2016 IL App (1st) 140731-U

SECOND DIVISION
August 16, 2016

No. 1-14-0731

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 10635
	)	
AMY PHERIGO,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to 20 years' imprisonment for aggravated battery. The two convictions for aggravated battery stem from one occurrence and, thus, one conviction must be vacated under the one-act, one-crime principle.

¶ 2 Following a jury trial, defendant Amy Pherigo was found guilty on a theory of accountability of two counts of aggravated battery and sentenced to two concurrent terms of 20 years' imprisonment. On appeal, defendant contends that her 20 year sentence was excessive and

that one of her convictions must be vacated under the one-act, one-crime principle because both counts alleged the exact same physical act. We affirm in part and vacate in part.

¶ 3 Defendant and codefendant Jose Morales, also known as Antonio Morales, were charged by indictment with nine counts of aggravated battery and three counts of aggravated domestic battery of defendant's son A.L. Prior to trial, the State moved to *nolle prosequi* all but two counts of aggravated battery. Count I alleged that defendant and Morales committed the offense of aggravated battery in that:

> "They, who were at least 18 years of age, in committing a battery, knowingly and without legal justification, by any means, caused great bodily harm to [A.L.], to wit: they struck him about the body, and [A.L.] was a child under the age of 13 years[.]" See 720 ILCS 5/12-3.05(b)(1) (West 2012).

Count III alleged that defendant and Morales committed the offense of aggravated battery in that:

> "They, who were at least 18 years of age, in committing a battery, knowingly and without legal justification, by any means, caused permanent disfigurement to [A.L.], to wit: they struck him about the body, and [A.L.] was a child under the age of 13 years[.]" See 720 ILCS 5/12-3.05(b)(1) (West 2012).

Defendant and Morales were tried separately. The State's theory of the case was that defendant was accountable for Morales's conduct. Because defendant does not challenge the sufficiency of the evidence to sustain her convictions, we recount the facts here to the extent necessary to resolve the issues raised on appeal.

¶ 4 The evidence adduced at trial showed that about 4:15 p.m. on April 29, 2013, Detective Katherine Crow and her partner, Detective Kelly Carsten, responded to a "hotline" child abuse call at 4429 South Fairfield Avenue. Defendant opened the front door of the residence and

Detective Crow informed defendant that she was there to investigate a claim of child abuse. Defendant escorted the detectives to an upstairs apartment of the residence. Defendant walked into the apartment and sat down on a couch in the living room. Inside the apartment, Detective Crow saw defendant's two daughters and Morales, and asked defendant about A.L., who was the subject of the child abuse call. In response, defendant, while seated on the couch, pointed to a bedroom in the apartment.

¶ 5 In the bedroom, Detective Crow found A.L. lying on a bed with a blanket pulled up to his neck. Detective Crow saw that A.L.'s face was severely bruised, his eyes were swollen shut, and he had a laceration on one of his cheeks. The detectives pulled the blanket down to A.L.'s feet and lifted his shirt, revealing bruises on his arms, abdomen and legs. The detectives then helped A.L. turn to his side and Detective Crow saw four lacerations on his back and severe bruising. Detective Crow also saw bruises on the back of A.L.'s legs and lacerations on the back of his left ankle. Detective Crow testified that on the day of trial she saw four scars on A.L.'s back that corresponded to the lacerations she saw on April 29, 2013. Detective Carsten called an ambulance and A.L. was transported to the emergency room at Mount Sinai Hospital.

¶ 6 A.L., who was four years old at the time of trial, testified that while defendant was at work Morales would watch him and that when defendant would come home from work he would have "boo boos" on him that were inflicted by Morales. A.L. also testified that defendant sometimes put make-up on his boo boos "so nobody can see [his] boo boos." A.L. further testified that Morales was mean to him when defendant was not present and that Morales would beat him when defendant was present. He testified that Morales would punch him on the head, nose, chin and both sides of his body. Morales would also hit A.L. on the back of the head with a mop and scratch A.L.'s back with his nails. A.L. acknowledged that defendant never hit him.

¶ 7 Amaya L., A.L.'s sister, testified that she was nine years old at the time of trial and that on the day A.L. went to the hospital she had seen bruises on his face. Amaya acknowledged that she did not see how A.L. received the bruises that day, but testified that she had also seen A.L. with bruises on his face before that day. Amaya testified that Morales watched A.L. while defendant was at work and while Amaya and her sister were at school. On some days, when Amaya arrived home from school she saw bruises on A.L. that were not there when she left for school on those days. Defendant would apply cocoa butter and "other stuff" to A.L.'s face. Amaya recounted that on Easter defendant applied make-up to the bruises on A.L.'s face because the family planned on leaving the house. When the make-up did not cover the bruises the family stayed home. Amaya testified that during the daytime A.L. was only allowed to play in the fenced-in backyard of the home where no one could see him.

