2017 IL App (1st) 152827-U

No. 1-15-2827

Order filed December 15, 2017

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 21649
	)	
PHILLIP MOORE,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's contention regarding alleged error by the trial court is forfeited. One of defendant's convictions for aggravated battery to a peace officer must be vacated under the one-act, one-crime rule. Remanded to trial court to determine which charge should be vacated.

¶ 2 Following a bench trial, defendant Phillip Moore was convicted of two counts of aggravated battery to a peace officer (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)) and sentenced to concurrent terms of seven years imprisonment. On appeal, defendant contends his convictions

should be reversed because the trial judge incorrectly recalled evidence adduced at trial. Alternatively, defendant contends that one of his convictions for aggravated battery to a peace officer should be vacated under the one-act, one-crime rule. We affirm in part, vacate in part, and remand.

¶ 3 Defendant was charged with two counts of aggravated battery to a peace officer. The State alleged that defendant, in committing a battery other than by discharge of a firearm, knowingly without legal justification caused bodily harm to Cook County Department of Corrections officer Jeffrey Wilds (Count 1) and made physical contact to Wilds of an insulting or provoking nature (Count 2), to wit: "struck *** Wilds about the body," and defendant knew Wilds to be a peace officer performing his official duties.

¶ 4 At trial, Cook County Sheriff officer Willie Moore testified that, on October 20, 2014, he was on duty at the Cook County Department of Corrections. He was wearing his full uniform, a blue shirt with the Department of Corrections star and his name printed on it. Around 11:00 a.m., Moore heard the call for a "fight in progress," and arrived to the scene in less than five seconds. There was a fight taking place in the bathroom. Immediately, Moore and other officers on the scene began taking inmates from the bathroom and placing them up against a wall to secure the area. There were approximately 10 inmates involved.

¶ 5 While Moore was securing an inmate along the wall, he saw another inmate, defendant, leave the wall and begin fighting with inmate Brandon Bruce. Officer Jeffrey Wilds, who was in full uniform, responded to defendant "throwing punches," and "started exchanging punches" with defendant. Moore observed defendant strike Wilds in the face with closed fists "two to three" times. Wilds was between defendant and Bruce when defendant "charge[d]" at Bruce.

Defendant kept throwing punches at Wilds until another officer assisted Wilds in taking defendant down and securing him. Moore observed defendant throw the first punch at Wilds. Moore did not hear Wilds threaten or make any aggressive movements towards defendant.

¶ 6 Cook County Sheriff officer Raymond White testified that, when he arrived on the scene, the inmates had already been separated by officers who arrived before him. White observed defendant "right in front of" or "right with" Wilds. He saw defendant break away and throw punches in the direction of another inmate. Wilds grabbed defendant to regain control, turned defendant around and defendant "threw a punch" that hit Wilds in the face. Wilds "put his hands up in an attempt to defend himself" and then a "flurry of punches" by defendant and Wilds were thrown at each other. White saw defendant strike Wilds in the face "a minimum of two times."

¶ 7 Officer Wilds testified that he was on the scene wearing his official uniform, "clearly denoting Cook County Sheriff's Deputy Sheriff." He had secured and handcuffed inmate Bruce and was moving Bruce against the wall when defendant came off the wall and struck Bruce. Wilds stepped between defendant and Bruce and was struck by defendant. He grabbed defendant by the collar and "stepped into him." Wilds was directly in front of defendant, face to face, when he reached for defendant's collar. Defendant then hit Wilds again, "more than once," to which Wilds responded by striking defendant back. Wilds testified that defendant struck him 7 to 10 times. Wilds suffered swelling and could feel bumps on his head and the side of his face.

¶ 8 The trial court found defendant guilty of both counts of aggravated battery to a peace officer. In its ruling, the court recalled the facts of the incident and emphasized that even if defendant had thrown just one punch that accidentally struck Wilds, transferred intent would still be enough to sustain defendant's convictions. The court noted it was clear that uniformed

officers were "on the deck" and defendant did not strike Wilds during an existing fight, as defendant had already been moved to the wall. Defendant intentionally struck Bruce and Wilds. The court went on to say, "in this case, he struck the officer testified at least, I believe, he said at least 10 more times. I have to look at my notes. That he was struck multiple times, 10 to 15 times he said he was hit by the defendant."

¶ 9 The court denied defendant's motion for a new trial. Defendant was Class X eligible, based on his criminal history, and was sentenced to two concurrent terms of seven years' imprisonment. The court denied defendant's motion to reconsider sentence. This appeal followed.

