2018 IL App (1st) 160248-U
Order filed: June 8, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-16-0248

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. 14 CR 13446
	)	
LUIS MERCADO,	)	Honorable
	)	James B Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated domestic battery affirmed over his contention that the State failed to prove beyond a reasonable doubt that he knowingly caused the victim great bodily harm; defendant's conviction and sentence for aggravated battery vacated under one-act, one-crime rule.

¶ 2 Following a bench trial, defendant-appellant, Luis Mercado, was convicted of aggravated battery (720 ILCS 5/12-3.05(b)(2) (West 2014)), and aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2014)), and sentenced to concurrent terms of four years' imprisonment. On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt. Alternatively, defendant contends that one of his convictions should be vacated under the one-

act, one-crime rule. We affirm defendant's conviction and sentence for aggravated domestic battery, but vacate defendant's conviction and sentence for aggravated battery under the one-act, one-crime rule.

¶ 3 Defendant was charged with four counts of aggravated battery and two counts of aggravated domestic battery following a June 30, 2014, incident involving his six-month-old daughter, A.M.

¶ 4 At trial, Lori Jorgensen testified that she is the mother of A.M. who was born on January 1, 2014. She and defendant began dating in the autumn of 2012. Ms. Jorgensen and defendant did not live together throughout their relationship. When A.M. was first born, Ms. Jorgensen did not leave her alone with defendant. Defendant would, instead, visit A.M. at Ms. Jorgensen's house, and he had a loving relationship with her.

¶ 5 When A.M. was about five months old, Ms. Jorgensen began allowing defendant to solely care for her at his home once a week. On June 30, 2014, it was the fourth time defendant picked up A.M. to watch her while Ms. Jorgensen went to work. Defendant arrived at Ms. Jorgensen's house around 4:00 p.m. A.M. was "a little fussy" prior to leaving with defendant because she did not like being in her car seat. She was born cross-eyed, but had no other issues with her eyes, nor issues with breathing, prior to leaving with defendant that day.

¶ 6 Around 8:30 p.m., Ms. Jorgensen received a phone call at work from defendant who told her that A.M. "wasn't okay" and that "she was breathing kind of weird." Ms. Jorgensen could hear A.M. breathing through the phone and described it as a "groaning sound." Ms. Jorgensen had never heard her make that sound before. Defendant told Ms. Jorgensen that when he first checked on A.M., she was okay. About 10 to 15 minutes later, he again checked on A.M. and

found her in that condition. Ms. Jorgensen told defendant to meet her in a Kmart parking lot, which was the halfway point between them.

¶ 7 Ms. Jorgensen saw A.M. in defendant's car and saw that her eyes were closed. She looked "a little funny" and "kind of buggy." Her chin was to her chest and she was "kind of sweaty." Ms. Jorgensen attempted to elicit a response from A.M., but the baby was unresponsive. They immediately took her to Swedish Covenant Hospital (Swedish). While there, Ms. Jorgensen changed the baby's diaper and noticed that A.M.'s "body was limp" and that she did not respond when she saw her mother. Swedish did not provide a diagnosis for A.M. and she was transported by ambulance to Ann & Robert H. Lurie Children's Hospital of Chicago (Lurie), where she remained for two weeks.

¶ 8 On July 2, 2014, Ms. Jorgensen and defendant had a conversation at the Area North police station in the presence of two detectives. Defendant told Ms. Jorgensen that he was playing with A.M. by tossing her into the air when he "missed her," and she "fell on the bed." Defendant said he picked her up to comfort her, but she was "pushing him away, like pushing her hands off of him." Defendant then "threw her on the bed."

¶ 9 Ms. Jorgensen testified that she knew defendant had five other children and did not notice anything that would give her cause for concern regarding his abilities to care for children. She did not have any concerns regarding defendant using drugs or alcohol, nor did she ever have any incidents of physical abuse or altercations with him. Ms. Jorgensen stated that, approximately three weeks prior to this incident, A.M. fell out of bed and hit her head on a carpeted floor. She said A.M. would rock her head back and forth and "bang" it on the bed.

