2018 IL App (1st) 151570-U

No. 1-15-1570

Order filed February 7, 2018

Third 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. 13 CR 12301
	)	
KOFI FOSTER,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated battery under count one is affirmed over his contention that the State failed to prove beyond a reasonable doubt that he battered the victim and knew the victim was 60 years of age or older. Defendant's conviction for aggravated battery and care facility resident abuse violated the one-act, one-crime principle. The matter is remanded to the trial court to determine which count should be vacated.

¶ 2 Following a bench trial, defendant Kofi Foster was found guilty of aggravated battery (720 ILCS 5/12-4(b)(10)(West 2010)) and care facility resident abuse (720 ILCS 5/12-19 (West

2010)), and sentenced to concurrent terms of two years' imprisonment. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he committed a battery on the victim, and, alternatively, that he knew the victim was 60 years of age. Defendant also contends that his conviction for aggravated battery should be vacated under the one act, one crime doctrine because the State, in the charging document, failed to apportion his acts separately. We affirm defendant's conviction for aggravated battery and remand to the trial court to determine which count, the aggravated battery count or the care facility resident abuse count is to be vacated for violating the one act, one crime doctrine.

¶ 3 Defendant was charged by indictment with two counts of aggravated battery (720 ILCS 5/12-4(b)(10)(West 2010)). Count one alleged that defendant, in committing a battery, intentionally or knowingly caused bodily harm to Lee Dougherty by striking her about the head, knowing her to be a person sixty years of age or older. Count two alleged the same as count one, adding that the State was seeking an extended term sentence because defendant committed the offense against a physically handicapped person. 730 ILCS 5/5-5-3.2 (a)(9) (West 2010). Defendant was also charged with three counts of Care Facility Resident Abuse. Count three alleged that defendant abused Lee Dougherty, a long term care facility resident, because he knowingly caused physical injury to the victim a resident of the McAllister nursing home. (720 ILCS 5/12-19 (West 2010)[1]. Count four alleged the same as count three, adding that the State was intending to seek an extended term sentence because defendant committed the offense against a physically handicapped person. 730 ILCS 5/5-5-3.2 (a)(9)(West 2010). Count five alleged the same as count three, adding that the State was intending to seek an extended term

[1] We note that 720 ILCS 5/12-19 (West 2010) was repealed by Public Act 96-1551 on July 1, 2011, and replaced by 720 ILCS 5/12-4.4a (West 2012).

sentence because defendant committed the offense against a person 60 years of age or older. 730 ILCS 5/5-5-3.2 (a)(8) (West 2010).

¶ 4 At trial, Dr. Antonio Noriega testified that in August of 2010, he was the medical director for the McAllister Nursing Home (McAllister) in Tinley Park. McAllister is a skilled nursing facility and has a unit for Alzheimer and dementia patients and is considered a long term care facility. In August of 2010, the victim Lee Dougherty was a 63 year old woman, who had resided at McAllister for about five years. She had multiple illnesses, including schizophrenia, seizure disorder, epilepsy, cirrhosis of the liver, instability that could result in a fall and dementia that may have resulted from a stroke she previously suffered. In addition to her many ailments, Dr. Noriega added that Dougherty was difficult to treat and would become combative, restless and agitated due to her dementia. Dougherty was wheelchair bound and unable to provide for herself relying on the staff to help her get in and out of bed. Dr. Noriega testified that the victim was born on August 13, 1947 and was on Medicare, Medicaid, and Public Aid.

¶ 5 In August 2010, Dr. Noriega was informed by the nursing staff that Dougherty was struck by one of the staff at the nursing home. On August 22, 2010, Dr. Noriega examined Dougherty and found that she had a significant amount of bruises and contusions to the right side of her face and neck. Dr. Noriega did not observe an open wound and stated that Dougherty was able to swallow and communicate. Dr. Noriega ordered x-rays and instructed the nursing staff to apply local wound care treatment including moist heat and ointment. Dr. Noriega found that the injuries he observed were consistent with abuse.

