2012 IL App (2d) 101302-U
No. 2-10-1302
Order filed March 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DARIUS L. ELLIS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 10-CF-115 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: One of the defendant's convictions for domestic battery must be vacated under the plain-error and one-act, one-crime doctrines.

¶ 1 Following a bench trial, the defendant, Darius Ellis, was convicted of two counts of domestic battery and one count of unlawful restraint. In this direct appeal, the defendant raises only one issue. The defendant argues that one of his convictions for domestic battery must be vacated because it violates one-act, one-crime principles. We agree and, therefore, affirm in part and vacate in part.

¶ 2 I. BACKGROUND

¶ 3 On February 17, 2010, the defendant was charged by indictment with one count of home invasion (720 ILCS 5/12-11(a)(2) (West 2008)) (count I), one count of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2008)) (count II), one count of unlawful restraint (720 ILCS 5/10-3 (West 2008)) (count III), and two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), 3.2(a)(2) (West 2008)) (counts IV and V). Count IV alleged that the defendant caused bodily harm to the victim in that he "struck said victim about the head and body." Count V alleged that the defendant made contact of an insulting and provoking nature with the victim in that he "struck said victim about the head and body."

¶ 4 The defendant waived his right to a jury trial and proceeded to a bench trial on June 1, 2010. The parties waived the opportunity to make an opening statement. The victim, Mistie Milligan, testified that she had been in a dating relationship with the defendant for about four years. They had two children together, a two-year old boy and a nine-month old girl. She and the two children lived in an apartment in Elgin.

¶ 5 On January 14, 2010, she fell asleep on the couch in the living room around 11 p.m. or midnight. The children were in their bedroom. At some point she woke up and saw the defendant standing over her. She asked the defendant how he entered the apartment. She testified that the defendant did not have a key to get in. She got up and noticed that both the front door and back door were still locked. However, the bathroom window was open. When she asked him, the defendant admitted that he came in through the window. The defendant did not live at the apartment, but he occasionally spent the night. The last time he slept over was at Christmas. In addition, within the two weeks prior to the event at issue, the defendant had watched their children when she went to work.

¶ 6 The victim further testified that after she shut the bathroom window, she returned to the living room. The defendant then grabbed her cell phone and struck her on the right side of the head. She fell over and the defendant continued to hit her in the head. When he finally stopped hitting her, she went towards the front door to try to get out. She reached the door, but then the defendant started hitting her again. She then went to the back door, which was in the kitchen. She was able to unlock the back door, but the defendant hit her on the right side of the head again. The left side of her head hit the refrigerator and then she fell to the floor. The defendant continued to hit her while she was on the floor. When she was able, she went back towards the front door. The defendant then started pulling her hair. Eventually she stopped trying to get out and they ended up back in the living room. He told her to sit on the couch. He said he was tired, wanted to go to sleep, and that he would leave in the morning. She repeatedly asked for her phone back, but the defendant refused. He laid down on the couch and eventually fell asleep.

¶ 7 After the defendant fell asleep, she retrieved her phone. Once she was sure that the defendant was still asleep, she went to the children's bedroom and called 911. The victim identified the defendant in court. She identified People's Exhibit No. 1 as a recording of her 911 phone call. She testified that it accurately depicted the conversation she had with the 911 dispatcher in the early morning hours on January 15, 2010. The trial court admitted the exhibit over the objection of the defendant. The audiotape was played.

¶ 8 The victim further testified regarding her injuries from that evening. There were bruises all over her body. She had swelling and bruising on her head and chunks of her hair had been pulled out. The victim identified People's Exhibits Nos. 2 through 8 as pictures of her injuries that were

taken that morning by the police. She identified People's Exhibit No. 9 as a picture of her bathroom window. The photos were admitted without objection.

¶ 9 Elgin Police Officer Joseph Sostre testified that he responded to a call at the victim's apartment around 4 a.m. on January 15, 2010. In total, three officers arrived. The victim was in front of the residence. The victim was crying, shaking, and had visible signs of injury. He and another officer went up to the apartment and found the defendant asleep on the couch. Officer Sostre identified the defendant in court. When the officer woke the defendant up, the defendant was not upset. When the officer asked what had happened, the defendant said "we got to fighting." The defendant was then taken into custody. The officer testified that there was bruising on the bridge of the victim's nose, bruising and scratches on her neck, and one of her eyes was red and swollen. She also had loose clumps of hair on the side of her head. He noticed a clump of hair in the living room on the floor next to the coffee table. The officer identified People's Exhibits No. 2 through 9 as photos he had taken that morning.

