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2012 IL App (4th) 110488-U

Filed 4/23/12

NO. 4-11-0488

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
JAMIE L. THOMASSON,	)	No. 09CF303
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa K. Righter
	)	Judge Presiding.

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JUSTICE POPE delivered the judgment of the court.

Presiding Justice Turner and Justice McCullough concurred in the judgment.

### ORDER

¶ 1 *Held:* (1) Trial court did not err in denying defendant's motion to suppress as he did not clearly and unambiguously invoke his right to remain silent.

(2) Defendant's convictions for both first degree murder and aggravated battery of a child did not violate the one-act, one-crime doctrine.

¶ 2 In December 2010, a jury found defendant, Jamie L. Thomasson, guilty of the aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)) and first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)). The jury also found the victim of the first degree murder was under 12 years of age. In February 2011, the trial court sentenced defendant to concurrent prison terms of 70 years for first degree murder and 20 years for aggravated battery of a child. Defendant appeals, arguing the trial court (1) erred in denying defendant's motion to suppress his statements made during an interrogation because he invoked his right to remain silent and (2)

violated the one-act, one-crime doctrine by imposing a concurrent sentence for his aggravated battery of a child conviction. We affirm.

¶ 3

## I. BACKGROUND

¶ 4

In July 2009, the State charged defendant by information with one count of first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) as a result of the death of H.J. (born May 19, 2007). The State alleged defendant caused H.J.'s brain injuries which led to his death by impacting his head and shaking his body, knowing such acts created a strong probability of death or great bodily harm. With regard to the first degree murder count, the information also alleged for sentencing purposes (1) defendant was over 17 years of age and H.J. was under 12 years of age and (2) the alleged murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. The State also charged defendant with one count of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)), alleging defendant knowingly caused great bodily harm to H.J. by breaking H.J.'s clavicle. The State also alleged in this count the aggravated battery was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 5

In August 2010, defendant filed a motion to suppress statements he made to the police during a custodial interrogation regarding the cause of H.J.'s death, arguing he invoked his right to remain silent during the interview. The motion acknowledged defendant was advised he did not have to answer any questions and could have refused to answer questions. The motion also acknowledged defendant initially waived his rights and agreed to answer the police officers' questions. However, defendant argued he asserted his right to end the interrogation when he later stated, "I'm done."

¶ 6 In October 2010, the trial court held a hearing on defendant's motion to suppress. Detective James Blagg testified defendant was advised of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) at the beginning of the interview because defendant was in custody at that time. Defendant stated he understood his rights and told Blagg he would answer any question the detectives had because he had nothing to hide. Defendant told the detectives he did not need a lawyer.

¶ 7 Before the interview, the police officers had been advised the autopsy of H.J. showed he was the victim of a possible homicide. Blagg told defendant during the course of the interrogation the child had a broken clavicle and brain injuries. The officers also told defendant they did not believe defendant was telling them everything with regard to H.J.'s injuries. The officers stressed the severity of H.J.'s injuries and defendant's sole access to the child. The officers told defendant his version of events did not make sense in relation to H.J.'s severe injuries.

¶ 8 Relying on the transcript of the custodial interview, Blagg acknowledged, at one point in the interrogation after he told defendant about the child's injuries, defendant stated, "I'm done." The video indicates defendant and Blagg were both talking at that time. Blagg responded, "Pardon me?" Blagg testified he did not hear what defendant had said so he was asking defendant to repeat the statement. Blagg only realized defendant said, "I'm done," several days later when he was checking the accuracy of the transcript of the interview against the video of the interview. After defendant said, "I'm done," the police officers continued asking questions and defendant continued to talk to the officers. Blagg stated, after watching the video again in court, he still did not understand what defendant meant when he said, "I'm done."

¶ 9           The State argued defendant did not clearly and unequivocally assert his right to remain silent. The trial court agreed, finding "[d]efendant stating[,] 'I'm done[,]'" in this particular context was not sufficient to invoke [his] right to remain silent." The court found this was not a clear and unequivocal statement that defendant was invoking his right to remain silent. As a result, the court denied defendant's motion to suppress.

