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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 De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-366
)	
DENNIS DUBERRY,)	Honorable
)	Robbin J. Stuckert,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Defendant's convictions of Class 4 felony (rather than Class A misdemeanor) domestic battery violated double jeopardy, as the trial court had previously found during trial that the State had failed to prove the enhancing factor (though the State did not have to prove it at trial); (2) the State proved defendant guilty beyond a reasonable doubt of domestic battery (bodily harm), as the trial court could infer bodily harm from the evidence of the victim's physical pain; (3) defendant's two convictions of domestic battery violated the one-act, one-crime rule, as the State did not apportion the series of acts between the counts; we vacated the less serious conviction, of insulting or provoking contact.
- ¶ 2 Following a bench trial, defendant, Dennis Duberry, was found guilty of two counts of domestic battery (720 ILCS 5/12-3.2(a) (West 2010)) and sentenced to 24 months' probation.

Following the denial of his posttrial motion, defendant timely appealed. Defendant now argues (1) that the trial court violated the prohibition against double jeopardy when, at sentencing, it entered convictions of Class 4 felony domestic battery after having ruled that the State had failed to prove defendant guilty of that offense; (2) that the State failed to prove defendant guilty beyond a reasonable doubt of domestic battery based on bodily harm; and (3) that, assuming the sufficiency of the evidence, one of defendant's convictions of domestic battery should be vacated under one-act, one-crime principles. For the reasons that follow, we reduce defendant's convictions from Class 4 felony domestic battery to misdemeanor domestic battery, we vacate defendant's conviction of domestic battery based on insulting or provoking conduct, and we remand for resentencing.

¶ 3

I. BACKGROUND

¶ 4 On September 30, 2011, defendant was indicted on two counts of domestic battery (720 ILCS 5/12-3.2(a) (West 2010)). The indictment alleged that defendant pulled the hair of and twisted the arm of his girlfriend, Gurkiran Saggi. Count I alleged that defendant's conduct caused bodily harm to Saggi (720 ILCS 5/12-3.2(a)(1) (West 2010)). Count II alleged that defendant's conduct was insulting or provoking (720 ILCS 5/12-3.2(a)(2) (West 2010)). The indictment further alleged that defendant had previously been convicted of domestic battery (case No. 10-CF-106); therefore, the offense was charged as a Class 4 felony. See 720 ILCS 5/12-3.2(b) (West 2010). As a result of the charges, the State filed a petition to revoke probation in case No. 10-CF-106. Defendant waived his right to a jury trial, and a bench trial was held simultaneously with a hearing on the petition to revoke probation.

¶ 5 At trial, Saggi testified that she was defendant's girlfriend. On May 13, 2011, Saggi went to a party with defendant and got drunk. She wanted to go home, and defendant took her

home. She wanted defendant to remain at her apartment, but he could not stay. According to Saggu, the police came to her apartment, because her roommate, Neha Darji, called them. She did not remember arguing with defendant. She remembered speaking with an officer, but she did not remember his name. She did not remember anything that she said to the officer, because she had been drinking. She did not remember telling the officer that she had gotten into an argument with defendant, that defendant had pulled her hair, or that defendant had twisted her arm behind her back and had forced her into her apartment. She did not remember putting all of defendant's belongings outside of her apartment or telling the officer that defendant insisted that she return his belongings to the apartment. She remembered talking to Darji that evening, but she did not remember telling Darji that defendant had hit her.

¶ 6 Darji testified that, during the early morning hours of May 13, 2011, she was with her boyfriend, outside of the apartment that she shared with Saggu, when she saw defendant pulling Saggu up the stairs by her hair. Darji heard Saggu screaming, yelling, and crying. Darji's boyfriend went to speak to defendant, and Darji went to speak with Saggu. Saggu told Darji that defendant had hit her. Darji testified that Saggu was terrified; she was crying and shaking. Darji asked Saggu if she could call 911, and Saggu told her that she could. Prior to witnessing the incident, Darji had been out with friends. She had not been drinking.

