2017 IL App (4th) 150378-U

NO. 4-15-0378

FILED
November 8, 2017
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.	)	Macon County
BRANDON D. OWENS,	)	No. 08CF1345
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) affirmed in part, concluding (a) defendant did not meet his burden to show the trial court abused its discretion in handling a sleeping juror or that he was denied a fair trial; and (b) the court did not abuse its discretion in admitting evidence of a prior uncharged crime at sentencing; and (2) vacated certain fines improperly imposed by the circuit clerk.

¶ 2 In September 2008, the State charged defendant, Brandon D. Owens, with six counts of first degree murder, alleging he stabbed and killed Leadgrie Cunningham. Following a jury trial, defendant was found guilty of first degree murder. The trial court sentenced defendant to 60 years' imprisonment.

¶ 3 Defendant appeals, arguing (1) he was denied the right to an impartial jury where the trial court did not remove or question a juror who slept during the trial; (2) a new sentencing hearing was necessary because the trial court improperly considered hearsay evidence regarding an uncharged home invasion in aggravation; and (3) this court should vacate certain void fines

improperly imposed by the circuit clerk. We affirm in part, and vacate the fines improperly imposed by the circuit clerk.

¶ 4 I. BACKGROUND

¶ 5 In September 2008, the State charged defendant with six counts of first degree murder. The following evidence was introduced at trial.

¶ 6 A. Trial

¶ 7 On September 7, 2008, Cunningham was found dead in her home. She had last been seen alive the night before. Cunningham's cousin lived across the street and testified she saw Cunningham the night of September 6, 2008, counting a large quantity of money. Cunningham died from approximately 70 stab and "cutting" wounds. The number of wounds, their locations, and defensive wounds indicated Cunningham had resisted her attacker. The police investigation led to defendant as a suspect.

¶ 8 Defendant's sister, Shaquila Clark, testified she purchased a pair of black jeans for defendant, which he wore in the early morning hours of September 7, 2008, at a club in Springfield. Clark, defendant, and a number of other Decatur residents left the Springfield club after it closed and stopped at a gas station in Decatur. Clark and defendant returned to her home, where defendant usually stayed, around 4 a.m. on September 7, 2008. Clark immediately fell asleep, but she testified defendant was there when she woke up sometime between 9 a.m. and 11 a.m. The black jeans Clark purchased for defendant were found doused in bleach in a bag in an unlocked garage behind Clark's house. Blood found on the jeans was a match for Cunningham's deoxyribonucleic acid (DNA). A pair of boxers was also recovered from the bag and blood found on the boxers had a mixture of Cunningham's DNA and defendant's DNA.

¶ 9 A latent print examiner testified a bloody fingerprint found on Cunningham's oven door matched defendant's right middle finger. According to the print examiner, a print on the edge of the oven door matched defendant's right palm.

¶ 10 The State played recorded interviews for the jury. When speaking to police, defendant denied any involvement in Cunningham's death. Defendant had a large amount of currency on him at the time of his arrest and told police officers he was a saver.

¶ 11 Defendant had numerous cuts on his right hand and he told police he was right handed. Defendant explained some of the cuts happened when he broke a plate in anger and he could not explain the rest of the cuts. A pathologist testified Cunningham's attacker could have had hand injuries because blood could make a knife slippery. According to the pathologist, photographs of defendant's cuts depicted "healing sharp" injuries.

¶ 12 After the State rested, defendant exercised his right to testify. Defendant testified he and Cunningham shared a relative of Cunningham's as a drug supplier. Although defendant and Cunningham did not pool their money to purchase drugs, they would get together to receive deliveries and pay Cunningham's relative for the drugs. Defendant testified he and Cunningham sold drugs from her house, although he also drove around to make sales. Sometimes defendant would leave drugs or money with Cunningham, which she stored behind her stove.

¶ 13 On September 6, 2008, defendant went to pick up some pills at another stash house he and Cunningham used, and Cunningham showed up in a truck with Toby Britton. Later that evening, defendant, his sister, and a few others went to a club in Springfield. They left the club around 3 a.m. on September 7, 2008, and met up with a few others at a gas station in Decatur. Defendant and some others went to his sister's house, where defendant got his sister's car keys to give some people rides.

¶ 14 The trial court interrupted defendant's testimony to take a recess. The following exchange occurred outside the presence of the jury:

"THE COURT: Did counsel make any observations about any of the jurors?

