2012 IL App (3d) 110156-U

Order filed October 11, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-11-0156
	)	Circuit No. 09-CF-237
CALEB L. ATTEBERRY,	)	
	)	Honorable
Defendant-Appellant.	)	Clark E. Erickson,
	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* There was sufficient evidence to find defendant guilty of first degree murder where a rational juror could have found that defendant knew that kicking the victim in the chest two or three times created a strong probability of great bodily harm.

¶ 2 Defendant, Caleb L. Atteberry, was charged with first degree murder (720 ILCS 5/9-1 (a)(2) (West 2008)) and two counts of aggravated battery (720 ILCS 5/12-4(a) (West 2008)). At trial, the jury received instructions on both first degree murder and the lesser included crime of involuntary manslaughter (720 ILCS 5/9-3(a) (West 2008)). The jury found defendant guilty of first degree

murder and both counts of aggravated battery.

¶ 3 Defendant now appeals his first degree murder conviction, arguing that the State failed to prove beyond a reasonable doubt that defendant acted with the requisite mental state, to wit, with knowledge that his actions created a strong probability of death or great bodily harm. 720 ILCS 5/9-1(a)(2) (West 2008). Defendant also challenges the trial court's calculation of fines and fees. We affirm as modified.

¶ 4 FACTS

¶ 5 Defendant was charged with first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and two counts of aggravated battery (720 ILCS 5/12-4(a) (West 2008)) for his alleged involvement in the death of Edwin Smith.

¶ 6 In April 2009, defendant was living in Kankakee County at the home of Brenda Long and her family. On April 26, 2009, defendant went to Jeffers Park with Brenda, four of her children, her niece, and some friends of the children. At the park, defendant sat on a bench drinking beer while the children played nearby. The victim, Edwin Smith, was also at the park. At some point, Brenda left the park to check on her son, Brad, who was to be returning home shortly.

¶ 7 Smith walked past defendant and asked him for a drink of his beer. Defendant agreed to let Smith finish the last of his beer, and Smith walked away. Defendant then received a telephone call from Brenda warning him that Smith was a child molester and that defendant should ensure that Smith didn't approach any of Brenda's children. Defendant later explained that he had been the victim of sexual abuse as a child and was upset by the information about Smith. Actually, Smith had no criminal record of sexual abuse.

¶ 8 Smith walked past defendant again, and defendant asked him if he liked to "mess with little

kids[.]" Defendant then approached Smith and punched him in the face once or twice. Smith fell to the ground, and defendant then kicked him several times on the left side of his body. The majority of the witnesses testified that defendant kicked Smith two or three times. Onlookers then pulled defendant away from Smith. Smith stood up and walked away. Smith was 6 feet, 1 inch tall and weighed 180 pounds, while defendant was 5 feet, 5 inches tall and weighed 130 pounds. Smith was 29 years old.

¶ 9 Smith was found dead the next morning. An autopsy was conducted by Dr. Bryan Mitchell. However, Mitchell was deceased at the time of trial, so Dr. Larry Blum testified about the contents of the autopsy report. Blum testified that the cause of Smith's death was hemorrhagic shock–blood loss–caused by a lacerated spleen resulting from blunt force trauma to the chest. Blum testified that hemorrhagic shock from a lacerated spleen would normally take anywhere from 2 to 24 hours to result in death, but an exact time of death could not be assessed in this case.

¶ 10 Blum also testified to the other injuries found on Smith's body. Smith's seventh, eighth, ninth, and tenth ribs on his left side had been broken. These ribs are positioned at the bottom of the rib cage, and the spleen is located directly behind them. Blum testified that a "[m]oderate to severe amount of force" would be required to result in the broken ribs exhibited in Smith's body. Defendant's witness, Dr. James Filkins, testified that a severe amount of force was required to break Smith's ribs because the bones had separated, rather than merely cracked. Smith's diaphragm was bruised and lacerated. Smith also exhibited two subgaleal contusions, which are bruises beneath the scalp on top of the skull. Blum testified that the infliction of the subgaleal contusions would require a mild to moderate amount of force, such as a punch or a fall to the ground. Smith also exhibited a cerebral edema–swelling of the brain–which resulted from the brain's lack of oxygen caused by the

loss of blood. Smith had several other bruises, abrasions, and contusions that Blum testified were inflicted about a week before the incident, and not as a result of the blows from defendant.

