2017 IL App (1st) 152637-U

No. 1-15-2637

Order filed September 27, 2017

Third Division

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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. 10 CR 21226
	)	
MARC CARTER,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's extended-term sentences for two counts of aggravated battery are vacated and the cause is remanded for resentencing.

¶ 2 Following a bench trial, defendant Marc Carter was convicted of attempted armed robbery, aggravated battery based on great bodily harm, and aggravated battery based on the use of a deadly weapon, and was sentenced to concurrent extended-term sentences of 11, 10, and 10 years in prison, respectively. On appeal, defendant contends that because he received an

extended-term sentence on the attempted armed robbery conviction, he was ineligible for extended-term sentences on the less-serious aggravated battery convictions, and that therefore, this court should reduce his sentences on those counts to the maximum non-extended term.

¶ 3 For the reasons that follow, we vacate the extended-term sentences on defendant's convictions for aggravated battery and remand for resentencing.

¶ 4 Defendant's convictions arose from events that occurred at the Harvey apartment of the victim, Johnny Funches, during the afternoon and evening of November 3, 2010, and the early morning hours of November 4, 2010. Present for the events were five people: defendant; Funches; Pamela Palmer, who was dating Funches; Palmer's sister, Loletha Chamblis, who was dating defendant; and Palmer's daughter, who was either two or four years old. After his arrest, defendant was charged with two counts of attempted first degree murder, two counts of armed robbery, and eight counts of aggravated battery.

¶ 5 At trial, Funches testified that on November 3, 2010, he had $80 in his wallet, which was in his back pocket. That afternoon, he was at his apartment, drinking with Palmer and Chamblis. Around 4 p.m., defendant arrived and joined in on the drinking. Funches stated that he had seen defendant before, but did not "know" him. At some point, Palmer left and returned with a pizza. Funches denied that anyone went on a "booze run" or went out to buy cocaine, said that no one was doing cocaine at his apartment, and denied arguing with defendant or Palmer. Funches did not remember what happened next. He explained that he was sitting on his couch and then woke up in the hospital, injured. Specifically, he "had a head injury, stabbed in the back, stitches in the back." He stayed in the hospital for three or four days, and still had recurring headaches at the time of trial four years later.

¶ 6 Loletha Chamblis testified that on November 3, 2010, she met up with defendant and went to Funches' apartment with him about 3:30 p.m. There, they drank "and just ha[d] a good time" with Funches and Palmer. Chamblis denied leaving at any point to get cocaine and denied that she, Funches, or Palmer did cocaine. However, she stated that Palmer left once to buy more alcohol and stated that all of them were "in and out" during the day. At some point, defendant talked to her about how his daughter may have been raped in Funches' apartment, and Chamblis talked to defendant's daughter on the phone. Chamblis did not remember going to a gas station with defendant to try to calm him down.

¶ 7 Chamblis testified that about 3:30 or 4:30 a.m. the next day, while she was sitting on a couch with defendant, Funches was sitting on an adjacent love seat, and Palmer was in the bathroom, defendant started saying that Funches raped his daughter. When Funches denied the accusation, defendant picked up a glass bottle from the table and "bust" Funches in the face with it, breaking the bottle and leaving Funches' face bloody. Chamblis got Palmer's daughter, who was standing by the bedroom door, and ran outside and to Palmer's apartment, which was upstairs.

¶ 8 After dropping the girl off upstairs, Chamblis went back downstairs to Funches' apartment. The door was closed and Chamblis could not get in, although she said she "was like, let my sister out." Chamblis testified that she called the police, but they never arrived. Eventually, Chamblis left.

¶ 9 Pamela Palmer testified that that around 1 or 2 p.m. on November 3, 2010, when she was at Funches' apartment, she saw him pull money out of his wallet and then put his wallet in his pocket. About 5 or 6 p.m., Chamblis and defendant arrived, and the group started socializing,

drinking, listening to music, and dancing. At some point, Funches was “flashing” and counting his money, which he then put back in his wallet and into his pocket.

