2017 IL App (1st) 150350-U

No. 1-15-0350

November 8, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 3706
	)	
MARSHAN MILSAP,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions did not violate the one-act, one-crime rule because the charging instrument specified the basis for each aggravated battery count and the evidence established that defendant committed multiple acts of touching the victim.

¶ 2 Following a bench trial, defendant Marshan Milsap was convicted of aggravated battery and criminal sexual abuse for touching the victim, L.S., while he sat next to her on a Chicago Transit Authority (CTA) bus. Defendant was sentenced to two years of probation and was

assessed various fines and fees. On appeal, defendant contends his two convictions violate the one-act, one-crime rule because the State did not specify in the charging instrument the physical act on which each count was based or prove at trial that each count involved a separate act of touching L.S. Defendant also argues that two fines were erroneously imposed against him and his monetary credit for time spent in custody prior to his sentencing can be applied to offset three additional charges, thus reducing the total amount of assessments that he owes.

¶ 3 The State charged defendant with one count of aggravated battery (720 ILCS 5/12-3.05(d)(7) (West 2012)) for knowingly making physical contact of an insulting or provoking nature with L.S. while she was a transit passenger when he "touched L.S. about the body." That offense is a Class 3 felony. 720 ILCS 5/12-3.05(h) (West 2012). The State also charged defendant with one count of criminal sexual abuse (720 ILCS 5/11-1.50(a)(1) (West 2012)) for knowingly committing an act of sexual conduct by the use or threat of force for his sexual gratification by touching his hand to L.S.'s vagina. That offense is a Class 4 felony. 720 ILCS 5/11-1.50(d) (West 2012).

¶ 4 Before trial, the State filed a motion to allow evidence of four incidents in which defendant touched a woman while sitting on a CTA bus or train, pursuant to section 115-7.3 of the Code of Criminal Procedure (725 ILCS 5/115-7.3(a)(1), (b) (West 2012)), under which the State may introduce evidence defendant's previous commission of a delineated sexual offense if charged with a similar offense in the instant proceeding. The trial court ruled that the most recent incident would be admitted into evidence.

¶ 5 At trial, L.S. testified that on January 16, 2014, she was 17 years old and was riding home on the 79th Street CTA bus. After she sat in a seat by herself, defendant sat down next to her. L.S. did not know defendant.

¶ 6 L.S. testified that a "couple of seconds" after defendant sat down to her right, he put his left arm around her shoulders. The bus started moving, and defendant "inched closer" to her. Defendant touched her coat with his right hand while his left arm remained "tightly" around her shoulders. Defendant put his right hand at the bottom of her jacket near her navel and "close to where the zipper starts when you pull it up." Defendant continued to "inch[] closer" to L.S. with his arm still around her.

¶ 7 Defendant reached under L.S.'s coat and touched her skin below her navel. Defendant continued to move closer to her and touched the upper portion of her vagina with his right hand. His left hand was still around her shoulders "pretty tight." Defendant's face was near hers, and their faces made contact "as he was pulling himself closer to me."

¶ 8 L.S. testified she looked out the bus window during this incident because she was "terrified" but "then I did look to see like his face." The entire encounter lasted between 10 and 15 minutes. L.S. got off the bus at her stop and described the incident to her family, who contacted police. L.S. identified defendant in a police photo array.

¶ 9 The State played for the trial a CTA video recording that depicted the events described by L.S. The video displayed nine different angles or views inside the bus.

¶ 10 L.S. described defendant's actions at various points during the video. At one point, defense counsel objected to L.S.'s narration, and the trial court overruled the objection, stating:

> "She's already testified as to what happened to her. The video doesn't capture everything that she testified to, but it does capture him sitting very close to her, putting his arm around her, almost actually leaning his head against her face and actually pulling her -- her into his shoulder."

¶ 11 During the video narration, L.S. testified that when defendant leaned toward her, his grip around her shoulders "felt tighter because he was pulling me closer."

¶ 12 On cross-examination, L.S. said she did not tell defendant to remove his hand at any point during the incident. As depicted in the CTA video, a backpack was sitting on her lap while defendant touched her. When asked why she did not loudly protest defendant's actions, L.S. responded that defendant had his arm around her and she was "close against him" during the entire encounter.