¶ 8 Ariana L., A.L.'s sister, testified that she was seven years old at the time of trial and that when the ambulance arrived to take A.L. to the hospital she saw bruises on his face. Ariana also saw A.L. with bruises on his face before the day he went to the hospital. Defendant would apply make-up to the bruises, but the make-up would not cover the bruises. Ariana testified that A.L. was not allowed to go outside and play during the day, but that he was allowed outside at nighttime.

¶ 9 Jessica Amaya, defendant's friend, testified that she had known defendant for four years and visited defendant at her apartment on the weekend of April 20 and 21, 2013. Jessica noticed that A.L. had minor bruising on the side of his face. Defendant told Jessica that A.L. fell off the counter while reaching for a toy. On April 27 and 28, Jessica again visited defendant at her apartment and again noticed that A.L. had bruising on his face and a "split" bottom lip. Jessica testified that these injuries were different from those that she noticed on the weekend of April 20

and 21. Jessica was shown photographs of A.L. taken in the emergency room on April 29, 2013, and testified that there were more injuries to A.L.'s face in the photographs than when she had seen him on the previous day.

¶ 10 Ricarda Flores testified that A.L. stayed with her on April 13 and 14, 2013. During this time, Ricarda saw a bruise near A.L.'s left eye and two lumps, one on his forehead and one on the right side of his face. The bruises were "greenish" in color and appeared to be old. While A.L. was staying with Ricarda, he cried and told her that he did not want defendant to be his "mommy." When Ricarda met with defendant to return A.L. to her, A.L. hid, and told Ricarda that he did not want to go home with defendant and that he did not want defendant to be his mommy. Defendant agreed to allow A.L. to spend another night with Ricarda. When defendant came to pick up A.L. on the following day, A.L.was hysterical and begged Ricarda to stay. A.L. left with defendant after she raised her voice and said "[A.L.], don't make me kick your f*** ass."

¶ 11 On April 28, 2013, Ricarda and her sister went to defendant's house, but defendant did not allow them inside the house. Ricarda asked defendant about A.L. and defendant told her that he was asleep. Defendant asked Ricarda if she could babysit A.L. on the following day and told her not to take him outside because he was badly bruised. When defendant did not arrive at Ricarda's house on the following day, Ricarda called the Department of Children and Family Services hotline.

¶ 12 Doctor Jeffrey Kreyer, a surgical resident at Mount Sinai Hospital, testified that on April 29, 2013, he treated A.L. in the emergency room. Doctor Kreyer detailed the extent of A.L.'s injuries as follows: multiple bruises over his legs, arms, torso, front, back, head and face; multiple brain bleeds; three lacerations to his liver; multiple lacerations to his spleen; lacerations

to both kidneys; a bruised adrenal gland; a paradoudenal hematoma; a subpleural hematoma; internal bleeding; and at least five broken ribs. Doctor Kreyer testified that A.L.'s injuries were in different stages of healing and inflicted at different times.

¶ 13 Betsy Kastak, a pediatric nurse practitioner at Mount Sinai Hospital, testified that on April 30, 2013, she was the coordinator of the Child Protective Services program at the hospital and in her 22 years of nursing experience had examined hundreds of children who were victims of suspected physical abuse or neglect. Kastak examined A.L. in the pediatric intensive care unit of the hospital and testified that he had extensive bruising to his head, arms, legs, face and back. He also had a laceration on the inside of his mouth and his eyes were "swollen, almost shut, and purple." Kastak testified that the bruising and swelling on A.L.'s face was consistent with blunt force trauma. She opined that some of the bruises were older than others and that A.L. had been abused on multiple occasions. Kastak testified that A.L.'s injuries would have been observable to any adult living in the same house with him. Kastak considered A.L.'s injuries to be the result of torture and testified that she had never seen a worse case of child abuse in which the victim had survived.

¶ 14 Defendant testified that before her arrest she had worked at Bridgeview Health Care Center for about one year and that she would take a train and a bus to work each day. Defendant met Morales in January of 2013 and they began living together on March 31, 2013. Morales watched A.L. full-time and was alone with him all day. Defendant testified that before she lived with Morales, she would bathe A.L. and help him put on his pajamas. After Morales moved into the apartment, she never saw A.L. naked because Morales would have him bathed and fully dressed before she returned home from work. Defendant testified that in the month of April 2013, she did not bathe A.L. or help him put on his pajamas.

