2014 IL App (1st) 120657-U

No. 1-12-0657

August 20, 2014

THIRD DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 4001
	)	
DWAYNE DYKES,	)	
	)	The Honorable
Defendant-Appellant.	)	Evelyn B. Clay,
	)	Judge presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: A statement in the defendant's medical record with no bearing on the diagnosis or treatment of the defendant does not fall under the medical records exception to the hearsay rule. The use of inadmissible hearsay at trial does not require reversal when the State shows the error caused no harm.

¶ 2 After a bench trial, the trial court found Dwayne Dykes guilty of aggravated battery, domestic battery, and aggravated domestic battery. On appeal, Dykes argues that the

prosecution's use of hearsay evidence requires reversal. Although we find that the trial court erred when it admitted hearsay evidence over defense counsel's objection, we find the error harmless. We affirm the convictions for aggravated domestic battery and domestic battery. We vacate the conviction for aggravated battery, because the State based the charge on the acts that also formed the basis for the aggravated domestic battery charge.

¶ 3 BACKGROUND

¶ 4 Alex Alge met Dwayne Dykes in January 2009. Dykes moved some of his belongings into Alge's apartment in February 2009. On January 26, 2010, Alge brought her friend, Keyma Morris, over to Alge's apartment building so that Alge could give Morris a copy of the keys to Alge's apartment. Morris waited in the apartment building's lobby while Alge went to retrieve the keys. Alge returned a few minutes later, gave Morris the keys, and asked Morris to call the police. When police officers arrived at the building, Morris took them upstairs to Alge's apartment. The officers heard Alge screaming. Morris and the officers had difficulty opening the door. When they entered the apartment, they found Alge inside, injured and bloody. Outside the building, beneath Alge's balcony, the officers found Dykes lying on the ground. Dykes had broken an ankle when he fell from Alge's balcony.

¶ 5 Doctors treated Dykes's ankle injury at a nearby hospital. Shelby Strong, a nurse, spoke with Dykes about the injury.

¶ 6 Prosecutors charged Dykes with domestic battery, aggravated battery, and aggravated domestic battery. Dykes waived his right to a jury trial.

¶ 7 Alge testified that on January 26, 2010, after she gave her keys to Morris, she went back to her apartment and told Dykes to take his possessions and leave. Alge testified that Dykes

then punched her hard, twice, and choked her. When police arrived, Dykes threw himself against the door. Dykes asked Alge to give him his phone charger. She gave him the charger and he used the cord to tie the door closed. Dykes then jumped off the balcony. Pictures presented in court showed that Alge had a black eye, a swollen jaw, and bruises from the beating. Opening the damaged door took her and police some minutes.

¶ 8 Morris corroborated Alge's account. Morris testified that when she and the police officers entered Alge's apartment, they found only Alge inside. One of the officers who responded to Morris's call also testified, corroborating Morris's testimony that they found only Alge in the apartment.

¶ 9 Strong testified that Dykes told her he jumped from the balcony. The court permitted Strong to testify, over Dykes's hearsay objection, that according to a note another nurse wrote in the hospital's record, Dykes told the other nurse that he fell from the balcony when he tried to escape from police.

¶ 10 Shaunte Berry testified that she dated Dykes in 2007. On November 28, 2007, Dykes hit her and choked her until she passed out. Yashiva Edwards testified that she dated Dykes in 2005. On September 22, 2005, Dykes hit her in the face, banged her against a wall, kicked her, hit her with a flashlight, and held her tightly around the neck.

¶ 11 Dykes testified that when he arrived at Alge's apartment on January 26, 2010, he found Akiva Briscoe and a man named Darico there, but not Alge. Alge arrived a little later and fought with Darico. Dykes pushed Darico off Alge, and Darico pulled out a knife. Dykes got a pillow and a knife and fought with Darico. Dykes cut Darico, but Darico pushed Dykes off the balcony when Dykes tried to escape. On the ground, Dykes called his sister when he

found that he could not move. Dykes admitted that he did not call police. He explained that he thought only of revenge.

¶ 12 In closing argument, the prosecutor referred to the note Strong said she found in the medical record as evidence that Dykes fell when he tried to escape from police. The trial court overruled defense counsel's objection to the remark.