¶ 6 On cross-examination, Dr. Noriega acknowledged that he had previously received reports of Dougherty being combative on several occasions and that it was difficult for her to follow the

requests or demands of the nurses. Dr. Noriega stated that there were never any physical attacks by Dougherty nor were there any reports that there was difficulty in getting her to bed. When Dr. Noriega spoke to Dougherty on August 22, 2010, she could not remember the events from August 18, 2010. Dr. Noriega acknowledged that he did not ask Dougherty specifically what had occurred on August 18, 2010, and did not conduct an independent investigation of his own. Dr. Noriega also acknowledged that he relied on information from the staff regarding the August 18 incident involving defendant.

¶ 7 Terry Jones[2] testified that he is a certified nursing assistant (CNA) and was on duty at McAllister on August 18, 2010, working the 10:30 p.m. to 7:00 a.m. shift. Terry saw defendant helping another CNA, Rochelle Achampion, place Dougherty onto her bed. Terry testified that defendant was also a CNA. Terry asked defendant if he needed help and defendant replied that he did not need Terry's assistance. Terry saw defendant place Dougherty onto her bed and leave the room. At that time, Terry did not notice any bruises or marks on the victim other than a "bruise on her right chin." When Terry saw the victim about 30-45 minutes later, she had a black eye and blood coming from her mouth.

¶ 8 On cross-examination, Terry acknowledged that he never saw defendant hit the victim and did not know if anyone else went into Dougherty's room while defendant was assisting her. Terry acknowledged that, when he left Dougherty's room, both defendant and Rochelle were in the room. Terry also acknowledged that another CNA went into the room during the 30-45 minute period he was away but "didn't know her name offhand." Terry admitted that his wife Pam Jones was employed at McAllister as a CNA.

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[2] Because multiple witnesses share the same last name, we refer to all witnesses by their first name.

¶ 9 Cara Catlett testified that she is a licensed practical nurse (LPN) and was on duty at McAllister on August 18, 2010. At approximately 10:45 p.m., Cara was at the nurse's station and noticed Dougherty sitting in a "Geri chair." Cara described a "Geri chair" as a reclining chair with wheels. Cara could not recall seeing any injuries on Dougherty when she was sitting outside of the nurse's station. Cara asked Rochelle Achampion why the victim was still up. Rochelle replied that she was waiting for defendant to help her put Dougherty to bed. Cara saw defendant walk past the nurse's station, but did not see him go into Dougherty's room.

¶ 10 At approximately 10:50 p.m., CNA Pam Jones asked Cara to look at the victim because there was blood coming from her mouth. Pam was the CNA that came on duty at 11:00 p.m. Cara went into Dougherty's room and noticed that there was blood inside Dougherty's mouth. Cara asked Dougherty what happened to her and Dougherty replied "the black big monster pounded me in the mouth." Cara saw bruising on Dougherty's cheek, but could not remember if it was on August 18 or the next day. Cara admitted that when she testified in the grand jury her memory of the incident was better and she said that Dougherty told her "the big black monster pounded her in the face."

¶ 11 On cross-examination, Cara acknowledged that Dougherty never mentioned anyone by name as having struck her. Cara stated that defendant was from Trinidad and that Rochelle and Pam were African American. Cara acknowledged that Terry Jones is Pam's husband.

¶ 12 Rochelle Achampion testified that she is a CNA and was working the second shift at McAllister on August 18, 2010, from 2:30 p.m. to 11:00 p.m. Rochelle spoke to Cara at about 10:45 p.m. and was instructed to put Dougherty to bed. Rochelle testified that because Dougherty was a large woman she needed help putting her to bed. Defendant offered to help

Rochelle. Rochelle removed Dougherty's shoes, socks, pants and diaper and defendant put her on the bed. While defendant was attending to Dougherty, Rochelle checked on the two other patients in the room. Rochelle explained that the beds have curtains around them for privacy and on the day in question the curtains were closed on all the beds, including Dougherty's. Rochelle stated that Terry Jones was with defendant initially. Because Rochelle's shift was ending at 11:00 p.m., she left the room after attending to Dougherty's roommates. Rochelle acknowledged that she left the room without checking on Dougherty. Rochelle testified that, when she left defendant with Dougherty to tend to the other two patients in the room, Dougherty did not have any injuries. Rochelle did not see Dougherty on August 19, 2010.