¶ 10 On appeal, defendant contends he was denied due process because the trial court, the trier of fact, decided the case based on incorrectly recalled evidence adduced at trial, specifically the number of blows defendant administered to Wilds.

¶ 11 As an initial matter, the State alleges that defendant has forfeited review of this issue by failing to object at trial or failing to raise the issue in his motion for new trial. See *People v. Thorne*, 352 Ill. App. 3d 1062, 1077 (2004). Defendant acknowledges his failure to properly preserve the issue, but asserts that we may review it because forfeiture is less rigidly applied when the conduct of the trial court is at issue. *People v. Davis*, 185 Ill. 2d 317, 343 (1998).

¶ 12 Although judicial misconduct can be a basis to relax the forfeiture rule (*People v. Sprinkle*, 27 Ill. 2d 398 (1963)), our supreme court has clarified that this exception only applies to extraordinary circumstances such as when the trial court makes inappropriate comments to the jury or relies on social commentary, rather than evidence, in sentencing a defendant to death. *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). The fact that we seldom relax forfeiture in

noncapital cases further underscores the importance of uniformly applying the forfeiture rule except in the most compelling situations. *Id.* Here, defendant has not provided any extraordinary or compelling reason to relax the forfeiture rule, and we decline to do so.

¶ 13 Defendant urges us to review the issue as a matter of plain error. The plain error doctrine allows us to remedy a "clear or obvious error" in two instances, despite defendant's forfeiture: (1) where the evidence in the case is so closely balanced, the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error; or (2) where the error was so serious, defendant was denied his substantial rights, thus denied a fair trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). In both instances, the burden of persuasion remains with the defendant. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). However, the first step in determining whether plain error exists, is determining whether there was a clear or obvious error at all. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Absent any error, there can be no plain error and defendant's forfeiture will be honored. *Id.*

¶ 14 The trial court clearly erred when it misstated the number of times defendant struck Officer Wilds. Wilds testified defendant hit him between 7 and 10 times; the court incorrectly recalled defendant hit Wilds 10 to 15 times. However, we find defendant does not meet his burden of persuasion under either prong of plain error analysis such that his forfeiture of the issue should be excused.

¶ 15 Defendant fails to establish first prong plain error because the evidence was not so closely balanced that the court's error prejudiced defendant. To prove defendant guilty of both counts of aggravated battery to a peace officer as charged, the State had to prove that he

committed a battery by knowingly without legal justification caused great bodily harm to Wilds (Count1) and made physical contact to Wilds of an insulting or provoking nature (Count 2) by striking him about the body, and that he knew Wilds was a corrections officer performing his official duties. 720 ILCS 5/12-3.05(d)(4)(i) (West 2014); 720 ILCS 5/12-3(a) (West 2014). A person acts knowingly when he "is consciously aware" of the nature of his conduct or the results of his conduct. *People v. Thigpen*, 2017 IL App (1st) 153151, ¶ 24 (citing 720 ILCS 5/4–5(a) (West 2012)).

¶ 16 The evidence presented at trial established that defendant was placed against the wall by officers breaking up a fight that initially occurred in the bathroom. The officers were in uniform and defendant was necessarily aware that the officers were performing their official duties in attempting to diffuse the situation. The fight between inmates had essentially ended when, instead of staying along the wall as officers secured the remaining inmates, defendant left the wall and began punching another inmate, Bruce. Wilds, who was in his full uniform, intervened, and defendant then struck Wilds. Wilds grabbed defendant by his collar and turned him around so that they were facing one another, and defendant continued to throw punches at Wilds. Officers Wilds, White, and Moore each testified that defendant struck Wilds multiple times while Wilds was in full uniform.

¶ 17 Wilds' injuries were uncontested and defendant concedes on appeal that he struck Wilds. Defendant's argument at trial was that he hit Wilds unintentionally, "in the heat of the moment," as he intended to hit Bruce. The evidence shows otherwise. Even if defendant's first blow at Wilds was accidental, defendant was turned around, face-to-face with Wilds, who was wearing his full uniform, when he hit Wilds again. When defendant hit Wilds the second time, he clearly

knew that Wilds was a corrections officer performing his official duties. With that second blow, the evidence overwhelmingly established defendant's guilt. Thus, the evidence was not closely balanced.

¶ 18 Whether defendant hit Wilds "10 to 15" times as the court recalled, "7 to 10" times as Wilds recalled, "2 to 3" times as Moore recalled, or "a minimum of two times" as White recalled, makes little difference in the outcome of the case. Defendant asserts that the court's recollection that defendant punched Wilds 10 to 15 times inadvertently bolstered the State's case. But defendant clearly knew with the second blow that he was hitting an officer performing his official duties, so how many times he hit Wilds after that was not critical to determining whether he knowingly hit a peace officer. In fact, the trial court specifically stated that even one punch would have supported the convictions. Accordingly, we find that the trial court's incorrect recollection of the number of blows did not tip the scales of justice against defendant such that he was prejudiced by the error.