MS. KURTZ [(Assistant State's Attorney)]: Judge, I—when the—earlier I did see one of the jurors—[another prosecutor] pointed it out to me—she had her head down or she was slouched back. She had her head tilted. When I looked over, she did open her eyes and sit up. Although I wasn't paying attention again, but when the [c]ourt started to say we were going to take a break, I did look over again wondering if that was the issue and the same juror did have—was slouched down with her head to the side and her eyes were closed.

THE COURT: And that comports with the [c]ourt's observations. It's Ms. Brown. Sometimes people look down when they're listening. I have seen that happen, but I'm pretty sure that wasn't the case here with Ms. Brown. I'm bringing it to the counsel's attention. I don't know what you want to do anything about it or just—I'll take your suggestions.

Ms. Kurtz?

MS. KURTZ: I—I guess I can say I'm not sure how much—I wasn't looking at her enough to know was she sleeping the entire time or nodding off the entire time. I don't know what

counsel wants to do or what the [c]ourt thinks is best whether or not it's good to have a conversation with her or dismiss her outright, I guess, I'm sorry, I didn't—those are—

THE COURT: Sure. Well, I think in these situations the best thing to do is either excuse her and put in an alternate or continue with her. But I don't think—it reached the point where I feel I had to tell counsel in case—I wasn't sure you knew or not.

MS. KURTZ: I had not seen it. I'm sorry. I was trying to take notes of the defendant except for the two times I described. I would have no objection to replacing her with an alternate.

THE COURT: What's your preference, Ms. Root [defense attorney]?

MS. ROOT: Well, we are very close to the end, Judge. I did not notice it. I have looked over a couple of times this morning, and she was observant when—at least when I was interviewing—or when I was questioning other witnesses. And I looked at her so I'm fine with—let's keep her and continue on.

THE COURT: Very well. And that's what we'll do. We might as well go ahead and take a little break, just maybe about ten minutes, let's resume then."

¶ 15 Defendant resumed his testimony, and testified Britton called him while he was still at the gas station in Decatur. According to defendant, Britton wanted to purchase ecstasy

and defendant arranged to meet him. Eventually, defendant took his sister's car, gave a friend a ride, and then drove to Cunningham's house to meet Britton.

¶ 16 When he arrived, defendant saw the truck Cunningham and Britton were in earlier parked in the driveway. Defendant testified Cunningham's front door was open. When he opened the screen door, an unknown man with his face covered pulled defendant inside. According to defendant, Cunningham was wearing only a bra and knelt in the middle of the living room with her hands up. Britton was there and had a bandana partially covering his face. Britton and the unknown man forced defendant to his knees and told him to remove his clothes. The two men repeatedly asked for the "shit," and defendant and Cunningham told them they did not have anything.

¶ 17 The unknown man went to the kitchen and returned with a knife, threatening to make defendant and Cunningham talk. The man again asked about the "shit" and, when defendant again denied having anything, the man stabbed Cunningham. Defendant testified he was scared, knew there was money in the house, and told Cunningham to give the men the "shit." Cunningham was moaning and the unknown man stabbed her again, so defendant grabbed her.

¶ 18 Defendant testified Britton asked him about the stove, and defendant felt he had been set up. The men told defendant to move the stove, so he walked on his knees into the kitchen. Defendant tried to move the stove by the handle on the oven door, but the door started to come off. Britton and the unknown man looked behind the stove and found nothing there. The unknown man returned to the living room and defendant followed on his knees.

¶ 19 According to defendant, he offered to take the two men to get money. Britton and defendant got into the truck in the driveway, leaving the unknown man behind. Defendant gave Britton various directions, and defendant jumped from the vehicle when Britton came to a stop.

Defendant testified he ran for approximately 10 minutes before he arrived at his sister's house. Defendant got some money and a gun from his sister's house and called a friend for a ride back to Cunningham's house. When he got to Cunningham's house, she was unresponsive on the floor, so defendant retrieved his sister's car and went back to her house.

¶ 20 Defendant did not tell anyone what happened that night because he was "trying to piece stuff together" to figure out what exactly happened. Defendant testified he eventually told Detective Williams to look into Britton's involvement with Cunningham's death. According to defendant, he did not trust the police and wanted to hide that he was a drug dealer. Defendant testified he decided to piece together what happened that night himself and "whatever happened, happened."

¶ 21 Following closing arguments and deliberation, the jury returned a guilty verdict, finding defendant guilty of first degree murder.