¶ 13 On cross-examination, Rochelle acknowledged that she did not see Terry Jones leave the room and he did not help her with the other two patients in the room.

¶ 14 Carolyn Catlett testified that she is a registered nurse (RN) and was the Director of Nursing Services at McAllister in August 2010. Carolyn was working at McAllister on August 18, 2010, but left when her shift ended at 7:00 p.m. Prior to leaving, Carolyn saw Dougherty but did not notice any bruises on her. In the evening hours of August 18, Carolyn received a call from her daughter Cara, who was on duty at McAllister. Cara informed her of Dougherty's injuries. Carolyn returned to the facility on August 19, 2010, and examined Dougherty. Carolyn noticed that Dougherty had bruising on her right side by her eye. Carolyn testified that one of her responsibilities is to report suspected abuse. Carolyn conducted interviews of the employees that had contact with the victim and instructed them to write a statement. Defendant complied and wrote a statement regarding his involvement with the victim on August 18, 2010. In his statement, defendant stated that the victim broke his necklace and there were beads all over the

victim's bed. Carolyn testified that, after speaking to Dougherty and the staff, defendant was removed from the building. Carolyn notified the Cook County Sheriff's department and officers visited McAllister on August 20, 2010.

¶ 15 On cross-examination Carolyn acknowledged that she conducted interviews of the staff that were on duty on August 18, 2010. Carolyn admitted she did not speak to the two patients in the victim's room but explained that they were "expressive aphasic" meaning they could not speak. Carolyn acknowledged that she did speak to the victim and was able to understand her clearly.

¶ 16 On redirect examination, Carolyn stated that when she inquired of Dougherty who had hit her, Dougherty replied "Kofi" hit her.

¶ 17 Detective Devin Gray of the Cook County Sheriff's Police testified that he is an elder abuse specialist and was assigned to investigate the victim's injuries on August 26, 2010. Patrol officers Charillo and Woods were the first officers to respond on August 20, 2010. Defendant was the named offender and Devin began searching for him to interview. Devin stated that, after several weeks of searching, he could not locate defendant at the addresses that he had for him in Illinois or Indiana. Devin obtained an arrest warrant for defendant in 2010. In 2014, Devin was notified that defendant was arrested. Devin went to visit the victim at the Abreva Nursing Home in 2015 to inquire about the beating from August 18, 2010, but Dougherty could not remember the incident.

¶ 18 On cross-examination, Devin acknowledged that Rochelle was considered to be a second suspect because she was in Dougherty's room with defendant. Terry Jones was not considered a suspect.

¶ 19 At the conclusion of Devin's testimony, the State rested. Defendant presented a motion for a directed finding that was denied after argument. Defendant did not present any witnesses.

¶ 20 In issuing its ruling, the court noted that the victim was in a nursing home not only because of her mental problems but also because of her physical problems. The court found the victim needed "constant assistance" to be put into bed and taken out of bed. On the date in question, the victim was not observed to have any injuries while she was sitting in the "Geri chair" in front of the nurse's station. It was only when defendant helped her onto her bed that she developed the injuries. The court found defendant was "the last one to have contact with [the victim] and to be alone with her." The court considered the two statements that were presented by the State, one to Cara Catlett when the victim said "the big black monster hit her in the face," and the second one from defendant in his written statement to Carolyn Catlett where he stated that the victim broke his necklace. The court noted that the victim's statements had some weight but the court had to look "far beyond her statements as to what occurred." The court found defendant's statement to contain a "potential for motive" and defendant's flight after the crime as evidence of guilt. The court ultimately ruled that "all matters only point to defendant as the one who committed the offense" and found him guilty of the charged offenses.

