, and the children ran upstairs.

¶ 12 Defendant threw the younger child's bike in the trash and threw the older child's bike into the yard. L.W. began to walk away. She was in tears and had taken out her phone to call 911. Defendant ran after her, grabbed her by the waist, picked her up and carried her back toward the entrance to his building. Defendant said he wanted her phone so that he could call the man she was dating. When L.W. refused, defendant threatened to beat her. She gave him the phone. When L.W. said she wanted to leave, defendant told her she was not going anywhere. L.W. walked upstairs to defendant's apartment.

¶ 13 Once they were inside defendant's apartment, L.W. saw defendant talking on her phone. She could not do anything because defendant locked her in a back bedroom. L.W. testified that the door was locked from the outside, but also said that, when she tried to open the door, it opened. L.W. testified that, when she opened the door, defendant told her to sit her "ass down" and closed the door. This happened three times over the course of 20 minutes. Eventually, defendant came into the room and threw the phone on the bed. L.W. did not call anyone because she was afraid the situation "might escalate some more." She stayed in the bedroom. L.W. testified that, while she was in the bedroom, her left ear was painful, "ringing," and "pounding."

¶ 14 After 15 minutes, defendant came into the bedroom and said that they were going to the park. L.W. said she did not want to go to the park and wanted to go home. Defendant replied that his daughters wanted to go to the park, so they were going to the park.

¶ 15 As L.W., defendant, and the children walked to the park, L.W. continued to tell defendant that she wanted to go home. Defendant told her that she was not going anywhere. L.W. did not leave because she did not want to leave her children. L.W. testified that, while they were at the park, she said that she wanted to go home and got up to leave, but defendant yelled that he would beat her and did not care if other people were watching. L.W. sat and listened to defendant in

order to avoid a situation "like there was in the alley." Ultimately, the group left the park and returned to defendant's apartment.

¶ 16 Back at the apartment, defendant played a movie for the children. L.W. testified that she "snuck out" the back door and went to the corner store. On her way back from the store, she saw defendant walking toward her on the street. Defendant was upset that she left the apartment without his knowledge and told her to get back inside. After L.W. went back inside, defendant called someone to drive the victim and the children home. Defendant accompanied them on the trip back to L.W.'s house. When they arrived, defendant entered the apartment and walked around. L.W. put the children to bed and laid down with them.

¶ 17 The next day after dropping the children at school, L.W. went to a doctor because her ear still rang and stung. The doctor performed a CAT scan and hearing test. L.W. testified that, at the time of trial, she could hear out of her left ear, although she did not have "full hearing." She said that it took two months for any hearing to return to her left ear.

¶ 18 L.W. testified that, after the doctor's visit, she went to a police station to file a police report. On cross-examination, she acknowledged that the police did not take her statement until nine days after the incident because she had told defendant that if he did not contact her she would not press charges.

¶ 19 The parties stipulated that Dr. Vikas Patel, the physician who treated L.W., would testify that he saw blood in her ear canal. He diagnosed her with a ruptured eardrum and prescribed her pain medication.

¶ 20 The State also admitted into evidence a certified copy of defendant's conviction for domestic battery in case number 10 CR 143858.

¶ 21 In finding defendant guilty, the trial court found that L.W. was "very credible" and that the stipulated medical evidence established that the victim suffered great bodily harm when

defendant ruptured her eardrum. The court further found that the victim was held against her will after "repeatedly" asking to leave and that she was threatened with bodily harm if she did not do what defendant "instructed her to do."

¶ 22 At sentencing, L.W. made a victim impact statement. In the statement, she apologized to her children. She further stated that over the course of her relationship with defendant, he inflicted mental and physical abuse upon her by pulling her hair, slapping her, punching her, and choking her. Defendant also used physical force and intimidation when she refused to "sexually satisfy" him. L.W. said that she had been diagnosed with hypertension, posttraumatic stress disorder, depression, and severe anxiety. She explained that she had believed defendant's apologies, from the first time he hit her, and lied when asked about her injuries because she wanted to "have a family." Although she contemplated suicide, she realized that she had to protect her daughters.

¶ 23 The State argued in aggravation that defendant had a previous conviction for domestic battery and that Hill, "another victim," had testified at trial. In mitigation, the defense argued that because defendant was 43 years old and had no prior felony convictions, this was an "isolated incident." The defense concluded that defendant was not "irredeemable."

¶ 24 Defendant apologized to the court, said that he loved his children, and said that this was the "first time" he had been "accused of hitting anybody." Defendant also stated that he did not do drugs. He explained that both he and L.W. were victims and that his "baby mothers" keep in contact with his former girlfriend Hill. On September 9, when he went to pick up his daughters, the victim's "guy friend" came out and tried to "jump on" him. Defendant said that if this man, a Chicago police officer, had been at trial this person could have "vouched" for the fact that they had discussed the victim's drinking and drug use. He further stated that Hill still wrote to him.