¶ 10 Dr. Amanda Fingarson, a pediatrics and child abuse pediatrics physician at Lurie, testified that she examined A.M. and found that she responded to pain stimuli, but was minimally

responsive. Dr. Fingarson noticed a chin bruise which, based on its location, indicated an inflicted injury. A CT Scan and MRI of A.M.'s head revealed subdural hemorrhages on both sides of the head, subarachnoid hemorrhage and contusions to the brain, restricted circulation of blood to several areas of the brain, and bilateral hematomas. A.M. also had seizure activity, retinal hemorrhaging, and retinoschisis. She was unable to feed orally, was listless, and required ventilator support for several days due to the severity of her seizures.

¶ 11 It was the opinion of Dr. Fingarson that A.M.'s injuries were likely caused by an acceleration and deceleration motion. The doctor could not say whether there had been blunt impact, but A.M.'s injuries were possibly caused by being shaken and thrown up against a wall.

¶ 12 In coming to this conclusion, Dr. Fingarson interviewed both defendant and Ms. Jorgensen and was told that, three weeks earlier, A.M. had fallen off a bed to a carpeted floor that resulted in a small pink mark on her forehead. Dr. Fingarson was also told that, six days prior, A.M. was hit in the head with a small plastic toy thrown by a two-year-old, which resulted in bruises to both of her eyes.

¶ 13 Dr. Fingarson explained that it was "extremely unlikely" that A.M.'s injuries were the result of falling from a bed to a carpeted floor, nor were her injuries consistent with being held upside down by her feet and dropping her to the floor. And, although A.M.'s half-siblings had a history of febrile seizures, A.M.'s seizures were not febrile.

¶ 14 A.M. remained at Lurie for 13 days and was then transferred to a rehabilitation center.

¶ 15 Chicago police officer Brian O'Shea testified that, on July 1, 2014, he and his partner, Detective Roth, interviewed defendant and Ms. Jorgensen at Lurie. Prior to the interview, Officer O'Shea was aware of A.M.'s injuries and that defendant had been the last person with her. In the interview, defendant told Officer O'Shea that he brought A.M. to the second story of his home so

no one would know she was there. No one in defendant's family knew that A.M. existed and he was the only person with her on the day of the incident.

¶ 16 Defendant explained that he fed A.M. and she took two naps. He went downstairs to eat and, when he returned upstairs, he noticed that A.M. was not breathing correctly. She was "wheezing and not acting normal." Concerned that A.M. was choking on something, he put his finger in her mouth, but found no obstruction. He believed A.M. might have been having a seizure since his other children had a history of seizures. He then contacted Ms. Jorgensen and agreed to meet her at a Kmart parking lot.

¶ 17 The next day, defendant was in custody and Officer O'Shea interviewed him at the police station. Defendant reiterated the same facts he had relayed to Officer O'Shea the previous day at Lurie. Defendant then had the opportunity to speak with Ms. Jorgensen in the presence of Officer O'Shea. Defendant apologized to Ms. Jorgensen and said he "didn't understand why [A.M.] wouldn't take to him like a father, that she was always fuzzy [sic] and always crying and somewhat uncontrollable with her crying." Defendant asked for some time to be alone, and Officer O'Shea and Ms. Jorgensen left the room.

¶ 18 A short while later, defendant was interviewed by Officer O'Shea and Detective Roth. Defendant told them that A.M. "wasn't cooperating" when he tried to feed her, so he tried bouncing her on his knee. He then tried picking her up under her arms, outstretching her then bringing her back toward his chest. A.M. was still fussy, so he stood up and tried rotating her in a "circular motion." Defendant sat down on the bed and began "tossing" A.M. into the air "basically as high as he could" until he missed catching her on one of the tosses. She came down, striking his legs and knees.

¶ 19 After speaking with defendant, Officer O'Shea called Dr. Fingarson and explained to her what defendant had just told him. She stated that defendant's explanation of what happened was inconsistent with A.M.'s injuries and, consequently, Officer O'Shea confronted defendant. Defendant apologized for not being "forthcoming and truthful." He said that he was not sitting down when he tossed A.M. into the air, but was standing instead. When he missed catching A.M., she bounced "very high" off of the bed and began to loudly cry. Defendant picked her up and, when she reached out to touch his face with one of her hands, defendant "just lost it." He "launched" A.M. across the bed and heard a "loud thud" through the pillows he had propped up between the bed and the wall to protect A.M. from falling into the crevice. Defendant noticed A.M. did not look normal, had labored breathing, was wheezing, and was motionless.