¶ 19 Defendant also fails to meet his burden of persuasion under the second prong of plain error analysis. Under the second prong, prejudice to defendant is presumed because of the substantial rights involved, regardless of the strength of the evidence. *Herron*, 215 Ill. 2d 167 at 186. The supreme court has equated the second prong of the plain error doctrine with structural error, stating that "automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Glasper*, 234 Ill. 2d 173, 197-98 (quoting *Herron*, 215 Ill. 2d 167 at 186).

¶ 20 Notwithstanding defendant's assertion to the contrary, we do not find the trial court's inaccurate recollection of the number of punches evinces such a fundamental exaggeration of critical evidence that defendant was denied a fair trial. The fact that defendant punched Wilds knowing he was a peace officer performing his duties was the critical evidence in the case. Therefore, the fact that he punched Wilds 7 to 10 times, rather than 10 to 15 times as the court recalled, did not "necessarily render[ ] [defendant's] criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence" (*People v. Thompson*, 238 Ill. 2d 598, 609 (2010) (citing *Washington v. Recuenco,* 548 U.S. 212, 218 n. 2 (2006)) such that the error should be designated second prong structural error. Accordingly, the court's error in recalling the evidence was not plain error and we honor defendant's forfeiture of the argument.

¶ 21 Defendant next argues, and the State concedes, that one of his convictions for aggravated battery to a peace officer should be vacated under the one-act, one-crime rule. Defendant did not raise his one-act, one-crime challenge in the trial court and, therefore, forfeiture applies. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). However, one-act, one-crime violations are subject to review under the second prong of plain error. *Id*. at 389. Therefore, if we find a one-act, one-crime error occurred at trial, the plain error exception to the forfeiture rule applies. *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009).

¶ 22 Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on the same physical act. *Harvey*, 211 Ill. 2d at 389. Accordingly, where two convictions arise from the same physical act, the sentence should be imposed on the more serious offense, and the less serious offense vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Even when multiple acts could support multiple convictions, the charging instrument must demonstrate the

State's intention to treat a defendant's conduct as multiple separate acts. *People v. Crespo*, 203 Ill. 2d 335, 344-45 (2001). A conviction challenged under the one-act, one-crime rule presents a question of law, which we review *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 23 Here, defendant's multiple, separate punches and Wild's subsequent injuries arguably form the basis for multiple acts of aggravated battery. However, the State concedes that it did not apportion each separate act in the charges so that each formed the basis for a separate offense. Instead, both charges alleged the same conduct: that defendant "struck Officer Jeffrey Wilds about the body." Nor did the State make any attempt to apportion defendant's multiple punches between the two charges at trial. The convictions for aggravated battery to a peace officer therefore violate the one-act, one-crime rule because they were based on the same physical act. Thus, the less serious of the two aggravated battery to a peace officer convictions should be vacated. *Artis*, 232 Ill. 2d at 170.

¶ 24 Here, the two aggravated battery charges differed only in their theories of criminal culpability. Count 1 alleged defendant inflicted bodily harm on Wilds, while Count 2 alleged he made physical contact with Wilds of an insulting or provoking nature. The State asserts that remand is not necessary as common sense dictates that aggravated battery causing bodily harm would be the more serious offense than physical contact of an insulting or provoking nature.

¶ 25 "[C]ommon sense dictates that the legislature would prescribe greater punishment for the offense it deems the more serious." *In re Samantha V.*, 234 Ill. 2d at 379. Where the punishments are identical, we must consider which offense has the more culpable mental state. *Id.* Here, both aggravated battery to a peace officer offenses are Class two felonies and both require that defendant acted knowingly. 720 ILCS 5/12-3.05(d)(4)(i), (h) (West 2014); 720 ILCS 5/3(a)

(West 2014). Accordingly, as the punishments and mental states are the same, we cannot determine which count reflects the more serious offense and remand to the trial court to make this determination and amend its order accordingly. *In re Samantha V.*, 234 Ill. 2d at 379-80.

¶ 26 For the foregoing reasons, we affirm defendant's convictions for aggravated battery to a peace officer but find one of those convictions must be vacated under the one-act, one-crime rule. We remand to the trial court to determine which offense shall be vacated. We affirm the judgment of the court in all other respects.

¶ 27 Affirmed in part, vacated in part, and remanded.