2018 IL App (4th) 160012-U

NOS. 4-16-0012, 4-16-0013 cons.

FILED
March 2, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ANDREW PAUL DUBOIS,	)	Nos. 14CF1186
Defendant-Appellant.	)	14CF1438
	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in joining defendant's two felony cases. Moreover, because the trial court did not abuse its discretion in joining the cases, defendant cannot establish that counsel's failure to object to the joinder deprived him of the effective assistance of counsel, or that the plain-error rule would excuse his procedural forfeiture.

¶ 2 Defendant, Andrew Paul Dubois, appeals from his convictions in two joined criminal cases. After sentencing, defendant appealed in both cases, claiming the trial court erred in joining them for trial. We consolidated the appeals and consider defendant's claim that he was prejudiced by the joinder. Defendant contends, despite his forfeiture of the claim, this court should review the issue under the plain-error rule because both prongs of the rule are satisfied. Further, he contends he was denied the effective assistance of counsel when counsel failed to include this issue in a posttrial motion. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 6, 2014, the State charged defendant with (1) one count of domestic battery (720 ILCS 5/12-3.2(a)(2), (b) (West 2012)) (count I), a Class 4 felony, for hitting Kandi Clifton in the face after having been previously convicted of domestic battery in Woodford County case No. 98-CM-09, and (2) one count of obstructing justice (720 ILCS 5/31-4(a)(1) (West 2012)) (count II) for providing false information to police officers. These charges stemmed from an altercation that occurred during the early morning hours of October 5, 2014, inside a vehicle. After defendant got off work as a security guard at a tavern, he picked up Clifton in a truck he had borrowed from his roommate, Hugh LeMaster. Clifton had been drinking at different taverns that evening and, after those taverns had closed, she went to eat with some male friends. Because defendant did not like Clifton's socializing with male friends, Clifton had defendant pick her up down the road from the restaurant. As they rode around in the truck with defendant driving, defendant accused Clifton of cheating on him, and an altercation ensued.

¶ 5 Based on those same facts, on November 25, 2014, in McLean County case No. 14-CF-1438, the State charged defendant with driving while his license was revoked or suspended (625 ILCS 5/6-303(a) (West 2012)). The State filed a motion for joinder and consolidation, asserting it would be calling "substantially the same witnesses in each of the trials." The State claimed consolidation would not prejudice defendant and alleged as follows:

> "The separate trials of these matters would be detrimental to the use of court resources and to the witnesses and use of jurors because police officers and lay witnesses common to both causes would have to testify in two separate trials as to the same events[,] and two separate juries would need to be selected and

would need to consider substantially the same occurrence evidence, which would more efficiently be heard in one consolidated jury trial on all charges."

¶ 6 At the August 2015 hearing on the State's motion, defendant agreed the events occurred at the same time but argued against joinder to avoid the risk the State would make a propensity argument. In support of its motion, the State argued "the crimes are almost inextricably connected" and any propensity argument would not be anticipated. After considering arguments by counsel, the trial court ruled as follows:

> "Okay. Although it doesn't appear as though the offenses would be required[,] in order to be consolidated under 720 ILCS 5/3-3(b) [(West 2014)], under 725 ILCS 5/114-7 [(West 2014)], it would appear that all of the other criteria with respect to joinder of these two prosecutions ought and should occur[,] [i]n that we have[,] what used to be referred to in civil court under consolidation[,] a common nucleus of operative [facts], which is[,] there is a continuation, a continuum if you would[,] of these particular offenses during a particular date or dates that ran into one another.
>
> So[,] from the standpoint of inconvenience to witnesses[,] as well as the fact that the charges are not charges which[,] I think[,] there would be inherently any prejudice with the jury considering them in one proceeding[,] and obviously the State being required to prove any such charge that they continue with by a burden of proof of beyond a reasonable doubt, it is appropriate[,] from the court's perspective[,] over objection of the defendant[,] to grant the State's motion to join and consolidate these prosecutions.