¶ 22 B. Sentencing

¶ 23 In April 2015, the trial court held a sentencing hearing. As part of its evidence in aggravation, the State presented Adam Jahraus, a Decatur police officer, who testified that he responded to a December 2007 home invasion. According to Jahraus, the victim, Linda Pugh, reported she heard her front door being forced open and then a male jumped on top of her in her bed. Pugh told Jahraus the man began asking where the money was and she recognized the voice as belonging to a person named Brandon. The man led Pugh to one of her children's bedrooms and ordered her and the child to lie on the floor. The man again asked where the money was and punched Pugh twice in the mouth. Pugh said the man then led her and her child to her other child's bedroom and made all three lie on the floor. The man took all three to the living room and again demanded to know where the money was and demanded Pugh remove her clothing.

He then led them to the laundry room before fleeing. Pugh waited 10 minutes before calling the police.

¶ 24 Jahraus testified Pugh said the man was an associate of her boyfriend, Leon Walker. Walker arrived at the scene and, after speaking with him and getting a description of the man, Jahraus believed the man was defendant. Walker told Jahraus he had seen defendant at a bar earlier in the night and defendant left the bar 30 to 45 minutes before the home invasion occurred. When presented with a photographic lineup, Pugh identified defendant as the perpetrator of the home invasion.

¶ 25 The presentence investigation report (PSI) does not reflect a conviction for the December 2007 home invasion. The PSI shows a class 4 felony aggravated unlawful use of a weapon and a misdemeanor domestic battery conviction in Macon County case No. 08-CF-1332. The trial court agreed to strike and disregard the felony aggravated unlawful use of a weapon because it was "an unconstitutional void offense and void sentence." The PSI also shows four misdemeanor convictions for driving on a suspended license. Finally, the PSI indicates defendant was adjudicated a delinquent minor in 2003 for an unlawful-use-of-weapons charge and sentenced to 24 months of probation. He violated his probation, served 120 days in the Department of Corrections, and was re-sentenced to probation. He committed another weapons charge and his probation was revoked and he was sentenced to the Department of Corrections on a full commitment.

¶ 26 In imposing sentence, the trial court stated it considered (1) the PSI, (2) the evidence in aggravation, (3) the arguments and recommendations of counsel, and (4) the statutory factors in aggravation and mitigation. The court noted "some mitigation" set forth in the PSI. Finally, the court stated,

> "There isn't an extensive prior history of criminal conduct but there is a history. The most prevalent factor in this whole case is the nature and circumstances of the offense. This woman was stabbed, approximately, 70 times. This defendant showed absolutely no remorse. This defendant repeatedly lied to the police. The factors in aggravation [far] outweigh any mitigation that may exist here. Where mercy is shown[,] mercy is given. There was no mercy shown to this victim."

The court sentenced defendant to 60 years' imprisonment.

¶ 27 C. Fines and Fees

¶ 28 The trial court did not impose any fines on defendant. However, the record shows defendant was assessed the following: (1) a $15 "state police ops" fee; (2) a $4.75 drug court fee; (3) a $50 court fee; (4) a $5 youth diversion fee; (5) $28.50 child advocacy fee; (6) a $10 medical costs fee; (7) a $20 lump sum surcharge; (8) a $100 "violent crime" fee; (9) a $10 state police services fee; (10) a $25 automation fee; (11) a $25 document storage fee; and (12) a $2 State's Attorney automation fee.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, defendant argues (1) he was denied the right to an impartial jury where the trial court did not remove a juror who slept during his testimony or question the juror as to what testimony she missed; (2) a new sentencing hearing was necessary because the court improperly considered hearsay evidence regarding an uncharged home invasion in aggravation; and (3) this court should vacate certain void fines improperly imposed by the circuit clerk.

¶ 32 A. Impartial Jury

¶ 33 Defendant first contends he was denied his right to trial by an impartial jury because the trial court did not remove a juror who slept during defendant's testimony, or question that juror to determine what testimony she missed. Defendant acknowledges this claim of error was "defaulted" and asks this court to review his claim under the second prong of the plain-error doctrine.

¶ 34 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The burden is on the defendant to show an error caused a severe threat to the fairness of the trial. *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 480 (2005).

¶ 35 Defendants have the constitutional right to be tried by a fair and impartial jury, and "a juror who is inattentive for a substantial portion of a trial has been found to be unqualified to serve on the jury." *People v. Jones*, 369 Ill. App. 3d 452, 455, 861 N.E.2d 276, 279 (2006). When there is possible juror misconduct, "it is within the sound discretion of the trial court whether to reopen *vior dire*, and we review the trial court's actions for an abuse of that discretion." *Id.*

¶ 36 The State asserts defendant has waived this claim of error and plain-error review is inapplicable where defense counsel affirmatively acquiesced to the trial court's handling of the situation. See *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011)

("In a situation like this, where defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel on collateral attack."). Defendant responds, arguing the trial court had a duty to *sua sponte* determine what the juror may have missed and whether the juror should have been removed from the jury. In his reply brief, defendant again asserts this court should review his claim for structural error under the second prong of the plain-error doctrine.