¶ 25 The court asked defendant whether he felt victimized. Defendant said yes and that "[i]t's like a love triangle."

¶ 26 The trial court sentenced defendant to 20 years in prison for aggravated kidnapping, 7 years for kidnapping, 7 years for aggravated domestic battery, 5 years for aggravated battery, 3 years for domestic battery, and 3 years for unlawful restraint. All sentences were to run concurrently and the "same classes were to merge."

¶ 27 On appeal, defendant first challenges his convictions for aggravated kidnapping, aggravated domestic battery, and aggravated battery. He contends that the State failed to prove, beyond a reasonable doubt, a necessary element of each of those offenses: that he caused great bodily harm to L.W. Defendant notes that the evidence only established that he slapped L.W. twice and she did not suffer any "permanent injuries." Defendant does not challenge the sufficiency of the evidence as to any other elements of these convictions. The State responds that the evidence at trial was sufficient to support of finding of great bodily harm when the blow defendant inflicted on L.W. ruptured her eardrum.

¶ 28 In assessing the sufficiency of the evidence, we determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). We will not substitute our judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, or the reasonable inferences to be drawn from the evidence. *Id.* A defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 29 To prove defendant guilty of aggravated kidnapping, aggravated domestic battery, and aggravated battery, the State had to prove, in pertinent part, that while committing the offenses,

defendant inflicted or knowingly caused great bodily harm. See 720 ILCS 5/10-2(a)(3) (West 2010) (aggravated kidnapping); 720 5/12-3.3(a) (West 2010) (aggravated domestic battery); 720 ILCS 5/12-3.05(a)(1) (West 2010) (aggravated battery). Whether an injury constitutes great bodily harm to support a conviction is a question of fact to be determined by the trier of fact. *People v. Crespo*, 203 Ill. 2d 335, 344 (2001); see also *People v. Doran*, 256 Ill. App. 3d 131, 136 (1993) (generally, whether a defendant inflicted great bodily harm or permanent disfigurement is a question for the trier of fact). "Bodily harm" requires "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). "Great bodily harm," on the other hand, does not lend itself to a precise legal definition, but requires proof of an injury greater and more serious in nature than a simple battery. *Mandarino*, 2013 IL App (1st) 111772, ¶ 63. The question is not what the victim did or did not do to treat her injuries, but what injuries she actually received. *Id*.

¶ 30 Viewing the evidence in the light most favorable to the State, we find that the evidence in this case was sufficient for the trial court to find that L.W. suffered great bodily harm. L.W. testified that when defendant "open hand slapped" her across the left side of the face, she felt her ear pop, and then start ringing. When she underwent a hearing test the next day, she still could not hear out of her left ear. Her hearing took two months to return, and, at the time of trial, she still had not recovered "full hearing" in that ear. The parties stipulated that Dr. Patel's examination of L.W. revealed blood in her ear canal and that he diagnosed her with a ruptured eardrum. A rational trier of fact could find that the evidence at trial established that the injuries suffered by the victim, a ruptured eardrum and partial hearing loss, rose to the level of great bodily harm.

¶ 31 We reject defendant's contention that the State failed to establish that the victim suffered great bodily harm because the ear "healed completely within two months." Contrary to defendant's argument, L.W. testified at trial that she had not recovered "full hearing" in that ear.

¶ 32 Defendant argues that "[f]indings of great bodily harm are restricted to cases where the victim suffered a very serious injury, usually from a shooting," citing numerous cases where the victims had been shot or stabbed. We disagree that those types of injuries establish a baseline for what constitutes "great bodily harm." This court has upheld findings of great bodily harm even when no weapons are used and injuries require little medical treatment. See, *e.g.*, *People v. Psichalinos*, 229 Ill. App. 3d 1058, 1068-69 (1992) (great bodily harm established where defendant punched child causing fracture to nose and bruise lasting one week); *People v. Smith*, 6 Ill. App. 3d 259, 264 (1972) (sufficient evidence of great bodily harm where defendant "stuck the complainant twice in the face with his fist, gave her a lump in her mouth, put a scar on her face, and left bruises under her chin"); *People v. Machroli*, 100 Ill. App. 2d 227 (1968), *rev'd on other grounds*, 44 Ill. 2d 222 (1969) (great bodily harm established where defendant slapped two-year-old with open had with sufficient force to knock her down and make her cry, and poked her with spoon). Because what constitutes great bodily harm is a question of fact, we cannot substitute our judgment for the trial court's unless no reasonable trier of fact could find that great bodily harm existed. A rational trier of fact could conclude that a months-long ear injury that caused significant pain and hearing loss was great bodily harm.