¶ 10 Palmer testified that sometime between 3:30 or 4:30 a.m. the next day, she went upstairs to her apartment to retrieve a pizza. When she got back, defendant was sitting on the couch with Chamblis, and Funches was sitting on the loveseat. Palmer put the pizza in the kitchen and then went into the bathroom. When she came out of the bathroom, defendant was standing over Funches with a broken bottle, hitting and stabbing him with it. Palmer told Chamblis to take her daughter, who was at the door, out of the apartment.

¶ 11 Funches was bleeding from his face, eyes, nose, and mouth. As defendant was hitting Funches with the bottle, he said, “Where’s the fucking money? Give me the money.” Palmer told Funches to give defendant money, but Funches did not move. Defendant searched Funches’ pockets, found his wallet, and threw it down. Defendant then went into Funches’ bedroom, where he looked through all the drawers, under the mattress, and in the closet. When defendant returned to the front room he searched Funches again and started hitting him “all over” his face and body with a lamp and in the face and head with a pot he retrieved from the stove. Palmer testified that she tried to leave the apartment, but defendant pushed her back and told Chamblis to get away from the door.

¶ 12 Palmer testified that when the beating stopped, she got out of the apartment and called the police or got a neighbor to call the police. By the time she returned to the apartment, defendant was gone. Funches, who was lying on the floor with his back against the couch, asked her for help getting up. Palmer refused and told him the police were on their way. When the police

arrived, they told her to go upstairs. Later, the police came upstairs and spoke with her and Chamblis.

¶ 13 Palmer stated that to her knowledge, Funches never called defendant names, pointed a weapon at him, or threatened him. She also stated that neither defendant nor Chamblis left the apartment at any point in time between their arrival and the incident. When presented with her grand jury testimony that defendant "was hitting [Funches] all over his body, digging in his pockets and saying you raped my daughter, and he kept saying where the fuck your money's at," Palmer explained that she actually had not heard defendant make the statement about his daughter. Rather, Chamblis had told her about defendant's statement. She asserted that she did not lie to the grand jury because "[t]hat's what the situation was about."

¶ 14 The parties stipulated that if called, Dr. Steven Salzman would have testified that he treated Funches in the emergency room on November 4, 2010. Among Funches' injuries were multiple facial contusions; lacerations of the right eyebrow, right eye, lower lip, upper lip, forehead, left flank, trunk, and lower back; a large hematoma on the left forehead; a subconjunctal hemorrhage of the left eye; a fracture of the front sinus into the intercranial portion; a fracture involving the ethmoid sinuses extending to the medial wall of the orbits on both sides; fractures involving the nasal bones; fractures involving the walls of the right orbit; fractures involving the right maxillary sinus; fractures of the inferior lateral of the left orbit; fractures of the anterior wall of the left maxillary sinus; a fracture of the left zygomatic arch; a subdural hematoma along the frontal are on both sides; and an intracerebral hematoma in the frontal lobe. Funches received stitches in the emergency room and thereafter was admitted to the

intensive care unit, where he was given pain medication but did not require surgery. He was transferred to the trauma unit on November 6, 2010, and discharged on November 8, 2010.

¶ 15 Illinois State Police crime scene investigator Sean Grovsenor testified that he arrived on the scene at 6:20 a.m. Photographs that he took of the apartment depicted bloodstains on a lampshade, on a sheet on the couch, and on the post portion of a lamp; glass debris, a bloodstained wallet, and a broken beer bottle on the living room floor; blood-like spatter on a living room wall; a greasy pot on the couch and grease on the living room floor; clothing and personal items scattered on the bed and bedroom floor; and a bedroom dresser with partially opened drawers. In court, Grosvenor identified several items he recovered from the scene, including the pot, pieces of glass, a broken beer bottle, a wallet, and a lamp base, shade, and post.

¶ 16 Harvey police detective Manuel Escalante testified that on November 6, 2010, he gave defendant *Miranda* warnings and spoke with him in a police station interview room. Defendant related that he was drinking at Funches' apartment with Chamblis and Palmer, that he and Funches "had words," and that "he doesn't know why, but he got up and began to beat up on Mr. Funches." Defendant told Escalante that he was the aggressor and used a beer bottle and lamp to strike Funches over the head. According to Escalante, defendant also stated that he took Funches' wallet and asked him for some money.