¶ 7 Police officer Geoff Guzinski testified that he arrived on the scene and spoke with Saggu. Defendant was not present. Saggu was upset, and her hair was disheveled. Saggu told him that she had gotten into an argument with defendant about some text messages and that she had put all of defendant's belongings outside of her apartment. Saggu told him further that defendant had insisted she return his belongings to the apartment and that, when she was not moving fast

enough, defendant grabbed her by the hair and dragged her up to the apartment. Saggu also told him that defendant had twisted her arm behind her back.

¶ 8 Police officer Scott Farrell testified that he arrived on the scene and spoke with Darji and Saggu. They appeared to be upset. He attempted to locate defendant, but he was unable to do so.

¶ 9 Following Farrell's testimony, the State rested. Defendant moved for a directed finding, arguing that the State failed to put forth evidence of an injury or of conduct of an insulting or provoking nature. The State responded that Darji's testimony that she saw defendant drag Saggu up the stairs and that she heard Saggu screaming was sufficient circumstantial evidence to support both charges. Thereafter, the following occurred:

"THE COURT: At this time I have to look at the evidence in the light most favorable to the State. I certainly believe based on the credible testimony of the witness, the particular eyewitness, that the State established beyond a reasonable doubt at this point in time Class 1 misdemeanor domestic battery, provoking and insulting. *I've heard no evidence why I have a felony in front of me if there's been no evidence before this court regarding the felony nature of the case.*

[THE STATE]: Judge, the previous conviction is before you in 10 CF 106 the Class A misdemeanor.

[DEFENSE COUNSEL]: Judge, if I may, I believe the State rested so I would object to anything further at this point.

THE COURT: The State has rested. This was a petition to revoke on a previous sentence. *I've heard no evidence of elevating this but I do find that the lesser included offense of domestic battery for a provoking and insulting, the evidence has been laid on*

the lesser included offense. So I will deny the motion for directed finding and we can proceed on that.

[THE STATE]: Judge, the State at this time I guess would be seeking to reopen the proofs and ask for you to take judicial notice of the prior conviction.

[DEFENSE COUNSEL]: And, Judge, I would object, the State has rested.

THE COURT: The State has rested so I'll sustain the objection by the defense and we can proceed then with your case." (Emphases added.)

¶ 10 For the defense, Saggi testified that she was neither insulted nor provoked by defendant's conduct. She further testified that she was not injured by defendant's conduct.

¶ 11 Following closing arguments, the trial court ruled as follows:

"THE COURT: All right, thank you. The court has taken into consideration all of the evidence, the credibility of the witnesses. I found Neha Darji to be a credible witness and that her testimony before the court here today was corroborated by both the officers, the observations of what the officers made. Most specifically that she did not appear to have been consuming any alcohol which was consistent with her testimony. She was in an appropriate position where she could view what happened on that date.

As far as the victim in this case's testimony I find it not to be credible. Although she says she was too inebriated to remember much of what occurred, she was able to remember some things which would be inapposite of any of her testimony. Plus the court has considered her bias in a continuing relationship with the defendant in this case as well.

The court finds that the State has proved beyond a reasonable doubt based on the testimony of the police officers as well as this testimony that there will be a finding of

guilty as to misdemeanor domestic battery, both Count 1 and Count 2 with the lesser included offense.”

Further, the court found that the State met its burden on the petition to revoke probation.

¶ 12 After a short recess, the following discussion occurred:

“[THE STATE]: Judge, at this time we would be seeking a pre-sentence investigation report and ask for you to reconsider the finding of guilty only on the Class A misdemeanor. After searching through the Code of Criminal Procedure we believe that the prior conviction is something that needs to be brought in at sentencing and not as an element of the offense [(725 ILCS 5/111-3(c) (West 2010))][.] [I]t states:

‘When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State’s intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during the trial unless otherwise permitted by issues properly raised during such trial.’

So, Judge, based on the actual statute we’re asking for a pre-sentence investigation report and for there still to be the consideration for a Class 4 felony.