¶ 33 We acknowledge that, in *In re J.A.*, 336 Ill. App. 3d 814, 818 (2003), and *In re T.G.*, 285 Ill. App. 3d 838 (1996), this court found that no great bodily harm had been proved even though the victims had been stabbed. But in each of those cases, the victims described their injuries as minor. See *J.A.*, 336 Ill. App. 3d at 818 (victim described stabbing "as feeling like somebody pinched him," there was no evidence of "the extent or nature of the victim's injury from the

single wound," and there was no evidence as to victim bleeding); *T.G.*, 295 Ill. App. 3d at 846 (victim equated stabbing to being poked with a pen or pencil and did not know he had been stabbed until he saw his shirt had been cut). By contrast, in this case, L.W. said that her ear was painful, ringing, and pounding.

¶ 34 The trial court found that defendant inflicted great bodily harm on the victim when he struck her causing her eardrum to rupture, and the victim had not regained full hearing in that ear as of the time of trial. We cannot say that no rational trier of fact could have found the element of great bodily harm proven beyond a reasonable doubt.

¶ 35 Defendant next contends that a 20-year sentence for aggravated kidnapping is excessive because L.W. did not suffer permanent injuries and he had no prior felony convictions. Defendant also argues that his lengthy sentence would be a heavy financial burden on the State and is not appropriate for an "older" offender such as himself.

¶ 36 Here, defendant was convicted of the Class X felony of aggravated kidnapping. See 720 ILCS 5/10-2(a)(3), (b) (West 2010). The sentencing range for a Class X felony is between 6 and 30 years in prison. See 730 ILCS 5/5-4.5-25 (West 2010).

¶ 37 A trial court has broad discretion in determining the appropriate sentence and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence within the statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010).

"Even where there is evidence in mitigation, the court is not obligated to impose the minimum sentence." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010).

¶ 38 At sentencing, the trial court heard evidence detailing the abuse that L.W. had suffered in her relationship with defendant, as well as the impact that abuse had had on L.W.'s health. Moreover, the trial court heard the extent to which defendant physically harmed L.W. in this case, threatened her, and held her captive for nearly an entire day. The circumstances of the offense thus support a higher sentence. See *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002) (seriousness of offense is most important factor in determining sentence).

¶ 39 The court also asked defendant whether he considered himself to be a victim, which he said that he did. The trial court would have been reasonable in aggravating defendant's sentence based on his lack of remorse. See *People v. Pace*, 2015 IL App (1st) 110415, ¶ 100 (a sentencing court may consider a defendant's lack of remorse as an aggravating factor, when the evidence that the defendant lacks remorse is taken from some source other than the defendant's silence at sentencing, such as the manner in which the defendant refers to a victim or describes the offense).

¶ 40 We reject defendant's contention that the trial court failed to adequately consider the mitigation evidence presented, including the facts that the victim did not suffer "permanent" injuries, defendant's lack of prior felony convictions, defendant's age, defendant's love for his children, or the financial impact of incarcerating defendant. We presume that the court properly considered the mitigating factors presented and it is the defendant's burden to show otherwise. *Brazziel*, 406 Ill. App. 3d at 434. We may not simply reweigh the aggravating and mitigating factors presented to the court. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). The presence of some mitigating factors does not persuade us that the trial court abused its discretion in imposing a 20-year sentence, where other factors justified a lengthier sentence. See *id.* ("The

existence of mitigating factors does not mandate imposition of the minimum sentence [citation] or preclude imposition of the maximum sentence [citation]." The trial court was in the best position to fashion an appropriate sentence, and this court cannot say that a sentence of 20 years was an abuse of discretion. See *Patterson*, 217 Ill. 2d at 448.

¶ 41 Defendant finally contends that certain convictions should be vacated pursuant to the one-act, one-crime rule. Although defendant concedes that he waived this issue by failing to object to this error before the trial court, we review one-act, one-crime issues pursuant to the second prong of the plain error doctrine because the potential for an unwarranted conviction and sentence threatens the integrity of the judicial process. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 42 To determine whether a violation of the one-act, one-crime rule has occurred, a reviewing court must determine whether the defendant's conduct involved multiple acts or a single act, and, if the conduct involved multiple acts, whether any of the offenses are lesser-included offenses. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). We review *de novo* whether a defendant's convictions violate the one-act, one-crime rule. *People v. Csaszar*, 375 Ill. App. 3d 929, 943 (2007).