¶ 10 The defendant was the sole defense witness. The defendant testified that at the time of the January 2010 incident, he lived at the Elgin apartment with the victim and their two children. They had moved into the apartment in November 2009. He did not have a job in January 2010, but the victim did. He would watch the children when the victim went to work. He and the victim had difficulties in their relationship and so, for a couple nights before the incident, he had stayed at a friend's house. When he entered the apartment in the early morning hours on January 15, 2010, he had used his key to get in. He woke the victim up and asked her why she was sleeping on the couch. The victim became irate because he came home so late and because she was continuing an argument with him that had started earlier in the day. They began tussling around because she wanted to see

if his cell phone battery was dead. During the tussle he got her cell phone because he wanted to see if she was really trying to call him because she told him she had been trying to reach him. They continued to tussle over the cell phones. Eventually, they sat on the couch and he told her he would take his things and leave in the morning.

¶ 11 The defendant denied hitting the victim. He said they had wrestled about, but he did not hit her with closed fists and he did not choke her. He did not enter the apartment through a bathroom window, he used his key. She must have taken his key out of his pocket while he was sleeping. His name was not on the lease because she was receiving assistance from the Community Crisis Center and her assistance would have been denied if he was on the lease. On cross-examination, the defendant denied talking to a friend on January 20 by phone from the jail asking him to send letters to the victim's apartment to show his residency. In rebuttal, the State played a recording of the jail telephone call. The State also impeached the defendant with a prior conviction for unlawful utilization of an account number.

¶ 12 In rebuttal, Officer Sostre testified that he did not see any bruising on the defendant. The police did not find any keys on the defendant and his cell phone was in his pocket. When he was booking the defendant, the defendant indicated that the address on an old booking sheet was his current address. That address was not the address of the Elgin apartment.

¶ 13 In closing argument, the State commented that the evidence showed that the defendant beat the victim, pulled her by the hair, and took her phone so she could not call for help. The State further noted that the victim's testimony was corroborated by Officer Sostre who observed the victim emotional, crying, upset and who testified as to bruises on her nose, back, arms, and clumps of loose hair. Finally, the State noted:

"*** I believe the State has proven each one of the counts as they relate to the domestic battery, both causing bodily harm and insulting or provoking contact."

¶ 14 The trial court found the defendant not guilty of home invasion and aggravated domestic battery. As to the charge for home invasion, the trial court found that the State had failed to prove that the defendant was not a peace officer acting in the line of duty. As to the charge for aggravated domestic battery, the trial court noted that it was based on the defendant strangling the victim and that it failed because the victim did not testify that she was strangled. However, the trial court found the defendant guilty of unlawful restraint and both counts of domestic battery. The trial court noted that "[t]he domestic batteries allege striking her about the head and body." The trial court found that this was clearly proved by the victim's testimony and the photographs. The trial court sentenced the defendant to four years' imprisonment. Following the denial of his motion for a new trial and his motion to reconsider his sentence, the defendant filed a timely notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 On appeal, the defendant argues that one of his convictions for domestic battery must be vacated because the two counts for domestic battery failed to allege separate acts that could support multiple convictions. Rather, the defendant argues that the two charges for domestic battery were alternative ways of charging him for the same offense. The defendant acknowledges that he failed to raise this issue in a posttrial motion but argues that we should consider it under the plain error doctrine.

¶ 17 Normally, an issue not raised in a posttrial motion is forfeited on appeal. *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 alleged error for review). However, under the plain error doctrine, plain

errors affecting substantial rights may be reviewed on appeal despite forfeiture. *People v. Smith*, 183 Ill. 2d 425, 430 (1998). A violation of the one-act, one-crime doctrine is subject to plain-error review because it affects a defendant's substantial rights. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Accordingly, we will address the defendant's argument.

¶ 18 Whether multiple convictions must be vacated under the one-act, one-crime doctrine is a question of law subject to *de novo* review. *People v. Young*, 362 Ill. App. 3d 843, 852 (2005). The one-act, one-crime doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, the court determines whether the defendant's conduct involved multiple acts or a single act. *Id.* Second, if the conduct involved multiple acts, the court determines whether any of the offenses are lesser-included offenses. *Id.* Multiple convictions are improper if they are based on a single act or, if based on multiple acts, any of the offenses are lesser-included offenses. *Id.*

¶ 19 The defendant's argument in the present appeal is based only on the first step and our supreme court's opinion in *People v. Crespo*, 203 Ill. 2d 335 (2001). In *Crespo*, our supreme court held that in order for multiple convictions to be sustained, a defendant must be on notice that the State intends to treat his conduct as multiple acts. *Id.* at 345. In determining whether the defendant had such notice, the *Crespo* court considered the indictment as well as the manner in which the crime was argued to the jury at trial. *Id.* at 342-44.