¶ 11 Smith's body exhibited abnormalities that may have made him more susceptible to injury than an average male of his age and size. Smith had cirrhosis of the liver, which Blum testified impaired the ability of Smith's blood to clot. As a result, Smith was more susceptible to death from hemorrhagic shock. Mitchell's autopsy report also stated that Smith's spleen was enlarged, which would cause it to rupture more easily. According to Mitchell's autopsy report, Smith's spleen weighed 280 grams, while a normal adult spleen weighs 150 grams. However, Blum provided contrary testimony that the size of Smith's spleen was normal for a male of his size. Blum did confirm that an enlarged spleen would be more easily ruptured than a normal-sized spleen. Filkins testified in agreement with the autopsy report that Smith's spleen was enlarged and more susceptible to injury. In addition, Filkins testified that Smith's spleen had not ruptured as a result of blunt force trauma, but rather as a result of blood accumulation in the capsule surrounding the spleen.

¶ 12 The jury received instructions on both first degree murder and involuntary manslaughter, in addition to the instructions regarding aggravated battery. The jury returned verdicts of guilty of first degree murder and both counts of aggravated battery. Defendant filed a motion for a new trial, which the court denied. Defendant also filed a motion for judgment notwithstanding the verdict, arguing that the first degree murder conviction should be reduced to involuntary manslaughter. The court denied that motion as well.

¶ 13 Defendant was sentenced to 25 years' imprisonment for first degree murder. At sentencing, the court imposed several fines and fees, including (1) a circuit court clerk fee for a felony (705 ILCS 105/27.1a (West 2008)); (2) a court fund fee (55 ILCS 5/5-1101 (West 2008)); and (3) a State's

Attorney felony conviction fee (55 ILCS 5/4-2002 (2008)). Each of these three fees was imposed in triplicate because defendant was convicted of three separate charges. Defendant now appeals, challenging his first degree murder conviction and the court's calculation of fines and fees.

¶ 14 ANALYSIS

¶ 15 A. Sufficiency of the Evidence

¶ 16 Defendant challenges his conviction for first degree murder, arguing that the State did not present sufficient evidence to establish beyond a reasonable doubt that he acted with the requisite mental state. Defendant argues that he acted merely with the mental state necessary to commit involuntary manslaughter and asks the court to reduce his conviction for first degree murder to a conviction for involuntary manslaughter. The sole issue concerns the sufficiency of the evidence to establish defendant's mental state.

¶ 17 The appropriate question when reviewing the sufficiency of the evidence on appeal is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A court of review does not retry a defendant (*People v. Smith*, 185 Ill. 2d 532 (1999)) and must not substitute its judgment for that of the jury unless the "inference of a mental state accepted by the jury was inherently impossible or unreasonable." *People v. Smith*, 149 Ill. 2d 558, 565 (1992). "Generally, the question of whether a defendant acted intentionally, knowingly, or merely recklessly is a question to be resolved by the trier of fact." *People v. Jones*, 404 Ill. App. 3d 734, 744 (2010).

¶ 18 A defendant commits strong probability murder when his acts cause the death of the victim,

and he "knows that such acts create a strong probability of death or great bodily harm to that individual." 720 ILCS 5/9-1(a)(2) (West 2008). The statute does not require a finding that defendant intended to kill. 720 ILCS 5/9-1(a)(2) (West 2008). A defendant acts with knowledge that his acts will cause a particular result "when he is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2008). The "result" contemplated in the murder statute is the creation of a strong probability of death or great bodily harm. Thus, combining the statutory language of the knowledge statute and the murder statute, a person commits murder when he is consciously aware that his actions are practically certain to create a strong probability of death or great bodily harm.

¶ 19 A defendant commits involuntary manslaughter when he unintentionally kills an individual if the acts which cause the death "are likely to cause death or great bodily harm *** and he performs them recklessly." 720 ILCS 5/9-3(a) (West 2008). A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow *** and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2008). Involuntary manslaughter is a lesser-included offense of first degree murder. *People v. Williams*, 391 Ill. App. 3d 257 (2009).

¶ 20 In the present case, defendant's actions were not practically certain to create a strong probability of death. Therefore, the issue before us is whether there was sufficient evidence for the jury to find that defendant was aware that his actions were practically certain to create a strong probability of great bodily harm.

¶ 21 The outcome in this case depends in large part upon the definition of "great bodily harm." 720 ILCS 5/9-1(a)(2) (West 2008). Because great bodily harm "is not susceptible of a precise legal

definition[.]" *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991) (describing great bodily harm in the context of aggravated battery (720 ILCS 5/12-4 (West 2008)), the question of whether great bodily harm occurred is left to the trier of fact. *Id.*

¶ 22 Whether a defendant acted knowingly or recklessly in bringing about the death of another is also a question for the trier of fact. *People v. Leach*, 405 Ill. App. 3d 297 (2010). In reaching a finding of a defendant's mental state, the fact finder may rely on circumstantial evidence, because "a person intends the natural and probable consequences of his acts[.]" *People v. Gresham*, 78 Ill. App. 3d 1003, 1007 (1979). "Because a defendant's mental state is not commonly proved by direct evidence, it may be inferred from the surrounding circumstances, including the character of the defendant's acts and the nature of the victim's injuries." *People v. Jones*, 404 Ill. App. 3d at 744 (2010).

