

2014 IL App (2d) 120971-U
No. 2-12-0971
Order filed March 27, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CM-346
)	
CORDEZ MULLEN,)	Honorable
)	John F. McAdams,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's two convictions of domestic battery violated the one-act, one-crime rule, as the only act charged and proved for both convictions was grabbing the victim by the neck; we vacated the less serious conviction, of insulting or provoking contact.
- ¶ 2 Following a bench trial, defendant, Cordez Mullen, was convicted of two counts of domestic battery (720 ILCS 5/12-3.2 (West 2010)). He appeals, contending that one of the convictions must be vacated because both were based on the same physical act. We vacate in part.

¶ 3 Defendant was charged by complaint following an incident with his girlfriend, Laura Brennan. Count I alleged that defendant made contact of an insulting or provoking nature in that he “grabbed Laura by the neck.” Count II alleged that defendant caused bodily harm in that he “struck Laura in the neck with his hand and grabbed Laura by the neck.”

¶ 4 At trial, Brennan testified that on April 13, 2012, she was living with defendant and her daughter. That night, she asked defendant to leave the house. He did, but returned about 9 p.m., vomiting and smelling of alcohol. Defendant wanted to have sex, but Brennan refused because he had been drinking. She began to go upstairs to go to sleep, but turned around because she realized that with defendant there she would have no way of getting out of the house.

¶ 5 As she returned downstairs, with a phone in her hand, defendant “smacked” it away. He pushed her from the bottom of the stairs to the back of the couch. As she tried to get out the front door, the handle came off. Defendant was standing in front of her doing some “karate moves.” He started to restrain her by pressing his thumbs into her neck, which caused her pain. He told her that it was “very possible” that he could break every bone in her body. She was finally able to leave by telling defendant that she needed to go to her car and get her medicine.

¶ 6 Brennan drove down the block and called the police. Officer Dan Canon, who responded to the call, testified that he noticed red marks on her neck.

¶ 7 In closing, the prosecutor argued that the State had proved both counts of the complaint. Specifically, Brennan testified that, when defendant placed his hands on her neck and pushed, she felt pain, thus showing that defendant caused bodily harm. Moreover, defendant was guilty of insulting or provoking contact because he pushed her on the stairs and thereafter put his hands on her neck and squeezed.

¶ 8 The court found defendant guilty on both counts, sentencing him to one year of conditional discharge and 69 days in jail, which he had already served. Defendant timely appeals.

¶ 9 Defendant contends that we must vacate one of his convictions because both were based on the same physical act. In *People v. King*, 66 Ill. 2d 551, 566 (1977), the supreme court held that multiple convictions may not be carved from the same physical act. In *People v. Crespo*, 203 Ill. 2d 335 (2001), the court held that, where the State intends to convict a defendant of multiple offenses based on a series of related acts, it must, in the charging instrument, apportion the acts among the various offenses and must argue the case that way at trial. *Id.* at 342-43.

¶ 10 The State initially responds that defendant has forfeited this contention by failing to raise it in the trial court. However, a violation of the one-act, one-crime doctrine affects the integrity of the judicial process, thus satisfying the plain-error rule. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 11 Here, both counts alleged that defendant grabbed Brennan by the neck. Further, the prosecutor argued to the court that the act of grabbing Brennan by the neck supported convictions on both counts. Although count II alleged the additional act that defendant “struck Laura in the neck with his hand,” Brennan never testified that defendant struck her in the neck with his hand. Moreover, although the prosecutor argued that defendant’s act of pushing Brennan on the stairs supported a conviction of making insulting or provoking contact, the complaint did not allege such conduct, and the State does not argue on appeal that this uncharged conduct supports a conviction. Thus, the only act charged and proved for both convictions was grabbing Brennan by the neck.

¶ 12 In *People v. Young*, 362 Ill. App. 3d 843 (2005), we held that the defendant could not be convicted of two counts of battery based on the evidence presented. We noted that “the State never distinguished at trial or in the complaint between the conduct it deemed to be an insulting or provoking contact and that which it deemed to be a contact causing physical harm. Instead, every indication supports the idea that the State charged and prosecuted this matter under alternate theories of culpability to prove a single offense of battery.” *Id.* at 853.

¶ 13 Here, too, every indication is that the State intended to charge alternate theories of liability based on a single act or perhaps a closely related series of acts. The State appears to argue that, because count II contained the additional allegation that defendant struck Brennan in the neck, and the court found defendant guilty beyond a reasonable doubt on both counts, the State sufficiently proved different offenses based on different acts.

¶ 14 The State’s argument misses the point. Defendant does not dispute that the State presented sufficient evidence to prove him guilty under both counts. He argues that both convictions may not stand where the same evidence supported both. Merely because the State alleged additional conduct in count II, and the court found defendant guilty on count II, does not mean that the court found that the State proved every allegation in that count. Proving that defendant struck Brennan in the neck was not essential to a conviction on count II and, as defendant points out, there was no such evidence.

¶ 15 The State relies heavily on *People v. Span*, 2011 IL App (1st) 083037. That case is distinguishable for the simple reason that the State there proved multiple acts. *Id.* ¶ 84. Evidence at trial showed that the defendant struck the victim at least twice, thus supporting two convictions. *Id.* Moreover, although the indictment failed to apportion the blows between the

two offenses, the prosecutor did so during trial. *Id.* ¶ 87. Thus, *Span* is distinguishable from this case.

¶ 16 The question remains which conviction we should vacate. In *Young*, we deemed the conviction based on insulting or provoking contact to be less serious and vacated it. Defendant suggests that we do the same here, and we agree. Thus, we vacate defendant's conviction based on insulting or provoking contact only.

¶ 17 Accordingly, the judgment of the circuit court of Kendall County is affirmed in part and vacated in part.

¶ 18 Affirmed in part and vacated in part.