[DEFENSE COUNSEL]: And, Judge, I guess in response to that the State can ask for a pre-sentence investigation but I believe that what they are doing now to be in the nature of a post-trial motion as opposed to arguing now and therefore I—

THE COURT: All right, well, I’m going to ask for caselaw as well, if you can show me that that’s the same for a bench trial as opposed to the jury trial. Obviously it’s

for a jury. We don't want a jury to know of any prior convictions because of any bias that would go along with that as well.

But generally I had no idea why it could have been the enhancement was for serious harm or something like that, I don't know, and that certainly wasn't before the court any evidence of any great bodily harm to enhance it to a felony offense. I had no evidence of that.

So, I'll let you give me some cases regarding bench trial. *I certainly would not be opposed to changing my verdict or my decision if you have some caselaw to support that as well.* But generally I read through the indictment and that I did not at this time so I had no idea why it was enhanced to a felony offense because I had not read the indictment right before we went to proceedings, I just knew that we did not have an arraignment on it.

So if you can show me some caselaw indicating the same thing as well or if you had said please take judicial notice on the PTR as well, I mean we put no evidence in about the petition and what the basis of the petition was. You just said we're proceeding on both. I don't even know what the petition was for. Was it because he violated for a technical or because of the new charge?

So I heard no evidence from the State regarding that as well. Perhaps that would have given me more insight. But if you can find me something that supports your position, I would be more than glad to say I was wrong, okay?

[THE STATE]: Should we continue it for sentencing and still order the pre-sentence investigation?

THE COURT: Sure, why don't we do that and just go ahead with that because either way *there will either be a finding of a Class 4 felony guilty if I reverse my own ruling or there will be a finding on the lesser included offense of domestic battery, Class A misdemeanor[.]*" (Emphases added.)

¶ 13 When the proceedings resumed on July 25, 2012, the State presented case law supporting its position that a prior conviction need not be proved at a bench trial. The court responded:

"And I did some review as well and that would be correct as stated by the State so the Court was incorrect in its finding. Although I had found enough circumstantial evidence for the domestic battery, which would be the underlying based on the caselaw that I reviewed myself, it would be then a finding of guilty on the Class 4 felony, the same facts applied other than the prior history of the defendant."

The court accepted into evidence certified copies of the complaint and the probation order in case No. 10-CF-106. Defense counsel objected, arguing that, in a bench trial, the State was required to prove the prior conviction as an element of its case-in-chief. The court rejected defense counsel's argument and found defendant guilty of two counts of felony domestic battery. The court sentenced defendant to 24 months' probation.

¶ 14 Defendant filed a posttrial motion, arguing that the trial "[c]ourt erred in finding Defendant guilty of a felony after having found him guilty of a misdemeanor at trial." At the hearing on the motion, defendant argued that the proof of the prior conviction was made "more than thirty days after the finding of guilty on the misdemeanor and because of that, that the conviction on the misdemeanor bars conviction on the felony." The State responded that the prior conviction was properly proved at sentencing. The court denied defendant's motion.

¶ 15 Defendant timely appealed.

¶ 16

II. ANALYSIS

¶ 17 Defendant first argues that his convictions of Class 4 felony domestic battery violated the prohibition against double jeopardy. Although defendant did not raise this issue below, the State concedes that we may excuse a procedural default where plain error affecting a substantial right has occurred. *People v. Henry*, 204 Ill. 2d 267, 281 (2003); *People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 21. “A conviction that violates double jeopardy is a substantial injustice and may be reviewed as plain error.” *Cervantes*, 2013 IL App (2d) 110191, ¶ 21.