¶ 20 Defendant told Officer O'Shea that he did not mention this to Ms. Jorgensen because he was embarrassed at what she, her family, and his family would think of him. Officer O'Shea described defendant as "very calm" when he first met him at the hospital and apologetic about what happened.

¶ 21 Photographs of A.M. (State's exhibits numbered 1 through 4) were entered into evidence. Defendant motioned for a directed finding and reserved argument, but never argued the motion.

¶ 22 Defendant had five other children with two different women, Jessica Mercado and Monica Moreno. Both women testified that defendant was never physically abusive to their children.

¶ 23 The trial court found defendant guilty of one count of aggravated domestic battery (knowingly caused great bodily harm to a family member who was under 12 years of age) and one count of aggravated battery (knowingly caused bodily harm to a child under 13 years of age). The court found defendant not guilty on all remaining counts, noting that it was "uncertain

about the permanency of disabilities that may have been caused that are alleged in [c]ounts, 2, 4, and 6." The court denied defendant's motion for a new trial, and he was sentenced to two concurrent four year terms' of imprisonment. Defendant's motion to reconsider sentence was denied. Defendant now appeals.

¶ 24 On appeal, defendant argues that the State failed to prove him guilty beyond a reasonable doubt of aggravated battery and aggravated domestic battery where the evidence did not establish that he was practically certain that throwing A.M. on the bed would cause her harm, let alone great bodily harm.

¶ 25 On a challenge to the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. The reviewing court will not retry a defendant or substitute its judgment for that of the trier of fact on issues pertaining to conflicts in testimony, the credibility of witnesses, or the weight of the evidence. *Id*. To sustain a conviction, "[i]t is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *People v. Hall*, 194 Ill. 2d 305, 330 (2000). Additionally, the trier of fact is not required to disregard inferences that normally flow from the evidence, or to seek out all possible explanations consistent with innocence, and raise them to a level of reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A conviction will be reversed only if the evidence is so improbable or unsatisfactory, as to justify a reasonable doubt of a defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 26 To sustain defendant's conviction for aggravated battery as charged, the State had to prove: (1) he committed a battery by knowingly and without legal justification by any means

causing bodily harm to A.M. when he threw her (720 ILCS 5/12-3 (West 2014)); and (2) when he committed the battery, he was at least 18 years old and A.M. was under 13 years old (720 ILCS 5/12-3.05(b)(2) (West 2014)). To sustain his conviction for aggravated domestic battery as charged, the State had to prove: (1) defendant committed domestic battery when he knowingly and without legal justification by any means caused bodily harm to a family or household member (720 ILCS 5/21-3.2(a) (West 2014)); and (2) in committing the domestic battery, he knowingly caused great bodily harm (720 ILCS 5/12-3.3(a) (West 2014)).

¶ 27 A person acts knowingly when he is consciously aware that his conduct is "practically certain" to cause the result defined in the offense, here great bodily harm (aggravated domestic battery) and bodily harm (aggravated battery). 720 ILCS 5/4-5(a), (b) (West 2014); see *People v. Willett*, 2015 IL App (4th) 130702, ¶ 51. We note that a finding of great bodily harm necessarily encompasses a finding of bodily harm. Although the State is not required to prove that defendant knew the "precise or exact nature" of the injuries his conduct would cause, it must prove the extent of the harm he would cause, here great bodily harm *Id*. ¶ 53. The State is not required to prove defendant intended the "specific consequences" that occurred. *People v. Isunza*, 396 Ill. App. 3d 127, 132 (2009). "Rather, where someone in the commission of a wrongful act commits another wrong not intended, or where in the execution of an intent to do wrong an unintended act resulting in a wrong ensues as a natural and probable consequence, the one acting with a wrongful intent is responsible for the unintended wrong." *Id*.

¶ 28 A defendant's mental state may be inferred from circumstantial evidence, including the actions of the accused and the surrounding circumstances of the incident such as the nature and severity of the victim's injuries and great disparity in size and strength between the defendant and the victim. *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶ 43; *People v. West*, 137 Ill. 2d

558, 585-86 (1990); *People v. Wehrwein*, 209 Ill. App. 3d 71, 81 (1990). "[W]hen the facts in a case give rise to more than one inference, a reviewing court should not substitute its judgment for that of the trier of fact unless the inference accepted by the trier of fact is inherently impossible or unreasonable." *Id.* at 81.