¶ 13 The trial court expressly found the evidence of guilt overwhelming. The court found Dykes guilty of all three charged offenses and sentenced him to concurrent terms of 3 years for domestic battery, 5 years for aggravated battery, and 7 years for aggravated domestic battery. Dykes now appeals.

¶ 14 ANALYSIS

¶ 15 Aggravated battery

¶ 16 Dykes points out that the State based the aggravated battery charge on the act of choking Alge, which also formed the basis for the charge of aggravated domestic battery. Under the one act, one crime principle, Dykes asks us to vacate the aggravated battery conviction. See *People v. King*, 66 Ill. 2d 551, 561-66 (1977). The State agrees with Dykes. We, too, agree, and we vacate the aggravated battery conviction and sentence.

¶ 17 Hearsay

¶ 18 Dykes also asks us to remand for a new trial because the court permitted the State to introduce into evidence hearsay testimony about a note in the medical record. We agree with Dykes that the testimony constituted double hearsay, and the trial court should not have admitted it into evidence.

¶ 19 The disputed testimony concerns a note written by a nurse who did not testify. The State treated the written note as though it recorded a statement Dykes made to the nurse who wrote the note. The nurse's note, written out of court, constitutes hearsay, and Dykes's putative statement to the nurse constitutes hearsay within that hearsay, or double hearsay. See *People v. Flewellen*, 273 Ill. App. 3d 1044, 1051 (1995); Ill. R. Evid. 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.") The State used the note for the purpose of proving the substance of the statement, that Dykes fell while fleeing from police. See *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). The medical records exception to the hearsay rule does not apply, because the State presented no evidence that the reason Dykes fell from the balcony had any relevance to his medical diagnosis or treatment. Cf. *People v. McNeal*, 405 Ill. App. 3d 647, 666-67 (2010); *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 277-78 (5th Cir. 1991) (details about the injury not necessary for treatment do not ordinarily qualify for admission into evidence under hearsay exception under Federal Rule of Evidence 803(4)); *People v. Oehrke*, 369 Ill. App. 3d 63, 70 (2006) (identity of person who caused injury not relevant to treatment, so not admissible under medical records exception to hearsay rule).

¶ 20 However, the erroneous admission of hearsay into evidence does not require reversal if the error caused no harm. *People v. Davis*, 185 Ill. 2d 317, 338 (1998). "The admission of the evidence is harmless error if there is no reasonable probability that the verdict would have been different had the hearsay been excluded." *Oehrke*, 369 Ill. App. 3d at 71. In deciding whether the State has shown the erroneous admission of evidence harmless, the

court may consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Davis*, 185 Ill. 2d at 338, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

¶ 21 Here, Strong's hearsay testimony echoed Alge's testimony that Dykes jumped off the balcony while escaping from police. Strong's testimony about the note had little importance for the State's case. Morris and the police officer corroborated Alge's account of the incident. None of the witnesses other than Dykes saw anyone other than Alge in her apartment. Dykes offered no explanation for the disappearance of Darico and Briscoe. Dykes also does not explain why Alge would accuse him of beating and choking her if he actually saved her from Darico's attack. If Dykes knew Darico remained in the apartment attacking Alge, as Dykes testified, Dykes should have called police to get them to arrest Darico and protect Alge. Instead, he called his sister. Moreover, both Berry and Edwards, former girlfriends of Dykes, testified that Dykes hit and choked them in a manner similar to that in which Alge testified that he hit and choked her.

¶ 22 In light of the overwhelming evidence that Dykes hit and choked Alge, we find no reasonable probability that the trier of fact would have reached a different result if the court had excluded Strong's testimony about the note in the medical record. Accordingly, we affirm the convictions and sentences the trial court imposed on Dykes for domestic battery and aggravated domestic battery.

¶ 23 CONCLUSION

¶ 24 The trial court erred by permitting Strong to testify about a note she found in the medical record, where the note consisted of hearsay that did not affect Dykes's medical treatment, and the State used the note as evidence of the truth of the matter asserted. However, in light of the overwhelming evidence against Dykes, we find the error harmless. We affirm the convictions and sentences for aggravated domestic battery and domestic battery. Finally, under the one act, one crime principle, we vacate the conviction and sentence for aggravated battery.

¶ 25 Affirmed in part and vacated in part.