¶ 21 Prior to sentencing, the State indicated they were not seeking an extended sentence but asked for four years' imprisonment. Defendant asked for probation. The court considered factors in both aggravation and mitigation and sentenced defendant to two years' imprisonment as to count one and two years' imprisonment as to count three to run concurrently. The court merged counts 2, 4 and 5.

¶ 22 On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction. Defendant contends that the State failed to prove beyond a reasonable doubt that he committed a battery because there were no witnesses to the beating. He also argues that, the State failed to prove beyond a reasonable doubt that he knew the victim was 60 years of age or older.

¶ 23 The standard of review on a challenge to the sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler,* 226 Ill. 2d 92, 114 (2007). This standard is applicable in all criminal cases regardless whether the evidence is direct or circumstantial. *People v. Herring,* 324 Ill.App.3d 458, 460 (2001); *People v. Campbell,* 146 Ill. 2d 363, 374-75 (1992). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Hutchinson,* 2013 IL App (1st) 102332 ¶ 27; *People v. Ortiz,* 196 Ill. 2d 236, 259 (2001). When considering the sufficiency of the evidence, it is not the reviewing court's duty to retry the defendant. *People v. Beauchamp,* 241 Ill. 2d 1, 8 (2011); *People v. Collins,* 106 Ill. 2d 237, 261 (1985). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A reviewing court will only reverse a criminal conviction when the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *Beauchamp,* 241 Ill. 2d at 8; *People v. Collins,* 214 Ill. 2d 206, 217 (2005).

¶ 24 It has been held that a criminal conviction may be based on circumstantial evidence, as long as it satisfies proof beyond a reasonable doubt of the charged offense. *People v. Hall*, 194 Ill. 2d 305, 320 (2000). In a case based on circumstantial evidence, the trier of fact need not be

satisfied beyond a reasonable doubt as to each link in the chain of circumstances if all the evidence considered collectively satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *Id.*

¶ 25 Defendant was found guilty of aggravated battery. 720 ILCS 5/12-4 (b)(10) (West 2010). Section 12-4(b)(10) provides that a person commits aggravated battery if, in committing a battery, he or she knows the individual harmed to be an individual of 60 years of age or older. 720 ILCS 5/12-4 (b)(10) (West 2010). In order to sustain defendant's conviction, the State was required to prove both the commission of a battery and the presence of the additional aggravating factor that defendant knew the victim was 60 years of age or older. *People v. Jasoni,* 2012 IL App (2d) 110217, ¶ 18.

¶ 26 In this court, defendant contends that the State failed to prove beyond a reasonable doubt that he committed a battery against the victim or alternatively, that he knew the victim was 60 years of age or older. "Because of its very nature, the mental element of an offense, such as knowledge, is ordinarily established by circumstantial evidence rather than by direct proof." *Jasoni,* 2012 IL App (2d) 110217, ¶ 20 (quoting *People v. Farrokhi*, 91 Ill. App. 3d 421, 427 (1980)); see also *People v. Rader,* 272 Ill.App.3d 796, 806 (1985) (An admission by a defendant is not required for the trier of fact to conclude that a defendant had knowledge of something).

¶ 27 After reviewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found that defendant committed an aggravated battery against Dougherty. The State presented ample circumstantial evidence as to defendant's guilt. Dr. Noriega testified that the victim was 63 years of age at the time of the offense and had resided at McAllister for about five years. It is reasonable to infer that defendant, a CNA at McAllister,

who was responsible for the patients therein and had previously attended to Dougherty, knew that she was 60 years of age or older. Cara saw the uninjured victim sitting in a "Geri chair" in front of the nurse's station. Shortly thereafter, defendant helped Rochelle place the victim onto her bed. Rochelle left defendant alone with the victim to tend to the two other patients that were in the victim's room. The victim was uninjured when Rochelle left her with defendant. Terry Jones testified that he was in the area and offered to help defendant place the victim onto her bed. Defendant refused his assistance and Terry left the room leaving defendant alone with the victim while Rochelle was tending to the other patients in the room. Terry testified that he did not notice any injuries on the victim when he left her room, but did observe the victim with a "black eye and blood coming from her mouth 30-45 minutes later."