¶ 15 Defendant acknowledged that she noticed A.L.'s bruises, but believed they were the result of three separate falls A.L. had sustained in March and April of 2013. Morales told defendant that A.L. had fallen off a bunk bed and a counter. Morales also told defendant that A.L. had fallen down the stairs outside of their apartment. Defendant asked A.L. about the bruises and A.L. did not indicate that Morales was hurting him. Defendant did not take A.L. to the hospital because "his bruising wasn't that bad." Defendant acknowledged that she put cocoa butter on A.L.'s bruises nearly every day and that on Easter she used makeup to cover the bruises. Defendant denied that she was trying to hide A.L.'s injuries from the community and testified that she was trying to hide his injuries from her mother. Defendant admitted that she would tell her children that she was "gonna kick their ass," but could not recall if she ever used the word "f***" Defendant also admitted that she told Ricarda not to take A.L. outside because defendant did not want people to think that she was abusing him.

¶ 16 Defendant testified that when she came home from work on April 29, 2013, she saw A.L. in the bedroom and asked Morales what had happened to him. Morales told defendant that he found A.L. in the shower with his knees pressed to his chest. Defendant told Morales that she did not understand how A.L.'s bruises came back and his eyes were swollen shut when she was treating his bruises with ice packs and cocoa butter. Defendant did not call the police because Morales's cellular telephone was shut off and they did not have another telephone in the apartment. Defendant testified that as she told Morales that she wanted to take A.L. to the hospital, the detectives arrived at the apartment. Defendant denied knowing that A.L. was being abused.

¶ 17 Following deliberations, the jury found defendant guilty of both counts of aggravated battery. The case proceeded to a sentencing hearing.

¶ 18 At sentencing, the State argued in aggravation that defendant knew that A.L. was being abused but did nothing to stop it despite having a support system of close family members. The State then recounted the extent of A.L.'s injuries and asked the court for the maximum sentence. In mitigation, defense counsel presented the testimony of defendant's mother, who testified that defendant had problems with drug abuse and depression, and was remorseful about what happened to A.L. Defendant testified and apologized to the court and her children. Defendant also testified that she "never meant for this to happen," that she was being selfish, and that if she was a "sober mom" she would have "know[n] what was going on." Defendant further testified that she could have called her family members for help if she had known what was happening to A.L.

¶ 19 In announcing sentence, the court stated that it had considered the factors in aggravation and mitigation and that it took note of the fact that defendant had no prior criminal history. The court also stated that it read the letters from defendant's family and friends which portrayed defendant as a good mother and asked for leniency. The court further stated that it could empathize with defendant's depression and financial struggles, but that it was not persuaded that defendant had a problem with drugs "to the point that she didn't know what was going on" where the record showed that defendant was a functional member of society who had a job and commuted to work every day.

¶ 20 The court then expressly rejected these mitigating factors as an excuse for defendant's behavior and recounted in detail the extent of A.L.'s "horrific" injuries, which as testified to by Kastak were so "extensive [they] would have been observable to any person living in the same home." The court found the most compelling part of Kastak's testimony was that in her 22 years as a nurse she had never seen a child who had survived with such severe injuries as A.L. In light

of all the evidence presented, the court rejected defendant's claim that she did not know A.L. was being abused until moments before the detectives arrived. The court pointed out that defendant had an extensive support system of family and friends, that she had numerous opportunities to ask for help, and that she could have easily stopped the abuse, but instead continued to let it happen until A.L. was near death. The court stated that it was in the best interest of defendant's children that they grow up without defendant and sentenced her to 20 years' imprisonment.

¶ 21 On appeal, defendant first contends that her 20-year sentence is excessive given that she had no prior convictions, showed rehabilitative potential, and the offense was aberrant conduct that was unlikely to recur. Defendant claims that the trial court primarily focused on the nature of the offense and discounted the many mitigating factors that were present. She asks this court to either reduce her sentence to a term closer to the statutory minimum of six years or remand the case for a new sentencing hearing.

