

No. 1-15-0404 and 1-15-0405 (cons.)

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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. 14 CR 8519; No. 14 CR 8520
)	
Valente Nevarez,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in joining defendant's two cases. In addition, trial counsel was not ineffective because defendant cannot demonstrate to a reasonable probability that the result of the proceeding would have been different without counsel's error. Affirmed.

¶ 2 Following a bench trial, the trial court found defendant Valente Nevarez guilty of ten counts of aggravated driving under the influence (DUI) (625 ILCS 5/11-501 (West 2014)), two counts of driving with a suspended or revoked driver's license (625 ILCS 5/6-303 (West 2014)), two counts of resisting or obstructing a peace officer (720 ILCS 5/31-1 (West 2014)), and five counts of aggravated battery (720 ILCS 5/12-3.05(a) (West 2014)). Defendant received concurrent sentences of six-years' imprisonment for the DUI, three-years' imprisonment for driving without a valid driver's license, and five-years' imprisonment for battery to a peace officer. On appeal, defendant contends that the trial court erred by improperly joining defendant's DUI charges and the charges for aggravated battery because the joinder prejudiced defendant. Further, defendant contends that trial counsel was ineffective for failing to preserve the issue of joinder by including it in a post-trial motion. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On April 14, 2014, Chicago Police Department (CPD) officers stopped defendant's minivan after it skidded through an intersection. Thereafter, defendant allegedly assaulted a police officer while being detained at the police station. The State then charged defendant with ten counts of aggravated driving under the influence and two counts of driving with a suspended or revoked license (case no. 14CR-8519). In addition, defendant was separately charged with five counts of aggravated battery and two counts of resisting or obstructing a peace officer (case no. 14CR-8520).

¶ 5 Before trial, the State moved to join defendant's DUI case with his aggravated battery case. When the trial court asked the State how long after defendant's DUI arrest the alleged battery took place, the State answered: "I believe it was a minute after. It happened while they

were trying to place him into custody." Defendant's counsel objected to the joinder, but the court observed that "it sounds like it's part and parcel of one incident." The "jury or judge will hear about the facts anyway and the facts of [defendant's] mental state from the DUI would affect his actions [in the battery case]." Thus, the trial court joined defendant's two cases.

¶ 6 At trial, several CPD officers testified to the following. Officer Sweeney testified that on the day of the incident he was with his partner Officer Franco near the intersection of Cermak Road and California Avenue at 12:40 a.m. While stopped at a red light traveling eastbound on Cermak Road, Officer Sweeney heard a vehicle traveling northbound on California Avenue decelerate and slide into the middle of the intersection. The vehicle was left of center and attempting to stop, but going "a little too fast for conditions." Defendant, the driver, looked over at the officers, stopped for a while in the intersection, and proceeded to make a left turn onto Cermak Road. The officers did a U-turn and stopped defendant. The officers then approached the driver side door and observed defendant had blood shot eyes, was slurring his words, and his breath smelled like alcohol. Officer Sweeney also noticed several empty Corona bottles on the floor of the vehicle. Defendant stated that he had "one shot of Cuervo and a Corona" to drink. Officer Sweeney formed the opinion that defendant appeared to be intoxicated and called for assistance. Officer Perales and Officer Vazquez arrived at the scene and took over the DUI investigation.

¶ 7 Officer Perales testified that, due to inclement weather, he transported defendant to the police station to conduct a field sobriety test which he failed. The breath analysis test also revealed that defendant had a blood alcohol content of .181. Defendant was taken to the bullpen, a lockup area in the station for processing. In the bullpen, defendant began causing a disturbance by screaming and punching the bullpen door with both hands. Officer Perez and Officer Franco

approached the cell to calm defendant down. The officers then opened the cell door and defendant took an aggressive stance, clenched his right fist and attempted to punch Officer Franco in the face. The officers then performed an emergency takedown, while defendant continued fighting the officers and also spit on Officer Franco. During the struggle, Officer Franco's left hand was cut. When Officer Sweeney attempted to intervene, defendant hit him with his elbows. After restraining defendant, both Officer Sweeney and Officer Franco went to St. Anthony's Hospital to receive treatment for lacerations on their hands.

¶ 8 Defendant testified that on the morning of the incident he was in the area to use a pay phone to call a friend about purchasing cocaine after drinking at another friend's house. When defendant saw the police, he was standing next to his girlfriend's minivan and threw an empty bottle of alcohol under the vehicle. He tried to get into the vehicle to evade the police, but the officers made a U-turn and told defendant to freeze. At the police station, officers did not conduct a field sobriety test because defendant told them he had post-surgical nerve damage in his leg and hand. Following a breath analysis test, the officers placed defendant in the bullpen, refusing to tell him about the charges against him. Officer Sweeney then told defendant "to shut the fuck up," and defendant responded, "you shut the fuck up." Subsequently, four officers entered the bullpen and Officer Franco began choking defendant. Officer Franco also kned defendant in the testicles, which caused him to inadvertently spit in Officer Franco's face. The officers then handcuffed defendant with his hands above his head.

¶ 9 After closing arguments, the trial court found defendant guilty on all counts and revoked bond. The trial court noted that it found the police officers to be credible and did not believe defendant's testimony. Based on defendant's criminal background, the trial court sentenced defendant to six-years' imprisonment for the DUI, three-years' imprisonment for driving without

a valid driver's license, and five-years' imprisonment for battery to a peace officer, all to be served concurrently. Defendant filed a motion for a new trial, but did not raise the issue of joinder. After the trial court denied defendant's motion, defendant filed a timely notice of appeal.