¶ 18 The fifth amendment to the United States Constitution and article I, section 10, of the Illinois Constitution provide that no person shall be twice placed in jeopardy for the same offense. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. The constitutional bar against double jeopardy protects against a second prosecution for the same offense after an acquittal. *Evans v. Michigan*, 568 U.S. ___, ___, 133 S. Ct. 1069, 1074 (2013); *Cervantes*, 2013 IL App (2d) 110191, ¶ 24. An acquittal encompasses “any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.” *Evans*, 568 U.S. at ___, 133 S. Ct. at 1074-75. An acquittal precludes retrial even if it is premised on a misunderstanding of what facts the State was required to prove to sustain a conviction. *Evans*, 568 U.S. at ___, 133 S. Ct. at 1075-76. We review the issue *de novo*. *Cervantes*, 2013 IL App (2d) 110191, ¶ 22.

¶ 19 Defendant argues that, because the trial court had found, after the State rested, that the State failed to present evidence to support a Class 4 felony conviction and also found, at the end of trial, that defendant was guilty of the lesser offense of misdemeanor domestic battery, the trial court had acquitted defendant of felony domestic battery. Therefore, according to defendant, the trial court’s subsequent reversal of that ruling and entry of convictions of felony domestic battery violated the prohibition against double jeopardy. The State responds that the trial court never

acquitted defendant of felony domestic battery, “because the enhancing factor—the defendant’s prior domestic battery conviction, was not a factual element that could be resolved or proved at trial.” In addition, the State argues that the trial court’s statements were “equivocal” and that it “never specifically found the evidence was insufficient to prove the defendant guilty of the enhanced charge of Class 4 felony domestic battery.” We agree with defendant.

¶ 20 Recently, in *Cervantes*, this court considered whether the trial judge violated double jeopardy principles when he announced that the defendant was not guilty of armed violence, but then later, after the State pointed out the judge’s mistaken understanding of the requisite elements, ultimately entered a conviction on that offense. *Cervantes*, 2013 IL App (2d) 110191, ¶ 21. At issue was whether the judge’s erroneous finding was an acquittal for double jeopardy purposes. *Id.* ¶ 39. The State argued that there was no acquittal, because the judge’s ruling was equivocal and ambiguous. *Id.* ¶ 45. Relying on *Evans*, we rejected the State’s position “that a trial judge’s ‘wrong’ finding of not guilty equals an ambiguous or inadvertent ruling.” *Id.* ¶ 48. We found that there was nothing ambiguous about the judge’s ruling or his intent, noting the judge’s comments acknowledging that he had resolved the issue of the defendant’s guilt or innocence “ ‘on another line of thinking, and I was wrong.’ ” *Id.* ¶ 46. We held that, because the judge acquitted defendant of armed violence, double jeopardy barred the judge’s later reconsideration of the acquittal and entry of a conviction on that offense. *Id.* ¶ 61.

¶ 21 So too here. A review of the trial court’s comments makes clear that, contrary to the State’s argument, the court found defendant not guilty of felony domestic battery. At the close of the State’s case, the court found that the evidence “established beyond a reasonable doubt at this point in time Class 1 misdemeanor domestic battery, provoking and insulting.” The court went on to state: “I’ve heard no evidence why I have a felony in front of me if there’s been no

evidence before this court regarding the felony nature of the case.” When the State sought to introduce evidence of the prior conviction, defendant objected, arguing that the State had rested. The court agreed that the State had rested and again stated: “I’ve heard no evidence of elevating this but I do find that the lesser included offense of domestic battery for a provoking and insulting, the evidence has been laid on the lesser included offense.” After defendant rested, the court found defendant guilty of “misdemeanor domestic battery.”

¶ 22 It is clear that the trial court was mistaken as to the requisite elements of felony domestic battery. Apparently, the court believed that certain elements had not been proved. As the court later admitted, it “had not read the indictment” prior to the proceedings, and it had “no idea” why the offense was being enhanced to a felony. It is equally clear that the court found defendant not guilty of felony domestic battery and guilty of misdemeanor domestic battery. When the State explained that the felony enhancement it sought was based on the prior conviction and that the prior conviction was not an element of the offense and could be proven at sentencing, the court stated: “I certainly would not be opposed to *changing my verdict* or my decision if you have some caselaw to support that as well.” (Emphasis added.) The court agreed to review the case law and to set the matter for sentencing, stating: “[T]here will either be a finding of a Class 4 felony guilt if I *reverse my own ruling* or there will be a finding on the lesser included offense of domestic battery, Class A misdemeanor[.]” (Emphasis added.) Although the court never used the word acquit, the court’s comments concerning “changing [the] verdict” and “revers[ing the] ruling” remove any ambiguity as to the court’s intent concerning the felony domestic battery charge. Therefore, because the court acquitted defendant of felony domestic battery, the court’s subsequent vacatur of that ruling and entry of convictions of felony domestic battery violated the prohibition against double jeopardy.