¶ 10           Defendant's jury trial was held in December 2010. As defendant is not arguing the State failed to present sufficient evidence to convict him of first degree murder or aggravated battery of a child, we need not summarize the numerous witnesses' testimony. However, we note the jury saw defendant's videotaped interview, which was the subject of defendant's motion to suppress.

¶ 11           The jury also heard testimony from Dr. John Ralston, the forensic pathologist who performed the autopsy on H.J. Dr. Ralston testified X-rays revealed H.J.'s left clavicle had been fractured. Ralston also stated H.J. had a subdural hematoma on both sides of his brain and subarachnoid hemorrhages all over the surface of his brain. H.J. also had a hemorrhage along one of his optic nerves.

¶ 12           Dr. Ralston testified H.J.'s clavicle was fractured in the middle of the bone. Ralston testified breaks that occur as a result of a fall normally are found at the end of the bone, which is weaker than the center. Dr. Ralston testified H.J.'s fractured clavicle was "more consistent with direct trauma to the center of the bone" as opposed to trauma resulting from a fall.

¶ 13           As for H.J.'s brain injuries, Dr. Ralston testified H.J.'s brain seemed to expand as soon as he opened H.J.'s skull during the autopsy. H.J.'s brain was significantly softer than a

healthy brain. The brain had swollen to an extent the wrinkles normally present in the brain had started to flatten. H.J.'s death was caused by the subdural hematoma. Dr. Ralston offered the following opinion as to the specifics of how H.J. suffered the clavicle and brain injuries:

"In terms of the injuries to his clavicle or the collar bone,  
that would be a fracture due to direct application of force.

And as far as the wounds to his head, subdural hematoma,  
that would be consistent with a shaking type motion."

¶ 14 The jury found defendant guilty of aggravated battery of a child. The jury found the State failed to prove the aggravated battery was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. The jury also found defendant guilty of first degree murder. The jury also found H.J. was under 12 years of age. The jury found the State failed to prove the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 15 In February 2011, the trial court filed its written judgment, sentencing defendant to a term of imprisonment of 70 years on the first-degree-murder charge and a concurrent term of 20 years on the aggravated-battery-of-a-child charge.

¶ 16 This appeal followed.

## ¶ 17 II. ANALYSIS

### ¶ 18 A. Defendant's Statements to Police

¶ 19 Defendant argues his statements to police during a custodial interrogation after he said, "I'm done," should have been suppressed. When reviewing the denial of a motion to suppress, we apply a bifurcated standard of review. With regard to a trial court's factual findings,

we apply a manifest weight of the evidence standard. However, as to the ultimate question of whether the evidence should have been suppressed, we apply a *de novo* standard of review.

*People v. Gipson*, 203 Ill. 2d 298, 303-04, 786 N.E.2d 540, 543 (2003).

¶ 20 During a custodial interrogation, if a law enforcement officer continues to question an individual after the individual has invoked his constitutional right to remain silent, any statement made thereafter "cannot be other than the product of compulsion, subtle or otherwise." (Internal quotation marks omitted.) *People v. Nielson*, 187 Ill. 2d 271, 286, 718 N.E.2d 131, 142 (1999). However, if that individual had earlier waived his right to remain silent, he can only later invoke that right by a positive assertion he wants to remain silent. *People v. Patterson*, 217 Ill. 2d 407, 445, 841 N.E.2d 889, 910-11 (2005). This invocation of his right to remain silent must be specific. *People v. Aldridge*, 68 Ill. App. 3d 181, 187, 385 N.E.2d 396, 401 (1979). While in some cases, the statement, "I'm done," could be a clear invocation of an individual's right to remain silent, in this case, defendant's statement, "I'm done," did not in any way indicate he no longer wanted to speak to the officers.

¶ 21 Defendant does not dispute he initially waived his right to remain silent. Prior to stating, "I'm done," defendant told the police officers he was the only person with access to the child the night of H.J.'s death. In addition, he had offered his explanation as to how H.J. might have been injured. However, the police officers told defendant in no uncertain terms his explanation did not comport with the child's severe injuries. Based on the context of the interview, the meaning of defendant's statement, "I'm done," is, at best, ambiguous. Defendant did not make it clear he wanted to invoke his right to remain silent and end the interview. Instead, it appears defendant's statement was his assessment of his current predicament and the

affect H.J.'s death would have on his life as he then knew it. In other words, he was done; "his goose was cooked;" he would be going to prison. When watching defendant's statement on the video, it is clear defendant is not invoking his right to remain silent. As a result, the trial court did not err in denying defendant's motion to suppress.