¶ 13 The State presented evidence of a similar act committed by defendant on January 22, 2014, six days after the incident involving L.S. The victim of that offense, N.F., testified defendant sat on her left side on a CTA bus and touched her leg. N.F. got up and moved to the front of the bus, and defendant followed her and touched her lower back. Defendant followed N.F. when she got off the bus and touched her buttocks. Defendant pled guilty to battery as to that incident. The State rested, and the defense presented no evidence.

¶ 14 In finding defendant guilty of both charged counts, the trial court made the following remarks as to the aggravated battery count:

> "The only thing that seems to be challenged here is whether or not there was the threat or the use of force. I looked at the video and I do find that there was that force there. The way that he positioned himself next to [L.S.] -- not next to her. Basically squeezed her

into the wall. And when I say squeezed her into the wall, she -- in her attempt to scoot away from him, she scooted closer to the wall or to the window. And he scooted next to hear and put his arm around her. And it was clear to the Court that she felt very uncomfortable in that position."

¶ 15 After noting that defendant did not try to stop L.S. from leaving the bus, the court stated:

"But I think his act of sitting next to her, putting his arms all around her -- the video -- you can't see what he is doing with his right hand because the video only shows what he is doing with his left hand. The angle of the video was from behind him. It is clear that his behavior constituted nonconsensual touching and his actions were very intimidating and could be deemed threatening and/or forceful. Because of that, there is going to be a finding of guilty on both counts."

¶ 16 The court denied defendant's motion for a new trial and sentenced defendant to two years of sex offender probation, which required him to undergo treatment and register as a sex offender. The court also imposed $1,422 in fines and fees.

¶ 17 On appeal, defendant contends his convictions for aggravated battery and criminal sexual abuse violate the one-act, one-crime doctrine because the indictment did not specify that those counts were based on separate acts of touching the victim and the State did not "clearly apportion" those acts at trial. Defendant contends that although the criminal sexual abuse count in the indictment specified that it was based on the physical act of touching the victim's vagina, the State did not indicate a separate physical act underlying the aggravated battery count.

¶ 18 Defendant acknowledges he raised no objection at trial and did not include the issue in a posttrial motion so that it could be argued before and considered by the trial court. Defendant

contends we can consider his one-act, one-crime contention under the plain-error rule. The second prong of the plain-error rule allows this type of forfeited claim to be addressed on appeal because a one-act, one-crime violation has the potential to impose a surplus conviction and sentence upon a defendant and, thus, implicates the integrity of the judicial process. *People v. Artis*, 232 Ill. 2d 156, 165 (2009). We agree that plain-error review is appropriate here.

¶ 19 Under plain error, the defendant bears the burden of persuasion to show both that an error has occurred and that either the evidence was closely balanced or the error affected the fairness of his trial. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010). The first step of plain-error review is determining whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The State asserts no error did, in fact, occur because the two counts of the indictment charged defendant with separate acts of touching the victim.

¶ 20 A defendant cannot be convicted of more than one offense "carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566 (1977). In considering if a conviction violates the one-act, one-crime rule, the reviewing court first determines whether the defendant's conduct involved multiple acts or a single act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). Multiple convictions cannot be based on precisely the same act. *People v. Nunez*, 236 Ill. 2d 488, 493-94 (2010).

¶ 21 If the conduct involved multiple acts, the court then must determine if any of the offenses are lesser-included offenses; if so, multiple convictions cannot be imposed. *Miller*, 238 Ill. 2d at 165. However, "when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser[-]included offenses, convictions with concurrent sentences can be entered." *King*, 66 Ill. 2d at 566.

¶ 22 Under the first part of the test, multiple convictions are allowed where a defendant has committed several acts, "despite the interrelationship of those acts." *People v. Almond*, 2015 IL 113817, ¶ 47 (citing *King*, 66 Ill. 2d at 566). For purposes of the one-act, one-crime rule, an "act" is "any overt or outward manifestation that will support a separate conviction." *Id*. To obtain multiple convictions for related acts, the State must provide defendant notice of its intent to treat the conduct as separate by apportioning the conduct among the charged offenses. *People v. Williams*, 2017 IL App (3d) 140841, ¶ 32 (citing *People v. Crespo*, 203 Ill. 2d 335, 345 (2001)). A defendant suffers prejudice where the State treats closely related acts as one in the indictment and during trial but changes course on appeal to contend that there were separate acts to support separate convictions. *People v. Bishop*, 218 Ill. 2d 232, 245-46 (2006).