The cases have now been ordered consolidated[.] [H]ow do you wish to proceed?"

¶ 7 Defendant's jury trial began on October 19, 2015. The State nol-prossed count II (obstructing justice) before the trial began. The State presented the following evidence. Kandi Clifton testified she and defendant had been dating for several months at the time of the incident in October 2014. Defendant worked as a security guard at Mugshots tavern. On October 4, 2014, she and defendant went to Mugshots for defendant's shift. They both consumed alcohol. At approximately 1 a.m., the bartender at Mugshots, Nicole Masters, asked Clifton to leave. Clifton did so and ended up at a restaurant with two male acquaintances. When defendant finished his shift, he texted Clifton, asking her whereabouts. At approximately 3:30 a.m., he told Clifton he was coming to get her. Clifton began walking away from the restaurant, and defendant picked her up on the side of the road in the truck of his neighbor, Hugh LeMaster.

¶ 8 Clifton said she and defendant began fighting in the vehicle after defendant accused her of cheating on him. He called her derogatory names and then hit her twice in the face with his phone. She escaped from the vehicle and contacted the police.

¶ 9 Bloomington police detective Michael Johnson investigated Clifton's claims after defendant was arrested for domestic battery. Johnson discovered defendant's driver's license was suspended and he had been granted a restricted driving permit. A condition of the permit required defendant to drive only vehicles containing a breath-alcohol-ignition-interlock (BAIID) device. Johnson said LeMaster's truck did not contain such a device.

¶ 10 Defendant did not testify nor did he present any evidence. The jury found defendant guilty of domestic battery and driving while his license was suspended. Defendant

filed a motion for a new trial, but not on the basis he raises in this appeal. The trial court sentenced defendant to two three-year prison terms to run concurrently.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant claims the trial court erred in joining the two cases for trial. Although he objected to the State's motion for joinder in the trial court proceedings, he did not raise the issue in his posttrial motion. Therefore, he has forfeited review for the purposes of this appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both a trial objection and a written posttrial motion raising the issue are required to preserve an issue for appeal).

¶ 14 Defendant acknowledges his procedural default but asks this court to review the issue under either prong of the plain-error doctrine (see *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005) (a court may consider an unpreserved error when (1) the evidence was so closely balanced that the error alone tipped the scales of justice against the defendant or (2) the error was so serious that it affected the fairness of the defendant's trial)). In the alternative, defendant asks this court to consider this issue as a basis for an ineffective assistance of counsel claim because he claims counsel's failure to include the issue in his posttrial motion was unreasonable. Initially, we choose to address whether any error occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

¶ 15 The trial court has discretion to join charges against a defendant if the offenses are based on two or more acts that are part of the same comprehensive transaction, unless the defendant will be prejudiced by the joinder of separate charges. *People v. Patterson*, 245 Ill. App. 3d 586, 587 (1993). If the trial court, in its sound discretion, determines that the joinder will prejudice the defendant, the court can order separate trials or provide any other relief justice requires. *Patterson*, 245 Ill. App. 3d at 587. Section 114-7 of the Code of Criminal Procedure of

1963 addresses when it is proper for the trial court to join related prosecutions. 725 ILCS 5/114-7 (West 2014) ("The court may order two or more charges to be tried together if the offenses and the defendants could have been joined in a single charge. The procedure shall be the same as if the prosecution were under a single charge.").

¶ 16 When determining whether multiple acts were part of the same comprehensive transaction, the factors generally considered by the trial court include (1) the proximity in time and location of the offenses; (2) the identity of evidence needed to establish a link between the offenses; (3) whether the offenses shared a common method; and (4) whether the same or similar evidence would prove the elements of the offenses. *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 36; see also *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 69. "The 'most important factors' in determining whether offenses are part of a comprehensive transaction are their proximity in time and location and whether there is common evidence with respect to the offenses." *Fleming*, 2014 IL App (1st) 113004, ¶ 41 (quoting *People v. Harmon*, 194 Ill. App. 3d 135, 139-40 (1990)). However, "the matter of judicial efficiency has no bearing on the controlling issue of whether multiple offenses are part of the same comprehensive transaction so that joinder is appropriate under the statute." *People v. Walston*, 386 Ill. App. 3d 598, 602 (2008).