¶ 22

#### B. Validity of Sentence

¶ 23

Defendant next argues his concurrent sentence for aggravated battery of a child violates the one-act, one-crime rule. The State charged defendant with first degree murder for causing brain injuries to H.J. "by impact to [H.J.'s] head and shaking of his body[,] knowing such acts created a strong probability of death or great bodily harm, thereby causing the death of [H.J.]" The State charged defendant with aggravated battery of a child for knowingly causing "great bodily harm to [H.J.], a child under 13 years of age \*\*\* in that he broke [H.J.'s] clavicle." Both counts alleged the respective acts were committed on June 21, 2009.

¶ 24

In his appellate brief, defendant argues the State's theory with regard to H.J.'s injuries was different at sentencing than at trial. According to defendant's appellate brief:

"At trial, the State presented a theory to the trier of fact that the referenced injuries 'all occurred at the same time.' Said theory was consistent with the forensic pathologist's finding that the death of the victim was due to child abuse.' [Citation.] The jury was advised by the State that the forensic pathologist attributed the fracture of the clavicle to 'child abuse, as well.'

At sentencing, however, the State adopted a brand new, opposite theory regarding the injuries, that being that although the

injuries occurred 'at or about the same time,' they were 'separate,' and therefore should not 'merge into one judgment.' The State argued that the 'fracture of the clavicle on the collarbone is a separate event as opposed to the shaking.' As a result of the separateness of the injuries, the State argued that 'judgment should be entered as to both counts.' "

¶ 25 We disagree with defendant the State's theory as to H.J.'s injuries was not consistent from trial to sentencing. The State's theory throughout this case was the injuries all occurred during the same course of abusive conduct. However, the State also consistently asserted H.J.'s clavicle fracture and his brain injuries were the result of separate acts.

¶ 26 In *People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838 (1977), our supreme court stated:

"Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act', when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more



than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered."

*King*, 66 Ill. 2d at 566, 363 N.E.2d at 844-45.

The supreme court's decision in *King* requires courts to apply a two-step analysis to determine whether multiple convictions violate the one-act, one-crime doctrine. *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010).

"First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *Miller*, 238 Ill. 2d at 165, 938 N.E.2d at 501.

¶ 27 We first review whether H.J.'s broken clavicle and brain injuries resulted from the same physical act. The evidence established these injuries were caused by two separate acts. Dr. Ralston offered the following opinion as to the specifics of how H.J. suffered the clavicle and brain injuries:

"In terms of the injuries to his clavicle or the collar bone, that would be a fracture due to direct application of force.

And as far as the wounds to his head, subdural hematoma, that would be consistent with a shaking type motion."

¶ 28 Under the second step of the *King* analysis, we must determine whether aggravated battery to a child is a lesser included offense of first degree murder. While neither party cited our supreme court's decision in *Miller*, the court's holding in that case controls our analysis with regard to determining whether aggravated battery of a child is a lesser-included offense of first degree murder. In situations such as the one in this case, our supreme court has directed courts to apply the abstract elements test to determine whether one charged offense is a lesser-included offense of another charged offense. *Miller*, 238 Ill. 2d at 173, 938 N.E.2d at 505-06.

"Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. [Citations.] Although this approach is the most clearly stated and the easiest to apply [citation], it is the strictest approach in the sense that it is formulaic and rigid, and considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Miller*, 238 Ill. 2d at 166, 938 N.E.2d at 502.

Pursuant to the abstract elements test, aggravated battery of a child is clearly not a lesser-included offense of first degree murder as it is not impossible to commit first degree murder

without necessarily committing aggravated battery of a child. First degree murder does not require the victim to be a child, whereas aggravated battery of a child necessitates the victim be under 13 years of age.

The broken clavicle did not result in H.J.'s death. It was the result of the aggravated battery. The brain injuries, as charged in the first-degree-murder count, resulted in H.J.'s death. As stated earlier, testimony established these injuries were caused by two separate acts.

¶ 29

### III. CONCLUSION

¶ 30

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

¶ 31

Affirmed.