2016 IL App (2d) 140341-U
No. 2-14-0341
Order filed August 9, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVIN M. OLDAKER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 10-CF-447 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of armed violence predicated on aggravated battery, as the jury could infer that he knowingly cut the victim with a knife as they were struggling over it; (2) as defendant's sentencing argument was premised on his assumption that we would reverse a separate conviction and sentence, which instead we affirmed, we did not address his sentencing argument; (3) we vacated defendant's successive (and thus unauthorized) DNA analysis fee.

¶ 2 After a jury trial, defendant, Kevin M. Oldaker, was convicted of home invasion (720 ILCS 5/12-11(a)(1) (West 2010)); aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2010)); and armed violence (720 ILCS 5/33A-2 (West 2010)) predicated on aggravated

battery (720 ILCS 5/12-4(a) (West 2010)). The trial court sentenced him to concurrent prison terms of 10 years for home invasion and armed violence and a 15-year prison term for aggravated criminal sexual assault, to be served consecutively to the other sentences. Defendant appeals, contending that (1) he was not proved guilty of armed violence, because the State produced insufficient evidence of aggravated battery; (2) his sentences must be modified, as the 15-year term for aggravated criminal sexual assault is one year less than the legal minimum; and (3) the trial court erred in charging him a DNA analysis fee. The State confesses error on the third issue. We reject defendant's other claims of error, and we affirm as modified.

¶ 3 The indictment alleged first that defendant committed home invasion in that, not being a peace officer acting in the line of duty, he knowingly and without authority entered the home of S.A., knowing her to be present, and placed a knife to her throat. It alleged second that defendant committed aggravated criminal sexual assault in that, while displaying the knife, by the use of force or the threat of force, he placed his penis into S.A.'s vagina. The indictment alleged third that defendant committed armed violence based on aggravated battery in that, while armed with the knife, he committed aggravated battery when, without lawful justification, he knowingly caused S.A. great bodily harm by cutting her with the knife.

¶ 4 We summarize the pertinent trial evidence, focusing on that relating to the conviction of armed violence, the only one at issue here.

¶ 5 S.A. testified as follows. In October 2010, she was married to defendant, but they were separated. She lived in the marital house in Poplar Grove with her four children. On Friday, October 22, after giving defendant custody of the children for the weekend, S.A. fell ill. She stayed home that evening. She spent Saturday in bed, closing the window for quiet. About 4 a.m. on Sunday, she woke up, took a sleeping aid, and went back to sleep. She woke up again

when she felt pressure on top of her. Opening her eyes, she saw defendant on top of her. S.A. started screaming at him to get off her. She felt pressure on her throat. Defendant told her to shut up or he would cut her. S.A. then felt pressure as defendant "actually started to slice." He was still on top of her, and she was struggling to push him off. Defendant started to pull down S.A.'s underwear and asked her whether the man whom he suspected her of seeing was better in bed than he was. Defendant forced S.A.'s legs open, pressed the knife to her throat, and had intercourse with her for a couple of minutes. He then stopped but continued to straddle her.

¶ 6 S.A. testified further that defendant placed the knife to his own throat and said that she was going to watch him die. As he started to slice his throat, S.A. looked away, but he forced her to look at him by using his free hand to pin her down by her shoulder and arm. Defendant then either lost his balance or got up. S.A. ran, reached the window, and tried to open it, screaming for help. Defendant came up from behind, grabbed her, pushed her away from the window, and closed it. As he locked the window with one hand, he held the knife in the other. S.A. went to grab the knife from him.

¶ 7 S.A. testified further as follows:

"Q. When you went to grab the knife from him, what happened?

A. My fingers got sliced, my right hand.

Q. And you're still in the master bedroom at this point?

A. We're still in the bedroom.

Q. And can you describe—you've just testified that you went for the knife. Can you describe in greater detail how you went about that?

> A. Well, his one hand was—was occupied locking the window, so I went for his other hand that was holding the knife, and as he was pulling it away, I'm grabbing it from him, and he pulled it as I was holding onto the blade, so it sliced three of my fingers."

S.A. testified that defendant told her that she should not have tried to grab the knife.

¶ 8 S.A. testified further that she and defendant continued to fight. S.A. managed to escape and ran downstairs. Eventually, she and defendant ended up in the basement. S.A. told defendant that, if he left, she would not call the police. They went upstairs, where S.A. saw a security guard outside and got his attention. Shortly afterward, the police arrived. S.A. told one officer that defendant had a knife. The officer walked her out to the security guard's vehicle. Later, S.A. went to the hospital.

¶ 9 S.A. testified that the knife was "like a regular kitchen knife," not a butcher knife. She identified photographs of the injuries to her hand. She explained that the knife had cut two fingers and, to a lesser extent, her pinky. She explained that "[t]he knife went straight across."

¶ 10 Tammy Voiles, the nurse who treated S.A. in the hospital, testified that she examined S.A.'s injuries. S.A. had lacerations on her fingers. Voiles asked S.A. how she got them; S.A. "said that [she] was trying to pull the knife away from her throat." Voiles also testified that S.A. said that she got the cuts to her hand "from trying to push the knife away from her throat."

¶ 11 The jury convicted defendant of the three charges, and the trial court sentenced him *in absentia* as noted. Defendant appealed.

¶ 12 Defendant contends first that the State did not prove him guilty beyond a reasonable doubt of armed violence. "A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law." 720 ILCS 5/33A-2(a) (West 2010). Here, defendant challenges the evidence of the predicate offense of aggravated battery,

which a person commits when, "in committing a battery, [he] intentionally or knowingly causes great bodily harm or permanent disability or disfigurement." 720 ILCS 5/12-4(a) (West 2010).

