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2014 IL App (3d) 120497-U

Order filed February 6, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Tazewell County, Illinois,
)	
v.)	Appeal No. 3-12-0497
)	Circuit No. 11-CF-676
)	
JAMES R. BANKS,)	Honorable
)	Paul Gilfillan,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in denying the defendant's motion for a mistrial. (2) The defendant's Class 4 felony conviction for aggravated fleeing and eluding is vacated under the one-act, one-crime doctrine.

¶ 2 After a jury trial, the defendant, James R. Banks, was found guilty of unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2010)), aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1(a)(1) (West 2010)), and aggravated fleeing and eluding in a stolen vehicle (625 ILCS 5/4-103.2(a)(7)(A) (West 2010)). The trial court sentenced

the defendant to a total of eight years' imprisonment. On appeal, the defendant argues that: (1) the trial court erred in denying his motion for a mistrial; and (2) his Class 4 felony conviction for aggravated fleeing and eluding should be vacated under the one-act, one-crime doctrine. We affirm in part and vacate in part.

¶ 3

FACTS

¶ 4 The defendant was charged by information with unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2010)), aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1(a)(1) (West 2010)), aggravated fleeing and eluding in a stolen vehicle (625 ILCS 5/4-103.2(a)(7)(A) (West 2010)), and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The case proceeded to a jury trial.

¶ 5 At the beginning of jury selection, the court instructed the venire that the defendant had been charged with four offenses and described them. The court explained that the charge for unlawful possession of a controlled substance alleged that the defendant "knowingly possessed less than 15 grams of a substance containing cocaine, a controlled substance."

¶ 6 During opening statements, the State discussed the four offenses the defendant was charged with, including unlawful possession of a controlled substance. The State explained that during a search of the defendant's vehicle, police located a "small rock of a substance that tested positive for cocaine."

¶ 7 At trial, Richard Mularoni testified that in December 2011, he was selling his 1991 Plymouth Voyager. The defendant expressed an interest in buying the Voyager and took the vehicle for a test drive. Upon his return, the defendant asked to drive Mularoni's 1989 Chevrolet van. Mularoni initially did not allow the defendant to drive the Chevrolet; however, the

defendant persisted, and Mularoni relented and allowed the defendant to drive the Chevrolet.

The defendant never returned the van. Four or five days later, a police officer informed Mularoni that the Chevrolet was located in an impound lot.

¶ 8 During Mularoni's testimony, the State showed the witness several pictures of the inside of the Chevrolet. Mularoni testified that he had not seen the items depicted in the pictures before, and they were not inside the Chevrolet when he gave the defendant permission to drive it. Mularoni also stated that he had never used cocaine and there was never cocaine or paraphernalia in the Chevrolet.

¶ 9 Pekin Police Officer Jeff Stolz testified that on December 10, 2011, Stolz attempted to stop the van that the defendant was driving. However, the defendant did not pull over, and he led police on a chase through Pekin. When the police ended the chase, Stolz saw an officer remove the defendant from the van and place him on the ground. While police attempted to arrest the defendant, the defendant yelled out "so fucking high right now."

¶ 10 Pekin Police Officer Ryan Smith testified that he participated in the chase. After the van stopped, he ordered the woman in the passenger seat to exit the vehicle. On cross-examination, Smith noted that the woman's pants were unbuttoned and positioned below her hips. Smith thought the woman might be hiding drugs on her body for her boyfriend. Smith also acknowledged that he confronted the woman with some drug paraphernalia that was discovered inside the van.

¶ 11 Following a recess and outside of the presence of the jury, the State informed the court that the cocaine at issue had not been laboratory tested. The State therefore moved to dismiss the charge for unlawful possession of a controlled substance. In response, defense counsel moved

for a mistrial, arguing that the jury had heard evidence pertaining to the unlawful possession charge and its decision on the remaining charges would be prejudiced. The court decided to individually question each juror to determine if he or she could fairly weigh the case after the dismissal of the unlawful possession charge. The court instructed each juror that

"all prior statements of counsel or testimony by witnesses or inferences therefrom pertaining to cocaine, its alleged possession by the [d]efendant or drugs of any type claimed to have been possessed by [the defendant] is stricken from the record and will be disregarded."

The court asked each juror if he or she could

"put aside any such reference in this case and decide the remaining counts that are pending freely and fairly for both sides without any consideration of what you heard or seen pertaining to cocaine possession in this case?"

Each of the jurors answered in the affirmative, and the court asked each juror if he or she understood

"the gravity of what I just said and how we are going to move forward, and that will be stricken, not to be considered in any way, shape or form for or against the [d]efendant or for or against the State, and you believe you can do that?"

Each of the jurors agreed, and the court then denied the defendant's motion for a mistrial.

¶ 12 At the conclusion of the trial, the jury found the defendant guilty of unlawful possession of a stolen vehicle, aggravated fleeing and eluding, and aggravated fleeing and eluding in a stolen vehicle.

¶ 13 Thereafter, the defendant filed a motion for acquittal or a new trial. The motion argued,

in part, that the court erred in denying a mistrial following the dismissal of the unlawful possession charge. In a related argument, the defendant contended that the court should have declared a mistrial based on the exhibition of a bag of alleged cocaine on the State's counsel table. At the hearing on the defendant's motion, the State conceded that a bag containing cocaine was located on its counsel table for approximately 10 minutes while the jury was viewing a video. The cocaine was contained in the corner of a small, tied-off bag that was enclosed within a "four by four" evidence bag that had several labels on it. The court denied the defendant's motion. The court found that no substantive testimony had been presented regarding the cocaine, the jury was unable to see the cocaine on the State's counsel table, and the court's questioning of the jury had cured any potential prejudice regarding evidence of the unlawful possession charge.