¶ 17 A trial court's decision on joinder will not be overturned absent an abuse of discretion. *Fleming*, 2014 IL App (1st) 113004, ¶ 38. A trial court abuses its discretion when its decision is arbitrary, fanciful, or where no reasonable person would take the trial court's view. *Fleming*, 2014 IL App (1st) 113004, ¶ 38.

¶ 18 Defendant maintains the trial court improperly joined the two cases because (1) the offenses were not part of the same transaction, (2) there was no link between the two

offenses, and (3) there was no common method of perpetrating the offenses. By joining the two cases, according to defendant, the court allowed the State to introduce evidence that prejudiced him in the eyes of the jury. Introducing evidence of defendant's other crimes (the crimes associated with the revocation of his driver's license and whether he drove beyond the restrictions set forth in his restricted driving permit) during a domestic-battery trial caused him "substantial prejudice." According to defendant, the joinder subjected him to the risk that the jurors would rely on the other-crimes evidence to presume defendant had the propensity to commit crimes.

¶ 19 Here, the charged offenses were alleged to have occurred on the same date and at the same time and location. Although there were minimal differences in the evidence between the two offenses, they involved substantially the same evidence and witnesses. In order to prove defendant guilty of driving while his license was revoked or suspended, the State presented a certified copy of his driving record and the conditions of his restricted driving permit. The State also called LeMaster as a witness to testify he allowed defendant to borrow his truck and that truck was not equipped with a BAIID device. Otherwise, the State's witnesses would have been called in both trials to prove the individual offenses.

¶ 20 Clifton and the investigating officers would have testified in two separate trials that defendant (1) drove a vehicle at a time when his license was revoked or suspended, (2) picked up Clifton in a borrowed vehicle, and (3) struck Clifton inside the vehicle while he was driving. In other words, the two offenses occurred at the exact same time and in the exact same location. These are the "most important factors." *Fleming*, 2014 IL App (1st) 113004, ¶ 41 (the proximity in time and location and whether there is shared evidence are the most important factors for courts to consider when determining whether to join cases).

¶ 21 Given these circumstances, we disagree defendant suffered substantial prejudice as a result of the trial court's decision on joinder. When other-crimes evidence is admissible, " 'the potential prejudice to a defendant of having the jury decide two separate charges is greatly diminished because the jury is going to be receiving evidence about both charges anyway.' " (Emphasis in original.) *People v. Slater*, 393 Ill. App. 3d 977, 993 (2009) (quoting *People v. Trail*, 197 Ill. App. 3d 742, 746 (1990)). The evidence proving each charge was convincing. The State introduced the certified copy of defendant's driving record clearly indicating his license was suspended or revoked. The State also introduced Clifton's testimony clearly indicating defendant struck her in the face. The evidence of the injuries appearing on Clifton's face corroborated her testimony. As the State argues, the focus of the trial was the domestic-battery charge. There is no indication the jury's knowledge of defendant's prior convictions of driving-related offenses tipped the scales against defendant on the jury's consideration of defendant's guilt on the domestic-battery offense.

¶ 22 In sum, we conclude the trial court did not abuse its discretion when joining the cases for trial. We find no error. We further find defendant cannot establish prejudice by the joinder. Having found no error, there can be no plain error. See *Cosby*, 231 Ill. 2d at 273 (absent reversible error, there can be no plain error). Likewise, we find defendant cannot establish he was prejudiced by counsel's failure to include an objection to joinder in his posttrial motion. Accordingly, defendant's claim of ineffective assistance of counsel must fail.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 25 Affirmed.