¶ 37 In support of this argument, defendant relies on *Jones*. We find *Jones* distinguishable. In that case, the trial court addressed defense counsel's objection to a comment made by the prosecutor. 369 Ill. App. 3d at 453, 861 N.E.2d at 278. In the course of the inquiry, the court stated, "So I know that the lady in the back seat was half asleep during almost the entire proceeding. So I assume you guys saw that, right?" *Id.* On appeal, the defendant argued he was denied a fair trial because neither the court nor his counsel took remedial action regarding the sleeping juror. *Id.* at 454, 861 N.E.2d at 278. The appellate court found the trial court abused its discretion by failing to reopen *voir dire* when it observed the juror " 'half asleep during *almost the entire* proceeding.' " (Emphasis in original.) *Id.* at 456, 861 N.E.2d at 280. In so holding, the appellate court distinguished *United States v. Tierney*, 947 F.2d 854 (1991), because "the court in *Tierney* specifically noted that the defendant did not show that the challenged jurors '*ignored any particularly important items*,' and that the defendant made a 'general assertion that [certain] jurors slept through *parts* of' the trial." (Emphasis in original.) *Jones*, 369 Ill. App. 3d at 456, 861 N.E.2d at 280.

¶ 38 Like in *Jones*, the trial court in this case did make the first mention of the allegedly sleeping juror. However, the *Jones* court placed great emphasis on the trial court's comment that the sleeping juror in that case slept through "*almost the entire* proceeding." *Id.* In

the present case, the trial court made no such comment and the prosecutor stated she only noticed the juror's eyes closed twice, although she admittedly was not paying careful attention. Our review of the record shows the juror was observed sleeping during defendant's testimony regarding various rides he gave to friends the evening of the murder. It was only after the recess that defendant testified as to Britton phone call requesting ecstasy and gave his version of the events that led to Cunningham's death. The record does not contain any indication the sleeping juror was a continued problem during this testimony.

¶ 39 The State relies on *People v. Gonzalez*, 388 Ill. App. 3d 566, 900 N.E.2d 1165, (2008). In *Gonzalez*, the defendant sought review under the second prong of the plain-error doctrine and argued "the trial court failed to fulfill its affirmative duty to ensure that he had an attentive jury." *Id.* at 574, 900 N.E.2d at 1173. In addressing *Jones*, the *Gonzalez* court noted *Jones* presented a situation where "the trial judge noticed that a juror had been sleeping throughout the proceedings but did not bring the matter to the parties' attention until the conclusion of trial." *Id.* at 577, 900 N.E.2d at 1175. Conversely, in *Gonzalez*, the trial court became aware of the possibly sleeping juror and immediately notified the parties of the problem, thus fulfilling "its affirmative duty to ensure that [the] defendant received a fair trial." *Id.* Additionally, where the defendant did not point to any significant testimony the juror might have missed and the problem did not arise again, the *Gonzalez* court found the defendant failed to meet his burden to demonstrate "the trial court's response to the issue was an abuse of discretion or that an error occurred which was so serious that it affected the fairness of [his] trial and challenged the integrity of the judicial process." *Id.* at 579, 900 N.E.2d at 1176-77.

¶ 40 We find the present case more like the situation in *Gonzalez*. As noted above, the record shows the trial court interrupted defendant's testimony to immediately address the issue

with the sleeping juror. Although the prosecutor was not paying special attention, she stated she only noticed the juror's eyes closed twice. Moreover, the problem did not persist through defendant's account of the events immediately surrounding Cunningham's death and we do not think defendant's account of the rides he gave various friends earlier in the evening constitutes "significant testimony" the juror might have missed. Accordingly, we conclude defendant has not met his burden to show the trial court's handling of the situation was an abuse of its discretion or structural error so serious it affected the fairness of his trial or challenged the integrity of the judicial process. *Id.*; see also *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 479-80 (2005).

¶ 41 B. Sentencing

¶ 42 Defendant contends the trial court abused its discretion in admitting hearsay evidence of prior criminal conduct for which that was no prosecution or conviction.

¶ 43 A trial court's sentencing decision is entitled to great deference and will be altered only if the court abused its discretion. *People v. Spicer*, 379 Ill. App. 3d 441, 465, 884 N.E.2d 675, 697 (2007). "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Jackson*, 375 Ill. App. 3d 796, 800, 874 N.E.2d 592, 595 (2007).