¶ 17 After the State rested, defendant made a motion for a directed finding, which was denied.

¶ 18 Defendant re-called Detective Escalante as a witness. Escalante testified that when he spoke with Palmer around 5:30 a.m. on the day in question, she indicated defendant ransacked

the bedroom and went through the whole apartment looking for money. However, Escalante acknowledged that he did not include this information in his written report.

¶ 19 Defendant testified that on the morning of November 3, 2010, he met up with Chamblis and went with her to Palmer's apartment. Chamblis went out and bought four bags of crack cocaine. When she returned, defendant, Chamblis, and Palmer drank some beer and smoked all the cocaine. Around 1 p.m., Palmer left the apartment. About half an hour later, after defendant and Chamblis had consumed the rest of the beer in the apartment, defendant went home and took his mother grocery shopping.

¶ 20 Defendant related that about 9 p.m., he went back to Palmer's apartment, looking for Chamblis. Palmer said Chamblis was not in, so defendant left. When he passed Funches' apartment on his way out, he saw Chamblis dancing in the living room. Defendant knocked on the screen door, and Chamblis gave him a beer with directions to bring it upstairs to Palmer, which he did. A short time later, Chamblis and Funches came upstairs, and Funches started arguing with Palmer. When Funches grabbed Palmer's shoulders and started shaking her, defendant grabbed Funches, pushed him up against the wall, and told him "he wasn't gonna do nothing to her while I was there." Defendant and Funches went outside to the bottom of the stairs, where they talked for about five minutes. Defendant then left to go to the liquor store, where he bought beer for himself and beer and vodka for Funches, with the understanding that Funches would pay him back.

¶ 21 Defendant returned to Funches' apartment around 10:30 p.m. There, he, Funches, Palmer, and Chamblis drank. Chamblis went out to get cocaine, which she brought back and shared with defendant and Palmer. Defendant testified that Palmer's daughter was present in the apartment

and was awake "the whole time." Shortly before midnight, a man named Richard Dale came to the door. Defendant had a conversation with Dale outside the apartment, during which Dale told defendant something that upset him. Defendant came back inside and told Chamblis what Dale had said. Chamblis told defendant to cool off and suggested they walk to the gas station so she could check her SNAP benefits on her Link card. At the gas station, they bought soda and snacks.

¶ 22 Back at Funches' apartment some 10 or 15 minutes later, defendant called his daughter, who told him she had been raped in Funches' apartment. Defendant confronted Funches, asking him whether he or anyone else in his apartment raped his daughter. According to defendant, Funches thought about it for a minute and then said, "Oh, she was a hoe anyway," which made defendant mad. Defendant hit Funches in the face with his fist. Funches fell back, and when he got back up, defendant picked up a bottle from the table and hit Funches in the head with it. The bottle slipped from defendant's hand and fell to the floor, breaking on impact. Defendant hit Funches again and the two men argued back and forth. Then, defendant said to Funches, "By the way, I still want my money that you owe me for the alcohol." Funches said he did not have any money. Defendant asked for the money "maybe" three times, and each time, Funches replied that he had none. When asked at trial, "What did you do?" defendant answered that he picked up a lamp and hit Funches with it, breaking the lamp and causing Funches to fall onto the couch. Defendant thought that Funches was unconscious, so he went to the kitchen, filled a pot with cold water, and poured it on Funches' face "to try to revive him." Funches woke up, so defendant threw the pot down. Defendant denied hitting Funches with the pot. At this point, Palmer was present, but Chamblis had left the apartment with Palmer's daughter. Palmer said she was going

to call the police and suggested that defendant leave and not come back for a few days. Taking Palmer's advice, defendant went home.

¶ 23 Defendant testified that he never intended to kill Funches or steal his money. He stated that at "some point," Funches handed him a wallet. Because Funches had denied having any money, defendant looked through the wallet, but when he saw it contained no cash, he threw it down. Defendant denied going into Funches' bedroom at any time, denied taking anything from Funches, and denied seeing any blood.