¶ 43 Here, defendant was found guilty of aggravated kidnapping (counts 1 and 2), kidnapping (counts 3 and 4), aggravated domestic battery (count 5), aggravated battery (counts 6, 7 and 8), domestic battery (counts 9 and 10), and unlawful restraint (count 11).

¶ 44 The State concedes that the kidnapping counts (counts 3 and 4), must merge with the aggravated kidnapping counts (counts 1 and 2), and that count 11 must also merge with the aggravated kidnapping counts because unlawful restraint is a lesser-included offense of aggravated kidnapping. The State further concedes that the domestic battery counts (counts 9 and 10), must merge into count 5 because domestic battery is a lesser-included offense of aggravated

domestic battery. The State finally concedes that counts 6 and 7 for aggravated battery must merge into count 5 for aggravated domestic battery because all three counts deal with the same act. We accept these concessions.

¶ 45 The State next contends, and we agree, that the mittimus must be corrected to conform to the trial court's oral pronouncement that the "same classes" of convictions were to merge. See *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993) (the trial court's oral pronouncement is the judgment of the court; the written order of commitment is merely evidence of that judgment). Therefore, the aggravated kidnapping counts (counts 1 and 2), must merge. See *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007) (when a written order conflicts with the trial court's oral pronouncement, the written order must be corrected to mirror the oral pronouncement). Pursuant to our power to correct a mittimus without remand, we therefore order that the mittimus be corrected to reflect one conviction for aggravated kidnapping. See Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999).

¶ 46 Defendant finally contends that he can only be found guilty of one act of battery because, although there were two blows to L.W.'s face, the State failed to parse out the blows in the relevant charging instruments and cannot now do so for the first time on appeal. The State responds that the evidence at trial established that defendant struck L.W. twice and, therefore, two battery convictions are appropriate.

¶ 47 Here, Count 5 alleged that defendant committed aggravated domestic battery in that he knowingly caused great bodily harm to L.W. when he "struck [her] about the face." Count 8 alleged that defendant committed aggravated battery when he "struck [L.W.] about the face." Thus, the charging instrument did not separate the two slaps—one to the left side of L.W.'s face and the other to the right—between the two charges.

¶ 48 *People v. Crespo*, 203 Ill. 2d 335 (2001) is instructive. In that case, the defendant stabbed the victim three times and was convicted of armed violence and aggravated battery. *Id*. at 337. On appeal to our supreme court, the defendant argued that his conviction for aggravated battery should be vacated because it stemmed from the same physical act as the armed violence charge. *Id*.

¶ 49 Our supreme court determined that the State did not charge the defendant for each of the three separate acts of stabbing the victim, but instead relied on the same conduct to charge the defendant under three different theories of criminal culpability. *Id*. at 342. Additionally, the State's theory at trial was that the defendant's conduct was a single attack. *Id*. at 343-44. The court held that, where a defendant commits multiple criminal acts but the indictment only charges the defendant with a single course of conduct, the State cannot change the theory of the case on appeal. *Id*. at 344. The court emphasized that the State could have charged defendant with multiple acts based on his actions of stabbing the victim three times, and could have argued the case to the jury that way but chose not to do so. *Id*. at 344-45.

¶ 50 Here, like *Crespo*, the State did not parse out defendant's conduct. Both charging instruments stated that defendant "struck [L.W.] about the face." While the State could have chosen to differentiate the physical acts by specifying the blow to the right side of L.W.'s face or the left side, it cannot do so for the first time on appeal. Thus, defendant's convictions for count 5 and count 8 violate the one-act, one-crime doctrine because they are based upon the same physical act. See *Miller*, 238 Ill. 2d at 165.

¶ 51 Our supreme court has held "that under the one-act, one-crime doctrine, sentence should be imposed on the more serious offense and the less serious offense should be vacated." *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Here, defendant was convicted of the Class 2 felony of aggravated domestic battery (735 ILCS 5/12-3.3(a), (b) (West 2010)), and the Class 3 felony of

aggravated battery (720 ILCS 5/12-3.05(a)(1), (h) (West 2010)). We vacate defendant's conviction for aggravated battery under count 8, as that offense has a lower sentencing range. See *Artis*, 232 Ill. 2d at 170 ("In determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense.").

¶ 52 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's mittimus by vacating counts 2, 3, 4, 6, 7, 8, 9, 10, and 11. Defendant's mittimus should reflect a 20-year sentence for a conviction for aggravated kidnapping (count 1), and a concurrent, 7-year sentence for his conviction for aggravated domestic battery (count 5). We affirm the trial court's judgment in all other aspects.

¶ 53 Affirmed; mittimus corrected.