¶ 23 The fact that the enhancing factor, the prior conviction, that the State sought to rely on is properly proven at sentencing does not change the result. The First District's very recent decision in *People v. Howard*, 2014 IL App (1st) 122958, is instructive. There, the defendant was charged with, *inter alia*, four counts of unlawful use of a weapon by a felon (UUW), which is ordinarily a Class 3 felony offense (720 ILCS 5/24-1.1(a), (e) (West 2010)). *Howard*, 2014 IL App (1st) 122958, ¶ 2. Counts IV and VI of the UUW charges were based on the defendant's possession of a firearm; counts V and VII of the UUW charges were based on the defendant's possession of the ammunition in the firearm. *Id.* Additionally, counts IV and V notified the defendant that the State would seek to have the defendant sentenced as a Class 2 felony offender, based on the defendant's parole status at the time of the offenses. *Id.* At the end of the defendant's bench trial, the court found him guilty of counts VI and VII. *Id.* ¶ 5. However, the court found the defendant not guilty of counts IV and V, based on its determination that the State failed to prove the defendant's parole status. *Id.* When the sentencing hearing began, several weeks later, the State asked the court to revisit its not-guilty findings on counts IV and V, arguing that the defendant's parole status was a sentence enhancement factor, rather than an element of UUW, and thus did not need to be proved at trial. *Id.* ¶ 6. The defendant stipulated to the fact of his parole status, and the court revised its findings of guilt to include convictions on all four counts of UUW. *Id.*

¶ 24 On appeal, defendant argued that his convictions on counts IV and V violated the bar against double jeopardy, because the trial court found him not guilty at trial and then rescinded the finding at sentencing. *Id.* ¶ 7. The State conceded that the convictions themselves violated double jeopardy and should be vacated. *Id.* Nevertheless, the State argued that, on remand for resentencing, the defendant's parole status could be used to enhance his sentences for the

remaining UUW convictions. *Id.* ¶ 12. The First District disagreed, finding that the use of the defendant's parole status was barred by double jeopardy. The court stated: "In initially acquitting the defendant, the trial court apparently believed either that his parole status was an element of the UUW offense or that it otherwise had to be proven at trial. Regardless of the basis for the court's decision, or the accuracy of that basis, the court ruled that the State failed to prove the offense of Class 2 UUW beyond a reasonable doubt." *Id.* ¶ 15. Thus the court held that the State was precluded "from using the defendant's parole status on remand to reestablish Class 2 UUW, as this would amount to a second prosecution for the same offense of which he was already acquitted." *Id.*

¶ 25 Here, although the trial court did not specifically find that the State failed to prove the existence of the enhancing factor (*i.e.*, the prior conviction), it did find that the State failed to put forth "evidence of elevating this" to a felony. As we noted above, the court's actions amounted to an acquittal of felony domestic battery. Thus, as in *Howard*, regardless of the basis of its ruling, where the court ruled at trial that the State failed to prove the offense of Class 4 felony domestic battery, it could not, at sentencing, elevate the misdemeanor offenses to felonies.

¶ 26 Based on the foregoing, we reduce the degrees of defendant's offenses from Class 4 felonies to Class A misdemeanors.

¶ 27 Defendant next argues that the State failed to provide sufficient proof of bodily harm to sustain a finding of guilty beyond a reasonable doubt as to count I. According to defendant, any inference of bodily harm arising from Darji's testimony was dispelled when Saggu testified that she suffered no bodily harm. In the alternative, defendant argues that defendant's multiple convictions violate the one-act, one-crime rule.