¶ 10

II. ANALYSIS

¶ 11 Defendant contends that the trial court improperly joined his two cases for driving under the influence and aggravated battery against a peace officer, thus arguing that each case should be retried separately. We initially observe that since defendant failed to raise the issue of joinder below in a post-trial motion, defendant has forfeited this issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ([b]oth a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during the trial). Therefore, we review the matter under the plain error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005).

¶ 12 We may consider unpreserved error pursuant to the plain error doctrine where the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The defendant has the burden of persuasion under both prongs of the plain error doctrine, and if he fails to meet the burden of persuasion, then the court must honor the forfeiture. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Before applying either prong of the plain error doctrine, we must first determine whether a clear and obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); Cf. *People v. White*, 2011 IL 109689, ¶ 144.

¶ 13 The trial court has discretion to join charges against a defendant if the offenses are based on two or more acts that are part of the same comprehensive transaction, unless the defendant will be prejudiced by the joinder of separate charges. *People v. Patterson*, 245 Ill. App. 3d 586,

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587 (1993). If the trial judge determines, in his sound discretion, that the joinder will prejudice the defendant, he can order separate trials or provide any other relief justice requires. *Id.* When joining cases, the factors to be considered are: (1) proximity in time and location; (2) the identity of evidence needed to demonstrate a link between the offenses and to establish elements of the offenses; and (3) whether there exists a common method of perpetrating the offenses. *Patterson*, 245 Ill. App. 3d at 588. A trial court's decision will not be overturned absent an abuse of discretion. *People v. Fleming*, 383 Ill. App. 3d 226, 234 (2014).

¶ 14 Here, the trial court did not abuse its discretion by joining defendant's two cases. First of all, the cases were close in proximity, occurring no more than two hours apart. Further, the second case directly stemmed from the first case, where police initiated a DUI stop against defendant, then transported him to the police station to continue the DUI investigation, which resulted in defendant allegedly battering two officers during processing. Consequently, even if the two cases were severed, the trial court would have heard about defendant's DUI stop because it was part of a continuing narrative that resulted in defendant's detainment in police custody. See *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003) (when the defendant moved to sever a charge for criminal sexual assault of a child from a charge of child pornography, the reviewing court held that joining the cases did not prejudice the defendant because the court would have heard about the first case even in separate trials); *People v. Sockwell*, 55 Ill. App. 3d 174, 176 (1977) (the reviewing court found no prejudice when the defendant moved to sever a charge for stealing a check-writing machine from a charge of trying to fraudulently use the checks two hours later). In addition, while we appreciate that the prosecutor may have misspoken about the timing between defendant's DUI stop and the subsequent battery, this does not change the fact that defendant's assault case was part of the same occurrence as the DUI case. See *People v.*

Slater, 393 Ill. App. 3d 977, 992 (2009) (when facts concerning other criminal conduct are part of a continuing narrative, they relate to the circumstances attending the entire transaction, "they do no concern separate, distinct, and unconnected crimes").

¶ 15 Nonetheless, even if we were to consider defendant's claim under the plain error doctrine, defendant would not prevail because the evidence was not closely balanced. Although defendant argues that his credibility was prejudiced by evidence of his prior DUI convictions, this is wholly unsupported by the record. The trial court specifically noted that it found the police officers' testimony credible and disbelieved defendant's contradictory version of events. Officer Sweeney specifically testified that defendant had blood shot eyes, was slurring his words, and his breath smelled like alcohol. Additional evidence at trial established that defendant failed his field sobriety test and his breath analysis test registered far above the legal limit. Furthermore, three officers corroborated the battery charges against defendant. It is the duty of the trier of fact to determine the credibility of the witnesses, the weight to be given their testimony and the resolution of any conflicts in the evidence and we will not substitute our judgment for that of the trier of fact. *People v. Fox*, 337 Ill. App. 3d 477, 481 (2003). Moreover, there is no evidence in the record to suggest that defendant was denied a fair trial or that the judicial process was compromised. See *People v. Thompson*, 238 Ill. 2d 598, 609 (2010) (only serious errors disrupt the judicial process, such as, "complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction").

¶ 16 Alternatively, defendant argues that his counsel was ineffective for failing to preserve the issue of joinder by including it in a post-trial motion. To show that counsel was ineffective, a defendant must show that (1) counsel's performance was objectively unreasonable under

prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Bailey*, 232 Ill. 2d 285, 289 (2009) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The defendant has the burden of persuasion under both prongs of the *Strickland* test. *People v. Manning*, 350 Ill. 2d 262, 266 (2011). We observe that despite timely objecting to the joinder before trial, defendant's counsel omitted the issue from defendant's post-trial motion. As discussed above, however, since the evidence was not closely balanced and defendant can establish no prejudice under plain error, he therefore cannot satisfy the prejudice prong of the *Strickland* test. See *People v. Evans*, 209 Ill. 2d 194, 220 (2004) ("a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome - or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair"). Accordingly, defendant's claim of ineffective assistance of counsel fails.

¶ 17

CONCLUSION

¶ 18 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.