¶ 22 In setting forth this argument, defendant acknowledges, and we agree, that although she did not file a written posttrial motion to reconsider sentence, the issue is not forfeited on appeal because she made an oral motion to reconsider sentence and the State did not object to the motion. See *People v. Davis*, 356 Ill. App. 3d 725, 731 (2005) ("the requirement of a written motion is waived where defendant makes an oral motion to reconsider his sentence and the State does not object"); *People v. Shields*, 298 Ill. App. 3d 943, 950 (1998) (the reviewing court may address sentencing issues on appeal based on any ground that appears in the record, despite defendant's failure to file the written motion).

¶ 23 Aggravated battery, as charged in this case, is a Class X felony. 720 ILCS 5/12-3.05(b)(1), 12-3.05(h) (West 2012). A Class X felony has a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012). The trial court has broad discretion in

imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where the sentence imposed is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 24 Here, we find that defendant's sentence was not excessive and that the trial court did not abuse its discretion when it imposed the 20-year term. The record shows that the trial court expressly stated that it considered the factors in aggravation and mitigation, the fact that defendant had no prior criminal history, and the letters from defendant's family and friends which portrayed defendant as a good mother. The court also stated that it could empathize with defendant's depression and financial struggles. However, the court rejected these mitigating factors as an excuse for defendant's behavior given the nature of the crime she committed and the extent of A.L.'s horrific injuries. See *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001) (a sentencing court need not give defendant's potential for rehabilitation greater weight than the seriousness of the offense); *People v. Maxwell*, 148 Ill. 2d 116, 148 (1992) (a sentencing court may determine the weight attributed to mitigating factors); *People v. Smith*, 214 Ill. App. 3d 327, 339 (1991) (the existence of mitigating factors does not require the court to reduce a sentence from the maximum allowable sentence).

¶ 25 The record shows that A.L. was abused over the course of at least one month and the abuse was characterized as "torture" by Kastak, a pediatric nurse who examined A.L. The extent of A.L.'s injuries was, as stated by the court, "horrific." A.L. had bruises over his whole body, including his face, multiple brain bleeds, lacerations to his liver, spleen and both kidneys, internal bleeding, and at least five broken ribs. Kastak testified that in her 22 years as a nurse she

had never seen a worse case of child abuse in which the victim had survived. Kastak also testified that A.L.'s injuries would have been observable to any adult living in the same house with him. Despite A.L.'s injuries, defendant never sought medical treatment for A.L. Instead, the record shows that defendant attempted to conceal A.L.'s bruises with makeup and had advised her friend Ricarda not to take A.L. outside because he was badly bruised. A reviewing court will not reweigh the sentencing factors or substitute our judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 213. Based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *People v. Fern*, 189 Ill. 2d 48, 56 (1999).

¶ 26 Defendant next contends that one of her two convictions for aggravated battery must be vacated under the one-act, one-crime principle because the indictment alleged that each of the offenses was based on the exact same physical act. Defendant acknowledges that she failed to preserve this issue for appeal, but argues that it is reviewable under the second prong of the plain error doctrine because the error affects her substantial rights.

¶ 27 The State concedes, and we agree, that because an alleged violation of the one-act, one-crime principle has the potential for a surplus conviction and sentence, it affects the integrity of the judicial process and is therefore reviewable under the second prong of the plain error doctrine. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Whether a conviction should be vacated under the one-act, one-crime principle is a question of law which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 28 The one-act, one-crime principle prohibits multiple convictions that are based on precisely the same physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996); *People v. King*,

66 Ill. 2d 551, 566 (1977). Our supreme court has consistently defined an "act" as "any overt or outward manifestation which will support a different offense." *Rodriguez*, 169 Ill. 2d at 188; *King*, 66 Ill. 2d at 566. To sustain multiple convictions, the charging instrument must indicate that the State intended to treat defendant's conduct as separate, multiple acts. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

¶ 29 Defendant argues that because the two counts in the indictment failed to differentiate between the acts that caused great bodily harm and permanent disfigurement to A.L., one of her aggravated battery convictions must be vacated. In support of this argument, defendant relies on *Crespo*, 203 Ill. 2d 335 (2001) and *In re Samantha V.*, 234 Ill. 2d 359 (2009).

¶ 30 Here, there record shows that the two counts in the indictment charging defendant with aggravated battery do not differentiate between defendant's separate acts of battery. Rather, both counts charge defendant with the same conduct i.e. "struck [A.L.] about the body." The two counts differ only in describing the injuries suffered by A.L. as a result of defendant's conduct: "great bodily harm" (count I) and "permanent disfigurement" (count III). As in *Crespo*, the charging instruments here show that the State intended to treat defendant's conduct as a single act and, in order to convict defendant, the State charged her with aggravated battery in two different ways based on two different theories. See *Crespo*, 203 Ill. 2d at 344.