¶ 24 Following closing arguments, the trial court found defendant guilty of attempted armed robbery based on use of a glass bottle on Count 3, attempted armed robbery based on use of a lamp on Count 4, aggravated battery based on causing great bodily harm with a glass bottle on Count 5, aggravated battery based on use of a deadly weapon, namely, a glass bottle, on Count 11, and aggravated battery based on use of a deadly weapon, namely, a lamp, on Count 12. Defendant made a motion for a new trial, which the trial court denied.

¶ 25 At sentencing, the trial court imposed an extended-term sentence of 11 years in prison for attempted armed robbery on count 3, into which it merged count 4. The court then stated as follows: "And as to Count 5, which is the aggravated battery, again you're extendible, it will be 10 years Illinois Department of Corrections, two years mandatory supervised release. And Count 5 will merge with Count 4, and Count 11 will be concurrent. All sentences will be concurrent." The half-sheet clarifies that the trial court imposed a sentence of 11 years on Count 3, merged Count 4 with Count 3, imposed a sentence of 10 years on Count 5, merged Count 11 with Count 5, and imposed a sentence of 10 years on Count 12, "all concurrent."

¶ 26 A mittimus was issued reflecting that defendant had been convicted of one count of Class X armed robbery and two counts of Class 3 aggravated battery. Defendant thereafter filed a motion to correct the mittimus to reflect that he was convicted of attempted armed robbery, as opposed to armed robbery. The motion was granted and a corrected mittimus was issued reflecting that defendant had been convicted of one count of Class 2 attempted armed robbery and two counts of Class 3 aggravated battery. Subsequently, a Records Officer Supervisor of the Illinois Department of Corrections sent a letter to the clerk of the circuit court, requesting that the clerk review the mittimus because it incorrectly listed attempted armed robbery as a Class 2 offense, rather than Class 1. Nothing in the record indicates that action was taken as a result of this letter.

¶ 27 On appeal, defendant contends that where he received an extended-term sentence on his attempted armed robbery conviction, and where all three of his convictions arose from the same course of conduct and were inseparably linked, he was ineligible to receive extended-term sentences on the less-serious aggravated battery convictions. Defendant argues that under section 5-8-2(a) of the Code of Corrections (Code) (730 ILCS 5/5-8-2(a) (West 2014)), *People v. Thompson*, 209 Ill. 2d 19, 23 (2004), and *People v. Jordan*, 103 Ill. 2d 192, 206 (1984), an extended term sentence is only warranted for the most serious class of offense for which he was convicted. Therefore, he asserts, this court should reduce his sentences on the aggravated battery counts to five years, the maximum non-extended term. Defendant acknowledges that he did not object to this error at sentencing or in a postsentencing motion, but argues that we may reach the issue under the second prong of the plain error rule or, in the alternative, asserts that trial counsel was ineffective for failing to object to the extended-term sentences.

¶ 28 Sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). Yet, forfeited sentencing issues may be reviewed for plain error. *Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *Hillier*, 237 Ill. 2d at 545). To obtain relief under the plain error doctrine in the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10 (citing *Hillier*, 237 Ill. 2d at 545). The imposition of an extended-term sentence in violation of section 5-8-2(a) is reviewable as second-prong plain error because such an error affects the defendant's fundamental right to liberty. *People v. Palen*, 2016 IL App (4th) 140228, ¶¶ 77, 78. However, before we consider application of the plain error doctrine, we must determine whether any error occurred. *Wooden*, 2014 IL App (1st) 130907, ¶ 10; *Powell*, 2012 IL App (1st) 102363, ¶ 7. This is because " 'without error, there can be no plain error.' " *Wooden*, 2014 IL App (1st) 130907, ¶ 10 (quoting *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007)).

¶ 29 Section 5-8-2(a) of the Code provides in relevant part as follows:

> "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present." 730 ILCS 5/5-8-2(a) (West 2014).

