

NOTICE
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2017 IL App (5th) 140403-U

NO. 5-14-0403

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Johnson County.
)	
v.)	No. 14-CF-7
)	
TYRONE HUNT,)	Honorable
)	James R. Williamson,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the State Appellate Defender's motion to withdraw and affirm the defendant's conviction because there were no reversible errors committed in the defendant's trial.

¶ 2 The defendant, Tyrone Hunt, appeals his convictions on two counts of aggravated battery and sentencing as a Class X offender. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Anders v. California*, 386 U.S. 738 (1967). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant did

not file a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Johnson County.

¶ 3

BACKGROUND

¶ 4 On February 21, 2014, the State filed an information against the defendant alleging two counts of aggravated battery committed by the defendant against both Stephen Jones and James Spivey, four counts total. The information alleged that, while knowing that the victims were correctional officers, the defendant made physical contact of an insulting or provoking nature against both victims by spitting on them and kicking them. The information also indicated, on each count, that if convicted, the defendant was subject to sentencing as a Class X offender.

¶ 5 On April 2, 2014, the court held a probable cause hearing. At that hearing, the defendant's counsel stated that he had advised his client that he would be sentenced as a Class X offender if convicted. The defendant indicated to the circuit court that he was due to be released from his current term of incarceration on April 29, 2014. The judge set bond and indicated that the defendant would be taken into custody on April 29 if he was unable to post bond.

¶ 6 At a hearing on July 2, 2014, the defendant filed a waiver of jury trial. The waiver, signed by the defendant, stated that the nature of the charges against him and their possible penalties had been explained to him. The waiver also indicated that the defendant had been apprised of his rights to a jury trial. The defendant's counsel stated

that he had explained to the defendant the difference between a bench and jury trial. The court also admonished the defendant of the difference between a bench and jury trial.

¶ 7 On July 22, 2014, a bench trial began. Immediately before the trial began, the defendant requested a "rule on witnesses." The court replied, "Rule on witness, anyone that is going to testify but the first witness, excuse yourself, if you would."

¶ 8 Officer James Spivey testified that on the date in question he and Officer Steve Jones were tasked with moving the defendant from a bullpen to a cell close to the bullpen. Spivey said that the defendant was agitated. He also testified that a Sergeant Hille was present at the time of the altercation. Spivey testified that while he and Jones were removing the defendant from the bullpen, the defendant, using an aggressive tone, said, "I have AIDS, motherfuckers." Spivey testified that he and Jones secured the defendant on the ground. While on the ground, the defendant kicked Spivey. He then began kicking and spitting on Spivey and Jones. Spivey testified that the defendant kicked him in the right calf. The altercation ended when Sergeant Hille used pepper spray on the defendant.

¶ 9 On cross-examination Spivey testified that he had not seen the defendant physically aggressive in the bullpen. Spivey did testify that he considered the defendant agitated due to his language. He also indicated that the spit from the defendant hit him on the right side of his face. Spivey also testified that the spitting on him occurred as they were going to the ground. Spivey described the altercations as a melee and stated that he could not be 100% sure of who kicked him in the melee. Spivey admitted that there were

no medical records and that no evidence was collected. On redirect, Spivey testified that he did not kick or spit on anyone.

¶ 10 Officer Stephen Jones was the next witness. He testified that while attempting to move the defendant from the bullpen, the defendant stated, "I have AIDS, motherfuckers, how about that?" He observed the defendant spit on Spivey. At that time he began putting the defendant to the ground to control the situation. As they were going down, the defendant spit on Jones. Following this there was a brief struggle that ended when Hille applied pepper spray. Jones testified that he was kicked on his right side below the knee during the struggle. He further testified that he did not believe he kicked anyone himself. On redirect he testified that there is no possibility that he kicked Spivey.

¶ 11 On cross-examination, Jones testified that at the time the altercation began, he was on the defendant's right side. He testified that he was kicked on his right side, and that he did not see who did it. He admitted that although unlikely, it may have been Spivey that kicked him.

¶ 12 Officer Michael Hille testified next. He testified that he was present at the time of the incident in question. Hille observed Jones and Spivey remove the defendant from a cell. At that point the defendant began kicking and spitting on Jones and Spivey. Ultimately, Jones and Spivey placed the defendant on the ground to control him and Hille applied mace to the defendant. Hille also heard the defendant claim that he had HIV. Hille explicitly stated that he saw the defendant kick both Spivey and Jones and that neither Jones nor Spivey kicked either the defendant or each other. He gave the same testimony regarding spitting. Hille stated that the kicking and hitting started while

everyone involved was standing but that it all happened quickly. Hille testified that he did not hear the defendant threaten to spit on Jones or Spivey. He also testified that Jones and Spivey were kicked multiple times.

¶ 13 The State then requested to recall Jones and Spivey. The court allowed it over objection. The State called Spivey first. He testified that they took the defendant to the ground after he began kicking. On cross-examination he stated the kicking continued before and after they took the defendant to the ground. Spivey admitted that he spoke with Jones and Hille outside the courtroom.

¶ 14 At this point the defendant moved for a mistrial based on a violation of the rule on witnesses. The court denied the motion. On redirect Spivey testified that the State did not tell him what his answers to questions should be. He claimed that his testimony was truthful and that neither the State nor Hille told Spivey what Hille's testimony was.

¶ 15 The State then recalled Jones. He testified that since his original testimony he had spoken with the other witnesses. On redirect he testified that the State did not inform him of Hille's testimony.

¶ 16 The defendant then renewed his motion for a mistrial. The court denied that motion but struck the testimony given by Jones and Spivey the second time they were called.