¶ 14 Thereafter, the court sentenced the defendant to a total of eight years' imprisonment.

¶ 15 ANALYSIS

¶ 16 I. Mistrial

¶ 17 The defendant argues that the trial court erred in denying his motion for a mistrial because the State dismissed the unlawful possession of a controlled substance charge after the jury had heard evidence and references to cocaine and drugs. The defendant contends that the court's attempt to rectify this error did not cure the prejudice resulting from the earlier references to cocaine. The defendant also alleges that further prejudice was caused by the 10-minute exhibition of a bag containing cocaine on the State's counsel table.

¶ 18 Generally, evidence of a defendant's other crimes is inadmissible to establish his or her propensity to commit crimes. *People v. Robinson*, 167 Ill. 2d 53 (1995). However, other crimes evidence is admissible, where relevant, for any purpose other than showing the defendant's

propensity to commit crime. *Id.*

¶ 19 In a case trying several offenses, the dismissal of a single charge does not necessarily warrant the declaration of a mistrial on the remaining charges. See *People v. Chianakas*, 114 Ill. App. 3d 496 (1983) (dismissal of conspiracy charge against the defendants did not entitle them to a mistrial on the basis that evidence was adduced at trial relevant to the conspiracy charge). The decision to declare a mistrial lies within the sound discretion of the trial court. *People v. Foster*, 394 Ill. App. 3d 163 (2009). A mistrial should only be declared if "there is some occurrence at trial of such a character and magnitude that the party seeking a mistrial is deprived of a fair trial." *Id.* at 166. We review the trial court's decision to deny a mistrial for an abuse of discretion. *People v. Walker*, 386 Ill. App. 3d 1025 (2008). "A decision is an abuse of discretion only if it is illogical, arbitrary, or contrary to law." *People v. Appelt*, 2013 IL App (4th) 120394, ¶ 86.

¶ 20 In the instant case, the State's mid-trial dismissal of the charge for unlawful possession of a controlled substance did not warrant the declaration of a mistrial. Although we are cognizant that the testimony of Mularoni, Stolz, and Smith referenced cocaine or drug use, their testimony did not conclusively show that the defendant had unlawfully possessed a controlled substance. Additionally, the trial court instructed each juror to disregard this evidence and all other statements by counsel, as well as any inferences pertaining to cocaine or drugs of any type. This instruction mitigated the need to individually question each juror. See *People v. Biggs*, 294 Ill. App. 3d 1046 (1998) (generally, any prejudicial effect caused by the admission of improper evidence is sufficiently cured by the court's instruction that the jury disregard the problematic evidence). Nevertheless, we do not find that the individual questioning prejudiced the outcome of the trial, because the record does not rebut the presumption that the jurors followed the court's

instruction. *People v. Scott*, 401 Ill. App. 3d 585 (2010). Therefore, we find that the jury was able to decide the remaining charges without prejudice. See *People v. Illgen*, 145 Ill. 2d 353, 376 (1991) ("[f]aith in the ability of a properly instructed jury to separate issues and reach a correct result is the cornerstone of the jury system").

¶ 21 Finally, we do not find that the State's exhibition of a bag containing cocaine warranted the declaration of a mistrial. The State indicated, and the defendant does not challenge, that the cocaine was contained within a bag inside of an evidence bag and was displayed for approximately 10 minutes. The trial court indicated that the jury could not see the bag from its location. As a court of review, we defer to the trial court's visual determination. Therefore, we affirm the trial court's denial of the defendant's motion for a mistrial.

¶ 22 **II. One-Act, One-Crime**

¶ 23 The defendant argues that his Class 4 felony conviction for aggravated fleeing and eluding should be vacated under the one-act, one-crime doctrine because he was also convicted of a Class 1 felony, aggravated fleeing and eluding in a stolen vehicle. The State agrees that the lesser of the defendant's aggravated fleeing and eluding convictions should be vacated.

¶ 24 The application of the one-act, one-crime rule presents a question of law, which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81 (2010). Under the rule, a defendant may not be convicted of multiple offenses that are based upon the same physical act. *Id.* If a defendant is convicted of two offenses based upon the same physical act, the conviction for the less serious offense must be vacated. *Id.*

¶ 25 The defendant was convicted of aggravated fleeing and eluding under section 11-204.1(a)(1) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-204.1(a)(1) (West 2010)) and

aggravated fleeing and eluding in a stolen vehicle under section 4-103.2(a)(7)(A) of the Code (625 ILCS 5/4-103.2(a)(7)(A) (West 2010)). Both of these charges were based on the same act of fleeing and eluding the police. The section 11-204.1(a)(1) conviction was a Class 4 felony (625 ILCS 5/11-204.1(b) (West 2010)), and the section 4-103.2 conviction was a Class 1 felony (625 ILCS 5/4-103.2(c) (West 2010)). Because the section 11-204.1 conviction was the less serious offense, we vacate it.

¶ 26

CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Tazewell County is affirmed in part and vacated in part.

¶ 28 Affirmed in part and vacated in part.