¶ 20 The same argument that is raised by the defendant in the present case was also raised by the defendant in *People v. Young*, 362 Ill. App. 3d 843 (2005). In *Young*, the defendant, Alvin Young, was convicted of two counts of domestic battery. One count charged Young with making contact of a provoking nature and the other count alleged that he caused bodily harm to the victim. *Id.* at 845. On appeal, this court vacated the conviction for domestic battery that was based on making

contact of a provoking nature. *Id.* at 853. This court noted that the State never set forth, either at trial or in the complaint, which conduct it deemed to be provoking and which conduct caused bodily harm. *Id.* This court further noted that in closing argument, the State simply described Young's conduct and then asserted that it caused offense and bodily harm. *Id.* Accordingly, this court held that the State had charged and prosecuted the matter under alternate theories of culpability to prove a single offense of domestic battery. *Id.*

¶ 21 In the present case, the State similarly charged and prosecuted the defendant under alternate theories of culpability to prove a single offense of domestic battery. Although the indictment charged the defendant with two separate counts of domestic battery, one based on contact of an insulting and provoking nature and one based on bodily harm, the indictment did not set forth the specific acts which it deemed to be insulting and provoking and those it deemed to cause bodily harm. Thus, the indictment treated the defendant's actions as a single course of conduct, not as separate acts, some of which caused bodily harm and others of which were insulting and provoking. Furthermore, at trial and during closing the State also failed to apportion any specific conduct of the defendant to any specific count for domestic battery. The State merely reiterated the evidence presented at trial and argued that it had proved each count of domestic battery. Accordingly, as in *Young*, we must vacate the defendant's conviction for domestic battery based on contact of an insulting or provoking nature (count V), the less serious offense. *Id.*

¶ 22 In so ruling, we note that the State argues the opposite result is warranted by the result in *People v. Span*, 2011 IL App (1st) 083037 (2011). In *Span*, the defendant argued that his aggravated battery conviction should be vacated because it was based on the same act as his attempted armed robbery conviction. *Id.* at ¶ 77. The evidence at trial indicated that the defendant entered a

convenience store and struck an employee on the back of the head. The employee tried to get up and the defendant struck him on the face. After an unsuccessful attempt to open the cash register, the defendant struck the employee again and left the store. *Id.* at ¶ 84. The defendant argued that the indictment failed to differentiate between the blows that supported the attempted armed robbery charge and those that supported the aggravated battery charge. *Id.* at ¶ 85. The reviewing court determined that the defendant's argument was without merit. The court noted that the State sought to apportion the defendant's acts among the separate charges in the trial court. *Id.* at ¶ 87. The court also noted that it was a bench trial and the court would have "understood the need to consider whether there was sufficient evidence to conclude that the defendant's actions constituted separate offenses." *Id.* at ¶ 88.

¶ 23 The State argues that, as in *Span*, the trial court in this case was similarly able to allocate the defendant's various acts to the two separate charges for domestic battery. However, in *Span*, the fact that it was a bench trial was significant because, during trial, the State had allocated the defendant's various acts to the separate offenses with which he was charged. Accordingly, the State had laid a foundation for the trial court in *Span* to enter multiple convictions. In the present case, as explained above, the State did not seek to apportion the defendant's conduct to the separate charges either in the indictment or at trial. Accordingly, the State did not provide a basis for the trial court to enter multiple convictions for domestic battery in this case. Moreover, in entering the multiple convictions, the trial court did not specify which acts supported each count of domestic battery. As such, we find the State's reliance on *Span* unpersuasive.

¶ 24 The State argues that it did apportion the defendant's conduct to the separate charges for domestic battery. The State argues that the victim's testimony and the photographs demonstrated

that she was beaten at various locations in her apartment and that she suffered bodily harm. The State further argues that, with regard to being insulted or provoked, the recording of the victim's 911 phone call and Officer Sostre's testimony demonstrated that she was fearful, upset, shaking, and crying. While this may be true, the State still failed to differentiate between the conduct that caused the bodily harm and the conduct that resulted in the victim's fearfulness, shaking, and crying.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the defendant's conviction for domestic battery based on bodily harm (count IV) and vacate the domestic battery conviction based on contact of an insulting or provoking nature (count V).

¶ 27 Affirmed in part and vacated in part.