¶ 28 In considering a challenge to the sufficiency of the evidence, we ask only whether, after viewing all of the evidence in the light most favorable to the State, any rational fact finder could have found the elements of the offense proved beyond a reasonable doubt. *People v. Ward*, 154 Ill. 2d 272, 326 (1992). The fact finder is responsible for determining the witnesses' credibility, weighing their testimony, and deciding what reasonable inferences to draw from the evidence. *People v. Hill*, 272 Ill. App. 3d 597, 603-04 (1995). It is not our function to retry the defendant. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004).

¶ 29 Our supreme court has stated that “[a]lthough it may be difficult to pinpoint exactly what constitutes bodily harm for the purposes of the [battery] statute, some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent, is required.” *People v. Mays*, 91 Ill. 2d 251, 256 (1982). Direct evidence of an injury is not required; rather, “evidence of contact between a defendant and the victim, combined with the [fact finder’s] common knowledge, is sufficient to establish that a defendant’s conduct has caused bodily harm.” *People v. Gaither*, 221 Ill. App. 3d 629, 634 (1991); see also *People v. Durham*, 312 Ill. App. 3d 413, 419 (2000) (“the trier of fact may infer injury based upon circumstantial evidence in light of common experience”).

¶ 30 Here, the State provided sufficient evidence to sustain a finding of guilty beyond a reasonable doubt as to count I. Darji testified that she observed Saggu scream, yell, and cry as defendant dragged her upstairs by the hair. Viewing this testimony in the light most favorable to the State, a rational trier of fact could have reasonably inferred that defendant caused bodily harm to Saggu. See *Gaither*, 221 Ill. App. 3d at 635 (evidence that the defendant caused physical pain to the victim was sufficient to sustain the finding of bodily harm). The fact that Saggu denied bodily harm is not determinative. The court had the opportunity to observe the

witnesses testify and was entitled to determine that Darji was a credible witness and that Saggu was not.

¶ 31 We next consider whether one of defendant's convictions of domestic battery should be vacated under one-act, one-crime principles. Although defendant failed to raise this issue below, the State concedes that it may be reviewed under the second prong of the plain-error rule. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010) ("forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process").

¶ 32 One-act, one-crime violations arise when more than one offense is carved from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). A physical act is "any overt or outward manifestation which will support a different offense." *Id.* Where a defendant commits a series of acts against a single victim, the State may obtain multiple convictions, but, in order to do so, the charging instrument and the State's evidence at trial must differentiate among the various acts. *People v. Crespo*, 203 Ill. 2d 335, 342-45 (2001). We review *de novo* whether there is a one-act, one-crime violation. *People v. Curtis*, 367 Ill. App. 3d 143, 147 (2006).

¶ 33 Here, the State made no effort to establish that defendant committed multiple acts against Saggu. Instead, the State merely argued alternate theories of liability. Both counts alleged that defendant pulled Saggu's hair and twisted her arm, without differentiating between those acts. Further, at trial, no evidence was presented to apportion those acts between the counts. Based on these facts, the State concedes that the record does not support multiple convictions. We agree. The question remains which conviction we should vacate. In *People v. Young*, 362 Ill. App. 3d 843, 853 (2005), we found that a battery conviction based on insulting or provoking contact was less serious than a battery conviction based on infliction of bodily harm, and we vacated it in

accordance with the one-act, one-crime rule. The State asks that we do the same here. Accordingly, in accordance with *Young*, we vacate defendant's conviction based on insulting or provoking contact only.

¶ 34

III. CONCLUSION

¶ 35 For the reasons stated, we reduce defendant's convictions from Class 4 felony domestic battery to misdemeanor domestic battery, we vacate defendant's conviction of domestic battery based on insulting or provoking contact, and we remand for resentencing on the remaining conviction of domestic battery.

¶ 36 Affirmed as modified in part and vacated in part; cause remanded.