¶ 23 As an example, the defendant in *Williams* was convicted of two counts of aggravated battery, and both counts alleged that the defendant struck the victim "about the body with a bat." *Williams*, 2017 IL App (3d) 140841, ¶ 33. On appeal, this court vacated one of the aggravated battery convictions under the one-act, one-crime rule, concluding the defendant "lacked the requisite notice that the State intended to treat her conduct as two separate acts." *Id*. This court determined that the State "did not attempt to apportion these offenses by providing distinct striking locations or resulting injuries." *Id.*

¶ 24 To review the language of the indictment in this case, the count charging defendant with aggravated battery alleged that he "knowingly made physical contact of an insulting or provoking nature with L.S." when he "touched L.S. about the body." The count charging defendant with criminal sexual abuse alleged that he committed an act of sexual conduct upon L.S. when he "touched his hand to L.S.'s vagina."

¶ 25 Those charges allege that defendant committed multiple acts. The aggravated battery count was based on the physical act of touching L.S. "about the body." The criminal sexual abuse count was based on the physical act of touching L.S.'s vagina with his hand. The specification of contact with L.S.'s vagina in the second count notified the defense that the State would consider his touching of her vagina as a separate act from his additional physical contact.

¶ 26 Defendant contends the allegation in the aggravated battery count that he touched the victim "about the body" was not specific enough to differentiate that conduct from his touching of the victim's vagina. Citing *Crespo* and *In re Samantha V.*, 234 Ill. 2d 359 (2009), defendant argues that the State did not clearly apportion his conduct between the two crimes.

¶ 27 In *Crespo* as well as in *Samantha V.*, the supreme court considered whether the State apportioned multiple blows and stab wounds to support multiple counts. *Crespo*, 203 Ill. 2d at 342-43; *Samantha V.*, 234 Ill. 2d at 376-77. The supreme court reviewed both the charging instruments and the theories presented by the State at trial and concluded that the prosecution failed to indicate the intent to separate the defendants' actions to support separate counts. *Crespo*, 203 Ill. 2d at 344; *Samantha V.*, 234 Ill. 2d at 377.

¶ 28 We do not find the facts of *Crespo* and *Samantha V.* comparable to those here, where defendant committed separate acts and the two counts of the indictment differentiated defendant's conduct. L.S. testified defendant put his arm "tightly" around her shoulders before touching her skin below her navel and then touching her vagina. Defendant's arm remained around her shoulders as he continued to touch her vagina, and his face made contact with her face. Those physical acts were separate from defendant's act of touching his hand to L.S.'s vagina, as charged in the criminal sexual abuse count. Again, an "act" is defined as "any overt or

outward manifestation that will support a separate conviction." *Almond*, 2015 IL 113817, ¶ 47. Defendant clearly committed more than one physical act.

¶ 29 Additionally, the State's theory at trial indicated its intent to treat defendant's conduct as separate acts supporting each conviction. The prosecutor described defendant's commission of more than one act, stating defendant sat next to L.S. and put his arm around her. The prosecutor noted L.S. was "being kept in that seat by a tight grip" and "[a]s soon as the defendant sits in that seat next to [her], she is locked in there." In finding that defendant committed aggravated battery, the trial court expressly described those acts by defendant. The prosecutor separately argued the offense of criminal sexual abuse was proven by defendant's touching of the victim's vagina. Defendant was therefore apprised of the alleged specific acts underlying both of the charges against him, and the State presented proof that defendant committed more than one act.

¶ 30 Having concluded that defendant committed multiple acts, we next consider whether aggravated battery or criminal sexual abuse constitutes a lesser-included offense of the other. When determining if one charged offense is a lesser-included offense of another charged offense for purposes of the one-act, one-crime doctrine, the abstract-elements approach is used. *Miller*, 238 Ill. 2d at 171-74 (noting that the charging-instrument approach applies where a court considers whether a defendant can be convicted of an *uncharged* crime as a lesser-included offense). Under the abstract-elements test, the statutory elements of the two offenses are compared. If all of the elements of one offense are included with a second offense and the first offense contains no element that is not included in the second offense, then the first offense is found to be a lesser-included offense of the second. *Miller*, 238 Ill. 2d at 166 (noting that "it

must be impossible to commit the greater offense without necessarily committing the lesser offense").