¶ 17 After being admonished of his right not to testify, the defendant chose to take the stand. In relevant part, he testified that although he was calm and compliant with all of the officers' commands, Jones and Spivey attacked him inside the bullpen. He stated that the attack lasted around 10 minutes and consisted of his being pinned to the ground,

punched, slapped, kicked, and maced. He further testified that he did not attack Jones or Spivey in anyway.

¶ 18 The court found the defendant guilty on all four counts.

¶ 19 On August 6, 2014, the defendant filed a motion for a new trial. He raised the following arguments in this motion: (1) the defendant was not proven guilty beyond a reasonable doubt of counts II and IV (alleging that the defendant had kicked Jones and Spivey); and (2) there was a violation of the rule on witnesses (that the witnesses not speak to each other during the trial) granted by the circuit court. The court denied this motion.

¶ 20 Also on August 6, 2014, the circuit court held a sentencing hearing. After hearing evidence in mitigation and aggravation, the circuit court sentenced the defendant to six years' incarceration on each count to run concurrent with each other but consecutive to the sentence for which he was incarcerated at the time of the offense. The judgment indicated that the defendant was due 100 days of credit for presentence incarceration. The defendant indicated his desire to appeal his conviction, so the circuit court appointed OSAD to represent the defendant on appeal. A final amended judgment and sentence were filed on August 11, 2014.

¶ 21 ANALYSIS

¶ 22 In its motion to withdraw as counsel, OSAD discusses five issues that might be raised on appeal. We discuss each briefly. Given the record in this case, OSAD's presentation of five potential issues on appeal is generous.

¶ 23

Proof Beyond a Reasonable Doubt

¶ 24 The standard used to determine whether a defendant was proven guilty beyond a reasonable doubt in Illinois is well settled. "The standard of review in a challenge to the sufficiency of the evidence is whether, when considering all of the evidence in the light most favorable to the State, a rational fact finder could have found the elements of the offense proved beyond a reasonable doubt." *In re Donald R.*, 343 Ill. App. 3d 237, 246 (2003) (citing *People v. Harris*, 333 Ill. App. 3d 741 (2002)).

¶ 25 Spivey and Jones each testified to being kicked and it having been extremely unlikely that they kicked anyone. Additionally, Hille testified that he saw the defendant kick both Spivey and Jones. Spivey and Jones both testified that the defendant spat on them after informing them that he had AIDS. Viewing this evidence in the light most favorable to the State, there can be no doubt that a reasonable finder of fact could find the defendant guilty.

¶ 26

Waiver of Jury Trial

¶ 27 A trial court must ensure a defendant choosing to waive his right to a jury trial does so "understandingly." *People v. Tooles*, 177 Ill. 2d 462, 464 (1997). "Generally, a jury waiver is valid if it is made by defense counsel in defendant's presence in open court, without an objection by defendant." *People v. Bracey*, 213 Ill. 2d 265, 270 (2004); *People v. Frey*, 103 Ill. 2d 327, 332 (1984). In this case, the defendant signed a jury trial waiver. In open court, the defendant's attorney stated that he had explained the difference between a jury and a bench trial and that the defendant desired a bench trial. The court

itself explained the right to a jury trial and the defendant stated he wished to waive a jury trial. The defendant knowingly and voluntarily waived his right to a jury trial.

¶ 28 Rule Against Witnesses

¶ 29 The defendant made multiple motions for mistrials based on violations of the rule against witnesses. A trial court's denial of a motion for a mistrial is reversed only upon a showing of a clear abuse of discretion. *People v. Bridgeforth*, 51 Ill. 2d 52, 63 (1972). Further, a trial court has discretion to allow the violating witness's testimony. Regardless, the court struck the testimony given by Jones and Spivey the second time they were called to testify.

¶ 30 We note that Jones and Spivey testified in immediate succession without a break. Therefore, there was no opportunity for them to have talked about the testimony previously given. While in theory, Spivey could have spoken to Hille prior to Hille's testimony, the defendant made no record of any such activity, and he did not ask Hille about any violation as he did with Spivey and Jones. Regardless, the court struck the testimony offered by Jones and Spivey given when called to the stand a second time. We review a trial court's denial of a motion for mistrial for an abuse of discretion. *People v. McDonald*, 322 Ill. App. 3d 244, 250 (2001). And a trial judge is presumed to have only considered admissible evidence. *People v. Pace*, 225 Ill. App. 3d 415, 426 (1992). Here, the defendant can show no harm. We find no abuse of discretion in the trial court's decision to not grant a mistrial.

¶ 32

Class X Sentencing

¶ 33 Before the trial began, the defendant was informed that he would be subject to Class X sentencing due to his previous convictions. 730 ILCS 5/5-4.5-95(b) (West 2012). The State failed to introduce certified copies of the defendant's previous convictions to prove that the defendant was eligible for Class X sentencing. Nevertheless, an unchallenged presentencing investigation report (PSI) is sufficient to prove the prior convictions needed to sentence a defendant as a Class X offender. *People v. Williams*, 149 Ill. 2d 467, 490-93 (1992). The defendant's PSI listed the previous convictions necessary to impose Class X sentencing. There was no error.

¶ 34

Credit Against Sentence

¶ 35 The court ordered the defendant's sentences in this case to run consecutively to the sentences for which the defendant was incarcerated at the time he committed these crimes. There was a time between the commission of these crimes and the defendant's release from custody on the charges for which he was incarcerated. The defendant cannot claim that he should receive credit against these charges for time he was serving on his previous sentence. *People v. Latona*, 184 Ill. 2d 260, 270-71 (1998).

¶ 36

CONCLUSION

¶ 37 There are no viable claims that the defendant can raise on appeal. OSAD's motion is granted.

¶ 38 Motion granted; affirmed.