¶ 13 Defendant notes that the charge was based on the injuries that S.A. received to her hand when she and defendant were struggling over the knife. He argues that, although S.A. suffered great bodily harm when the knife cut her hand, the State failed to prove that he *intentionally or knowingly* caused this harm. Defendant reasons that S.A.'s testimony proved only that she sought to take the knife from defendant and that, in the struggle, the knife cut her fingers. He concludes that this evidence falls short of proving beyond a reasonable doubt that he either intended to inflict the cuts or knew that the natural and probable consequence of his actions was to inflict bodily injury on S.A. And, defendant concludes, since no other great bodily harm was inflicted with the knife, the State did not prove the predicate offense.

¶ 14 In considering a challenge to the sufficiency of the evidence, we ask only whether, after viewing all of the evidence in the light most favorable to the State, any rational fact finder could have found the elements of the offense proved beyond a reasonable doubt. *People v. Ward*, 154 Ill. 2d 272, 326 (1992). The trier of fact is responsible for determining the witnesses' credibility, weighing their testimony, and deciding on the reasonable inferences to be drawn from the evidence. *People v. Hill*, 272 Ill. App. 3d 597, 603-04 (1995). It is not our function to retry the defendant. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004).

¶ 15 A person acts "knowingly when he is consciously aware that his conduct is practically certain to cause the result"—here, great bodily harm. See *People v. Psichalinos*, 229 Ill. App. 3d 1058, 1067 (1992). Although we acknowledge that this is a close case, we conclude that the evidence allowed the jury to infer that defendant acted knowingly. S.A. testified that she grabbed the knife blade as defendant held the knife by the handle. As she held onto the blade,

defendant "pulled" the knife, and the blade cut S.A. across the hand, injuring three fingers. The jury could have found that defendant knew that it was practically certain that, as he tilted the handle toward himself, the blade would correspondingly tilt the other way—digging into the hand by which S.A. was holding the blade. This inference was consistent with S.A.'s testimony and the evidence of her injuries. Therefore, we hold that defendant was proved guilty beyond a reasonable doubt of armed violence based on aggravated battery.

¶ 16 Defendant's second contention on appeal is that the trial court erred in sentencing him to one year less than the minimum term for aggravated criminal sexual assault. He notes that the aggravated-criminal-sexual-assault statute makes his offense (in which the aggravating factor was that he "used a dangerous weapon other than a firearm") (720 ILCS 5/12-14(a)(1) (West 2010)) "a Class X felony for which 10 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/12-14(d)(1) (West 2010). Therefore, because a Class X felony has a minimum prison term of 6 years (730 ILCS 5/5-4.5-25(a) (West 2010)), the trial court was required to sentence defendant to no less than 16 years in prison.

¶ 17 Defendant requests that we modify his sentences by adding one year to that for aggravated criminal sexual assault, bringing it up to the 16-year minimum, and compensating for this addition by subtracting one year from his sentence for home invasion. This would result in the same aggregate prison term as defendant now has: a total of 25 years' imprisonment.

¶ 18 Defendant is clearly proceeding on the assumption that his conviction of armed violence will be reversed, so that he will not be subject to the 10-year sentence for that offense. However, we have affirmed defendant's conviction of armed violence. Therefore, to modify the other two sentences as defendant requests would result in (1) a 10-year sentence for armed violence; (2) a concurrent 9-year sentence for home invasion; and (3) a 16-year sentence, to be served

consecutively to the others, for aggravated criminal sexual assault. Thus, instead of totaling 25 years' imprisonment (10 + 15), as now, defendant's terms would total 26 years' imprisonment (10 + 16). Therefore, we construe defendant's claim of error to depend on the reversal of his conviction of armed violence; not only does his argument read this way, but we shall not presume that, in the event that all of his convictions stand, defendant wants a longer total time of incarceration. Under these unique circumstances, we deem his argument consciously waived (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 6, 2013)) and consider it no further.

¶ 19 We note that there is no barrier to our refusal to disturb a sentence that is less than that required by statute. Although the law was formerly that a sentence that does not conform to statutory requirements is void (*People v. Arna*, 168 Ill. 2d 107, 113 (1995)), the supreme court, in an opinion issued after defendant filed his initial appellate brief, abolished this rule. *People v. Castleberry*, 2015 IL 116916, ¶ 15. Thus, the sentence is merely voidable, not void. As defendant has implicitly forgone requesting that we rule on the issue, we need not address it *sua sponte*. We note that the State requests that, if we deem defendant's sentence void and not merely voidable, we increase it to the minimum of 16 years. As we do not deem the sentence void, we need not consider the State's request. Moreover, as defendant points out, *Castleberry* bars this court from addressing the State's request to increase defendant's sentence. *Id.* ¶¶ 22, 26. As defendant does not, and the State may not, seek this result, we consider no further the matter of defendant's sentence.[1]

[1] One other matter merits brief note. Because this is a direct appeal from a conviction and sentence, we need not consider whether *Castleberry* applies retroactively in a collateral proceeding such as one under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). Thus, defendant does not attempt to argue that *Castleberry* is inapplicable.

¶ 20 Defendant's third argument is that the trial court erred in assessing a $250 DNA analysis fee (see 730 ILCS 5/5-4-3 (West 2012)). Defendant notes that the record shows that, in 2014, after a previous conviction, his DNA was collected and stored in the database kept by the Illinois State Police, and he was charged the required fee. The statute contemplates the collection of only one DNA sample from a person. *People v. Marshall*, 242 Ill. 2d 285, 301-03 (2011). The State confesses error. We modify the judgment by vacating the $250 DNA analysis fee.

¶ 21 The judgment of the circuit court of Boone County is affirmed as modified. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 22 Affirmed as modified.