¶ 31 A person commits aggravated battery if he commits a battery, *i.e.*, if he knowingly makes physical contact of an insulting or provoking nature in the presence of an aggravating factor (here, defendant's knowledge that L.S. was a transit passenger). See 720 ILCS 5/12-3.05(d)(7) (West 2012). A person commits criminal sexual abuse when he commits an act of sexual conduct by the use of force or threat of force. 720 ILCS 5/11-1.50 (West 2012). Each of those offenses requires proof of an element that is not found in the other. Aggravated battery requires proof of an aggravating factor, which is not required by the criminal sexual abuse statute. The criminal sexual abuse statute requires proof of an act of sexual conduct, which is not required by the aggravated battery statute. Therefore, aggravated battery is not a lesser-included offense of criminal sexual abuse, and vice versa.

¶ 32 To summarize our holdings to this point, the State alleged and established at trial that defendant committed multiple acts of touching L.S. so as to support convictions for separate counts of aggravated battery and criminal sexual abuse. Furthermore, neither of those crimes constitutes a lesser-included offense of the other. Therefore, defendant's convictions for both aggravated battery and criminal sexual abuse are affirmed.

¶ 33 Defendant's remaining contentions on appeal involve the imposition of various fines and fees that were erroneously imposed or toward which he argues his presentencing custody credit can be applied. Although defendant did not raise these issues in the trial court, the State does not argue the points have been forfeited; thus, the State has waived its own forfeiture argument. See *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 28.

¶ 34 The written fines and fees order in the record lists $1,472 as the total amount of fines and fees due. After the trial court applied defendant's presentence custody credit to offset a portion of that amount, the court imposed a total of $1,422 of fines, fees and other costs.

¶ 35 Defendant contends that amount should be reduced by another $275. First, he argues, and the State correctly agrees that two charges were imposed in error. The State concedes the $5 electronic citation fee was erroneously imposed because it only applies to defendants in traffic, misdemeanor, municipal ordinance or conservation cases. 705 ILCS 105/27.3 (West 2014). Here, defendant was convicted of a felony, and thus, that charge was incorrectly assessed. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. The State also agrees that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)) should not have been assessed against defendant because that fee applies only to those who were convicted or sentenced to supervision for a violation of the Illinois Vehicle Code. Accordingly, the $5 electronic citation fee and the $5 court system fee are vacated.

¶ 36 Defendant's remaining contentions involve the application of presentence custody credit toward several other monetary assessments imposed against him. For each day of incarceration prior to sentencing, a defendant is entitled to a credit of $5 toward the fines levied against him as part of his conviction. 725 ILCS 5/110-14(a) (West 2014). Here, defendant served 339 days in presentence custody and has accumulated $1,695 of credit toward his eligible charges. Defendant was assessed $1,422 in fines, fees and other assessments, and we have vacated $10 of those fees.

¶ 37 We now consider if any remaining fines may be offset by defendant's presentence custody credit. See *People v. Johnson*, 2011 IL 111817, ¶ 8 (section 110-14(a) indicates the credit applies only to "fines" imposed pursuant to a conviction). The State agrees that the three

charges at issue are all fines subject to offset by this credit: the $15 State Police operations assessment (705 ILCS 105/27.3a(1.5) (West 2014)); the $50 court system charge (55 ILCS 5/5-1101(c)(1) (West 2012)) and the $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1) (West 2014)). Therefore, defendant is entitled to have those charges offset by his credit for time in presentence custody.

¶ 38 In conclusion, defendant's convictions for aggravated battery and criminal sexual abuse are affirmed. The $5 electronic citation fee and the $5 court system fee are vacated. Accordingly, defendant owes a total of $1,412 in assessments and is entitled to have three charges offset by a portion of his presentence custody credit, totaling $265. Applying that offset, the $1,412 amount owed by defendant is reduced to $1,147. The clerk of the circuit court of Cook County is ordered to correct the fines and fees order to reflect a total amount due of $1,147.

¶ 39 Convictions affirmed; fines and fees order corrected.