¶ 28 On the following day, Carolyn Catlett interviewed the staff and had each employee write a statement. Defendant wrote that when he was placing the victim onto her bed she broke his necklace causing beads to fall onto the bed. Carolyn also spoke to the victim and she named defendant as the person that struck her. After conducting the interviews and speaking to the victim, Carolyn ordered that defendant be removed from the premises. Defendant did not return to McAllister and Detective Gray was unable to locate him at addresses in both Illinois and Indiana. See *People v. James,* 2017 IL App (1st) 143036, ¶ 49 citing *People v. Harris,* 52 Ill. 2d 558, 561 (1972); see also *People v. Wright,* 30 Ill. 2d 519, 523 (1964) (Evidence of flight is admissible as a circumstance tending to show consciousness of guilt). This evidence, and the reasonable inferences therefrom, support the conclusion that defendant committed aggravated battery beyond a reasonable doubt.

¶ 29 In reaching this conclusion, we are not persuaded by *People v. Smith*, 2015 IL App (4th) 131020, relied on by defendant in support of his argument that the State failed to prove beyond a reasonable doubt that he knew the victim was 60 years of age or older. In *Smith*, the Fourth District appellate court found that "despite evidence that the defendant and the victim had a long-term friendship, were roommates, and the defendant was the victim's caregiver, the evidence was insufficient to establish that the defendant knew that the victim was over 60 years of age." *Id.* ¶¶ 45-46. We initially note that one district of the State appellate court is not bound to follow the decisions of other districts. See *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 398 (1992). That aside, here, unlike in *Smith*, defendant was more than a caregiver. He was a certified nursing assistant employed at a nursing home, was responsible for the care of the patients at McAllister a skilled nursing and long term care facility, and had previously attended to the victim.

¶ 30 Defendant next contends that his conviction for aggravated battery should be vacated under the one-act, one-crime principle because the State failed to apportion any of the acts separately, and instead treated his conduct as a single act. In setting forth this argument, defendant acknowledges that he failed to preserve the issue for appeal but argues that it is reviewable under the second prong of the plain error doctrine because the error affects his substantial rights.

¶ 31 The State concedes and we agree that the alleged violation of the one-act, one-crime principle affects the integrity of the judicial process and thus it is reviewable under the second prong of the plain error doctrine. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Whether a

conviction should be vacated under the one-act, one-crime principle is a question of law that is reviewed *de novo*. *People v Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 32 The one-act, one-crime principle prohibits a defendant from being convicted of multiple offenses based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). An "act" has been defined as "any overt or outward manifestation that will support a separate conviction." *King*, 66 Ill. 2d at 566. "To sustain multiple convictions, the charging instrument must indicate that the State intends to treat the defendant's conduct as separate and multiple acts." *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

¶ 33 Here, the State concedes that defendant was charged with the same conduct for each offense *i.e.* striking the 63 year old victim. Defendant was charged with two counts of aggravated battery and three counts of care facility resident abuse with the counts stemming from the same incident. The record shows that the State did not treat defendant's conduct as separate acts. The aggravated battery count alleged that defendant, struck the victim about the head, knowing her to be a person 60 years of age or older. The care facility resident abuse count alleged that defendant, knowingly caused physical injury to the victim, a resident of McAllister nursing home. Both counts are based on defendant's single act of battery against the victim. We therefore agree with the State that one of defendant's convictions should be vacated for violating the one-act, one-crime principle. *Crespo*, 203 Ill. 2d at 345. However, both offenses for which defendant was convicted are Class 3 offenses. 720 ILCS 5/12-4(b)(10); 720 ILCS 5/12-4(e)(1) (West 2010) and 720 ILCS 5/12-19(a)(West 2010). It has been held that "when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause

will be remanded to the trial court for that determination." *People v. Artis*, 232 Ill. 2d 156, 177 (2009). Accordingly, we remand this matter to the trial court for that determination.

¶ 34 Affirmed and remanded.