¶ 23 In *People v. DiVincenzo*, 183 Ill. 2d 239 (1998), the court considered three factors in determining whether a defendant acted recklessly in causing another person's death: (1) the disparity in size and strength between the victim and the defendant; (2) the brutality and duration of the beating and the severity of the victim's injuries; and (3) whether the defendant used bare fists or a weapon. *Id.*

¶ 24 These three factors are inconclusive when applied to the present case. First, Smith was larger than defendant, which points more toward a finding of recklessness. Second, the duration of the beating was short, and the beating does not appear to be extraordinarily brutal. However, Smith's injuries were severe–including broken bones and a lacerated spleen. The third factor–whether defendant used bare fists or a weapon–does not weigh for or against a finding of recklessness. "There is a long-standing principle in Illinois that death is not ordinarily contemplated as a natural

consequence of blows from bare fists." *Jones*, 404 Ill. App. 3d at 748; see also *People v. Crenshaw*, 298 Ill. 412 (1921); *People v. Gresham*, 78 Ill. App. 3d 1003 (1979); *People v. Brackett*, 117 Ill. 2d 170 (1987). Although defendant did not use a weapon, he kicked Smith several times in addition to punching him with his bare fists.

¶ 25 The determining factor in this case is that the ultimate decision about defendant's mental state belongs with the jury. See, *e.g.*, *DiVincenzo*, 183 Ill. 2d at 253 ("inferences as to defendant's mental state are a matter particularly within the province of the jury"); *Leach*, 405 Ill. App. 3d 297; *Gresham*, 78 Ill. App. 3d 1003. The acts in the present case that caused Smith's death were defendant's kicks to Smith's chest, which resulted in four broken ribs, a bruised and lacerated diaphragm, and a lacerated spleen. The jury could rationally have found that such injuries rose to the level of great bodily harm. As a result, any serious damage done to the rib cage has a strong probability of damaging organs protected by the rib cage.

¶ 26 In addition, the jury could rationally find that broken ribs themselves constitute great bodily harm. We conclude that kicking a victim's rib cage multiple times with enough force to separate and break four ribs creates a strong probability of great bodily harm. We cannot say that the jury's finding of the mental state for first degree murder was "inherently impossible or unreasonable." *Smith*, 149 Ill. 2d at 565. We find that a rational juror could have found that defendant knew that his conduct created a strong probability of great bodily harm.

¶ 27 B. Fines and Fees

¶ 28 Defendant also challenges the court's imposition in triplicate of three fees: (1) a circuit clerk fee; (2) a court fund fee; and (3) the State's Attorney conviction fee. The court apparently imposed each fee severally for each of defendant's three convictions. Defendant argues the court was

authorized to impose each fee only once. He requests this court to modify and reduce the fees so that each is singularly imposed. We may review this issue despite defendant's failure to raise it below. See *People v. Alghadi*, 2011 IL App (4th) 100012. Whether duplicate fines and fees are statutorily authorized is reviewed *de novo*. *People v. Robinson*, 172 Ill. 2d 452 (1996).

¶ 29 The State concedes that the circuit clerk fee should have been entered only once. The State argues, however, that it was proper to enter the court fund fee and the State's Attorney fee in triplicate because defendant's case involved three separate convictions. In *Alghadi*, 2011 IL App (4th) 100012, the court addressed a similar factual situation and held that "[a]lthough a defendant may only be charged with multiple counts within the same case number, the defendant may only be assessed *** (6) *one* court-finance fee, [and] (7) *one* State's Attorney assessment[.]" (Emphasis in original.) *Id.* ¶ 22. The State acknowledges that *Alghadi* controls the present case, but asks us to overrule its holding. We find the holding of *Alghadi* persuasive and follow it here.

¶ 30 The trial court erred when it imposed the fees in triplicate. The circuit clerk fee should be reduced from $300 to $100, the court fund fee from $150 to $50, and the State's Attorney fee from $90 to $30.

¶ 31 CONCLUSION

¶ 32 Defendant's conviction for first degree murder is affirmed. The following fees are modified: the circuit clerk fee is reduced from $300 to $100; the court fund fee is reduced from $150 to $50; and the State's Attorney fee from $90 to $30.

¶ 33 Affirmed as modified.