¶ 29 Viewed in the light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that defendant knowingly caused great bodily harm to A.M. The evidence at trial established that defendant was standing when he threw A.M. into the air "as high as he could" and missed catching her, which caused A.M. to bounce very high off the bed and begin crying loudly. When A.M. then reached for defendant's face, he "launched" her across the bed into the wall, causing extensive injuries. There is no question that she sustained great bodily harm where she sustained subdural hemorrhages on both sides of her head, contusions to the brain, restricted circulation of blood to her brain, and bilateral hematomas. She was unable to feed orally, was listless, required ventilator support for several days, and was hospitalized for weeks. See *Kibayasi*, 2013 IL App (1st) 112291, ¶ 43 (the nature and severity of the victim's injures are circumstantial evidence to prove a defendant's mental state). Dr. Fingarson opined that A.M.'s injuries were consistent with an abusive or non-accidental injury and likely involved some form of acceleration and deceleration motion.

¶ 30 There is no dispute in the record that defendant caused these injuries to A.M., or that she was showing no sign of abnormal breathing nor unusual issues with her eyes, prior to being placed into his care. Although, on appeal, defendant characterizes his conduct as "toss[ing] her back" on the bed after she bounced up into the air when he missed catching her, the testimony of Officer O'Shea shows that defendant, in fact, "launched" the six-month old infant across the bed and into the wall. It is not unreasonable for the trier of fact to conclude that, when adult

defendant "launched" the baby into the wall, he was practically certain that great bodily harm would result. See *Jackson*, 232 Ill. 2d at 281 (in weighing the evidence, the trial court is not required to disregard inferences that flow naturally from the evidence, nor is it required to seek out all possible explanations consistent with innocence and raise them to a level of reasonable doubt).

¶ 31 Although defendant may not have known the specific consequences of his actions, his wrongful intent is sufficient to sustain his conviction. See *Isunza*, 396 Ill. App. 3d at 132 (the State is not required to prove defendant intended the specific consequences that occurred). As the evidence supports a finding that it was practically certain that launching the infant into the wall would result in great bodily injury to her, defendant's convictions for aggravated battery, premised on bodily harm and aggravated domestic battery, premised on great bodily harm, are affirmed.

¶ 32 Defendant next argues, and the State concedes, that his conviction for aggravated battery should be vacated under the one-act, one-crime rule. Defendant did not raise his one-act, one-crime challenge in the trial court and, therefore, forfeiture applies. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). However, one-act, one-crime violations are subject to review under the second prong of the plain-error doctrine. *Id*. at 389. Therefore, if we find a one-act, one-crime error occurred at trial, the plain-error exception to the forfeiture rule applies. *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009). A conviction challenged under the one-act, one-crime rule presents a question of law, which we review *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 47. We find the one-act, one-crime rule was violated in this case and, thus, find plain error.

¶ 33 Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. West*, 2017 IL App (1st) 143632, ¶ 24. Accordingly,

where two convictions arise from the same physical act, the sentence should be imposed on the more serious offense, and the less serious offense vacated. *Id*. As the State correctly concedes, defendant's two convictions, as charged in this case, are both clearly premised on the same physical act and, therefore, violate the one-act, one-crime rule where defendant should be sentenced only on the most serious offense. *Id*. ¶¶ 24-25.

¶ 34 To determine which offense is the most serious, we look to the intent of the legislature as expressed in the plain language of the statutes involved. *Samantha V.*, 234 Ill. 2d at 379. "[C]ommon sense dictates that the legislature would prescribe greater punishment for the offense it deems the more serious." *Id*.

¶ 35 Defendant's conviction for aggravated battery is a Class 3 felony, with a sentencing range of two to five years' imprisonment. 720 ILCS 5/12-3.05(b)(2), (h) (West 2014); 730 ILCS 5/5-4.5-40(a) (West 2014). Defendant's conviction for aggravated domestic battery is a Class 2 felony, with a sentencing range of three to seven years' imprisonment. 720 ILCS 5/12-3.3(a), (b) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014). Accordingly, the aggravated battery conviction is the less serious offense. We vacate that conviction and sentence.

¶ 36 For the foregoing reasons, we affirm defendant's conviction and sentence for aggravated domestic battery, but vacate defendant's conviction and sentence for aggravated battery. We direct the clerk of the circuit court to correct the mittimus to reflect our decision.

¶ 37 Affirmed in part, vacated in part, mittimus corrected.