¶ 44 The ordinary rules of evidence are relaxed at a sentencing hearing. *People v. Harris*, 375 Ill. App. 3d 398, 408, 873 N.E.2d 584, 593 (2007). "While evidence of past criminal conduct is often not admissible at trial, it is relevant information at sentencing." *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992). "[C]riminal conduct not resulting in prosecution or conviction may be considered." *Harris*, 375 Ill. App. 3d at 409, 873 N.E.2d at 593. At sentencing, hearsay may be considered and a hearsay objection affects the weight to be

given evidence, rather than the admissibility. *Id.* at 409, 873 N.E.2d at 594. It is in the trial court's sound discretion to decide the weight to be given to hearsay evidence. *Spicer*, 379 Ill. App. 3d at 467, 884 N.E.2d at 698.

¶ 45 We conclude the trial court did not abuse its discretion in allowing the investigating officer to testify about defendant's prior uncharged home invasion. "[T]he State may prove up defendant's other criminal activity at sentencing by having the investigating officer testify about what the witnesses told him and about what he learned during his investigation of the other crime." *Harris*, 371 Ill. App. 3d at 410, 873 N.E.2d at 594. Although the trial court in this case stated it considered the evidence in aggravation, the court made no further comment regarding the uncharged home invasion and referred to no details of the complained-of testimony. Moreover, the court clearly placed the most emphasis on the nature and the circumstances of the offense, noting Cunningham died of approximately 70 wounds and finding defendant showed no mercy or remorse for the crime. As the court stated, these factors were most heavily relied on in sentencing defendant. Although the court stated it considered counsel's arguments and noted defendant's criminal history, these statements do not show the court placed undue weight on Jahraus's testimony.

¶ 46 We also note defendant's criminal history includes more than just the uncharged home invasion. As detailed in the PSI, defendant had a number of misdemeanor convictions for driving on a suspended license, a domestic-battery conviction, and juvenile weapons charges. Accordingly, we find the trial court did not abuse its discretion in sentencing defendant to 60 years' imprisonment. See *Spicer*, at 465, 884 N.E.2d at 697 (maximum sentence still within the statutory range). Finally, in light of our conclusion that the court did not abuse its discretion in

admitting the evidence of the home invasion, defendant's claim that counsel was ineffective for failing to object to the evidence is without merit.

¶ 47 C. Fines and Fees

¶ 48 Defendant contends the following fines were improperly assessed by the circuit clerk and should be vacated: (1) a $15 "state police ops" fee; (2) a $4.75 drug court fee; (3) a $50 court fee; (4) a $5 youth diversion fee; (5) $28.50 child advocacy fee; (6) a $10 medical costs fee; (7) a $20 lump sum surcharge; (8) a $100 "violent crime" fee; and (9) a $10 state police services fee. The State concedes all of these assessments are fines improperly assessed by the circuit clerk and should be vacated. See *People v. Daily*, 2016 IL App (4th) 150588, ¶ 30, 74 N.E.3d 15 (circuit clerk lacks authority to impose fines). We accept the State's concession and vacate the above assessments improperly assessed by the circuit clerk.

¶ 49 Defendant asserts the circuit clerk also improperly imposed (1) a $25 automation fee; (2) a $25 document storage fee; and (3) a $2 State's Attorney automation fee. The State asserts this court has previously held the automation fee, the document storage fee, and the State's Attorney automation fee are, indeed, fees and, thus, were properly assessed by the circuit clerk. *Id.* ¶ 31. See also *People v. Warren*, 2016 IL App (4th) 120721-B, ¶¶ 100-03, 114-16, 55 N.E.3d 117. Defendant asks this court to reconsider our holding in *Daily* in light of the First District Appellate Court's decision in *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56, 64 N.E.3d 647 (holding the State's Attorney automation fee was not a "fee" because it did "not compensate the [S]tate for the costs associated in prosecuting a particular defendant"). We decline to reconsider our holding in either *Warren* or *Daily* and continue to hold the automation assessment, the document storage assessment, and the $2 State's Attorney automation assessment are fees. See *People v. Maggio*, 2017 IL App (4th) 150287, ¶ 54, 80 N.E.3d 72. Accordingly,

we do not vacate the $25 automation fee, the $25 document storage fee, and the $2 State's Attorney automation fee.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we vacate the fines improperly imposed by the circuit clerk. We otherwise affirm the trial court's judgment. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 52 Affirmed in part and vacated in part.