¶ 31 The State nevertheless argues that, although the indictment failed to differentiate between separate acts that caused great bodily harm and permanent disfigurement, the evidence adduced at trial showed that defendant's convictions were based on A.L.'s various injuries which were caused by multiple acts of abuse. The State claims that it argued during trial and in closing argument in such a way as to establish the prosecutorial intent to apportion defendant's acts among the two charges of aggravated battery. In support of this claim, the State points to a

portion of its closing argument: "You heard the detective tell you that she looked at [A.L.]'s back and she saw scars in the exact places where he had those deep scratches on his back. A scar is a permanent disfigurement." The State maintains that the jury heard testimony from multiple witnesses who testified that A.L.'s injuries were inflicted over the course of a month and could therefore properly conclude that the evidence was sufficient to support that each of A.L.'s injuries resulted, not from a single act, but from multiple separate acts.

¶ 32 The question before us, however, is not whether there were multiple acts which the State could have apportioned to separate counts, but rather whether the State actually did so. Contrary to the State's argument, the record does not show that the State ever clearly distinguished or apportioned which of defendant's acts caused great bodily harm and which caused permanent disfigurement to A.L. Instead, the record shows that the State relied on A.L.'s various injuries which were caused over a prolonged period of abuse to establish that defendant was aware of the injuries, knew A.L. was being abused, and therefore was accountable for Morales's actions.

¶ 33 The State now points to a two-sentence passage from its 16-page closing argument in the transcript to support its claim that the prosecutor apportioned defendant's acts among the two charges of aggravated battery. However, when placed in context, the passage supports the conclusion that, as in *Crespo*, 203 Ill. 2d at 343-44, the State charged defendant with aggravated battery in two different ways based on two different theories:

> "In addition to that aggravated battery with the great bodily harm instruction, you're going to get another count, another instruction for aggravated battery. And there's a different way of charging an aggravated battery in that he suffered permanent disfigurement. You heard about the permanent disfigurement.

> You heard the detective tell you that she looked at [A.L.]'s back and she saw scars in the exact places where he had those deep scratches on his back. A scar is a permanent disfigurement. It has the same other propositions as the great bodily harm instruction. We have proven all of those beyond a reasonable doubt."

Accordingly, because the State did not treat defendant's conduct as separate acts, we find that one of defendant's convictions must be vacated under the one-act, one-crime principle. *Crespo*, 203 Ill. 2d at 344-45; *In re Samantha V.*, 234 Ill 2d at 377-78.

¶ 34 In reaching this conclusion, we are not persuaded by the State's reliance on *People v. Span*, 2011 IL App (1st) 083037. In *Span*, this court affirmed the defendant's convictions for armed robbery and aggravated battery over the defendant's argument that his aggravated battery conviction must be vacated because it was based on the same act as his armed robbery conviction where the record showed the indictment failed to differentiate between the blows to the victim to support each charge. *Span*, 2011 IL App (1st) 083037, ¶¶ 77-85. In rejecting the defendant's argument, and distinguishing *Crespo*, this court found that during the defendant's bench trial the prosecutor responded to the defendant's motion for a directed finding and argued in such a way as to apportion the defendant's acts among the separate charges in the trial court. *Id*. ¶87. We also pointed out that, unlike in *Crespo*, the defendant was found guilty following a bench trial and that, "[u]nlike a jury, the experienced trial judge would have understood the need to consider whether there was sufficient evidence to conclude that the defendant's actions constituted separate offenses." *Id*. ¶88. In this case, unlike *Span*, defendant was found guilty by a jury of two counts of the same offense, each count alleged the exact same acts, and, for the reasons stated, the prosecutor at no time during trial argued in such a way as to apportion defendant's acts among the two charges.

¶ 35 Under the one-act, one-crime principle, a sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Here, defendant was convicted on two counts of the same offense, aggravated battery, one for causing great bodily harm and the other for causing permanent disfigurement. Both offenses are set forth in the same statutory section. Defendant's mittimus shows two convictions and sentences for aggravated battery under Counts I and III. Because both convictions for aggravated battery are premised on the same singular set of facts, only one conviction can stand. Accordingly, we vacate defendant's conviction under Count III so that only one conviction for aggravated battery under Count I stands.

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Cook County. We vacate defendant's duplicative conviction for aggravated battery under Count III and order the clerk of the circuit court to correct the mittimus to reflect this change.

¶ 37 Affirmed in part and vacated in part; mittimus corrected.