In *Jordan* and *Thompson*, the Illinois Supreme Court held that the plain language of section 5-8-2(a) requires that when a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may be imposed only on the conviction within the most serious class. *Thompson*, 209 Ill. 2d at 23; *Jordan*, 103 Ill. 2d at 205-06. However, our supreme court has carved an exception from this statute: extended-term sentences may be imposed "on separately charged, differing class offenses that arise from unrelated courses of conduct." *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). Offenses are considered to have arisen from unrelated courses of conduct, and thus are eligible for extended-term sentences, when there is a "substantial change in the nature of the defendant's criminal objective." *People v. Bell*, 196 Ill. 2d 343, 354-55 (2001).

¶ 30 The State argues that in this case, there was a substantial change in the nature of defendant's criminal objective, as defendant initially acted out of anger with the goal of injuring Funches with the beer bottle because he believed Funches raped his daughter, but then defendant's goal changed, and he acted out of avarice with the goal of taking Funches' property when he stopped his attack to search for Funches' wallet.[1] We are mindful that defendant's own testimony somewhat supports the State's argument, as he presented a version of events in which he initially hit Funches with the beer bottle because he was mad that Funches dismissed his daughter's accusation of rape by calling her a "hoe," and then, after arguing back and forth with Funches, started demanding repayment of money before hitting Funches with the lamp.

[1] We note that this claim is a departure from the State's position at trial, when the prosecutor made the following argument in response to defendant's motion for a directed finding: "Defendant took multiple steps to rob [Funches], using the violence of his attack on the victim to render him incapable of resisting. This defendant used a bottle, used a lamp, used a pot to render the victim incapable of resisting his - - his actions to take money from him, to take his wallet."

¶ 31 However, other evidence supports a conclusion that the nature of defendant's criminal objective did not experience a substantial change. Specifically, Palmer's testimony indicates that throughout the incident, Funches used violence with the goal of obtaining money. Palmer testified at trial that defendant was demanding money as he was hitting Funches with the bottle, and then, after ransacking the bedroom, returned to the living room, searched Funches' body, and beat him with the lamp. The trial court apparently believed that Funches acted with the goal of robbing Funches all along, as it found him guilty of attempted armed robbery both based on the use of the glass bottle (Count 3) and based on use of the lamp (Count 4), and then merged those two counts at sentencing. In order for us to find a substantial change in the nature of defendant's criminal objective, we would have to ignore the trial court's dual guilty findings on Count 3 and Count 4. We decline to substitute our judgment for the trial court's on this issue. See *People v. Brooks*, 187 Ill. 2d 91, 132 (1999) (it is the trier of fact's responsibility to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters).

¶ 32 Given the lack of a substantial change in the nature of defendant's criminal objective, we find that defendant's convictions for attempted armed robbery and aggravated battery all originated from a single course of conduct. Therefore, the trial court should only have imposed an extended-term sentence for attempted armed robbery, as that was the most serious conviction, and erred in imposing extended-term sentences on the less-serious convictions for aggravated battery. See 730 ILCS 5/5-8-2(a) (West 2014). As noted above, the imposition of an extended-term sentence in violation of section 5-8-2(a) constitutes plain error. *Palen*, 2016 IL App (4th)

140228, ¶ 78. Accordingly, we vacate the extended-term sentences imposed on the convictions for aggravated battery and remand for resentencing on Count 5 and Count 12. See *id*.

¶ 33 In light of our finding of plain error, we need not address defendant's argument that his trial counsel was ineffective for failing to object to the extended-term sentences.

¶ 34 As a final matter, we note that the State argues in its brief that the mittimus must be corrected to reflect that attempted armed robbery is a Class 1, rather than Class 2, offense. In our view, this argument is better directed to the trial court at resentencing, as a new mittimus will be issued following those proceedings.

¶ 35 For the reasons explained above, we vacate the trial court's imposition of extended-term sentences on defendant's convictions for aggravated battery and remand for resentencing consistent with this decision. We otherwise affirm the trial court's judgment.

¶ 36 Affirmed in part and vacated in part; remanded with directions.