2018 IL App (1st) 151599-U

FIRST DIVISION
October 22, 2018

No. 1-15-1599

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court of
	) Cook County, Criminal Division
Plaintiff-Appellee,	)
	)
v.	) No. 13 CR 6898 and 13 CR 12014
	)
MARK SCHELLING,	) Honorable James B. Linn
	) Judge Presiding
Defendant-Appellant.	)

JUSTICE GRIFFIN delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant is not entitled to plain error relief on his claim that the trial court improperly admitted other crimes evidence. Defendant is entitled to have certain of his convictions vacated under the one act, one crime rule. Defendant is entitled to have certain of his convictions reversed for receiving ineffective assistance of counsel. Defendant's fines and fees are corrected.

¶ 2 Defendant Mark Schelling was charged with and convicted of several counts of stalking and harassing his former girlfriend, particularly by phone. Defendant argues that the trial court improperly admitted "other crimes evidence" which consisted of testimony that, on one occasion, defendant had broken into his former girlfriend's apartment, went through her belongings, and

threw a bottle of wine at her. Defendant also argues that the trial court improperly admitted testimony from a separate occasion in which the former girlfriend testified that defendant slashed all four tires on her vehicle and left the knife protruding from one of the tires. Defendant contends that admitting testimony about these two alleged instances which were "completely dissimilar from and far more violent than the telephone crimes at issue" deprived him of a fair trial. We reject those arguments.

¶ 3 Defendant also argues that his trial counsel was ineffective, that certain of his convictions must be vacated under the one act, one crime rule, that the stalking statute is unconstitutional, and that the fines and fees assessed against him are improper and must be corrected. We affirm in part and reverse in part. We also vacate certain of defendant's convictions under the one act, one crime rule and order that the fines and fees assessed against defendant be corrected.

¶ 4 BACKGROUND

¶ 5 Defendant Mark Schelling was in a relationship with the complainant, Olivia Mahieu, that began in 2010 and ended in 2011. After the relationship ended, defendant was allegedly harassing Mahieu by calling her and texting her thousands of times over a two month period in the summer of 2012. Defendant also allegedly called and harassed Mahieu's parents and her boss.

¶ 6 In addition to the phone calls and text messages, Mahieu claimed that she returned home on June 17, 2012 to find defendant in her condominium. Defendant had allegedly broken the lock and entered the premises, and Mahieu claims to have seen defendant trying to take her television off of the wall. When Mahieu confronted defendant and told him she was going to call the police, defendant allegedly threw a wine bottle at her that hit her foot and cut her. A month later, on July 19, 2012, when Mahieu was leaving her condo to go to work, she discovered that

the tires on her vehicle had been slashed. Mahieu received a text message that day that she believed to be from defendant indicating that the sender had slashed the tires on her vehicle.

¶ 7 Mahieu filed a police report on August 8, 2012 to report the harassment. The harassing telephone calls and text messages allegedly continued. On September 25, 2012, Mahieu went to domestic violence court to get an order of protection against defendant. Defendant appeared in court. After Mahieu and defendant both addressed the judge, an order of protection was issued and defendant was ordered not to contact Mahieu by any means. Mahieu alleges that defendant called her immediately after they left court and threatened to kill her if she did not get the order of protection removed. Defendant also allegedly threatened Mahieu's family, leading Mahieu to file another police report. The calls continued.

¶ 8 Mahieu went to the police department again on November 4, 2012. She filed another police report because the messages were becoming progressively scarier and more threatening to her. Mahieu recorded some of the threatening calls allegedly made by defendant. She was scared and feared for her safety.

¶ 9 On April 15, 2013, defendant was charged with threatening and harassing Mahieu for offenses that allegedly took place between August 8, 2012 and March 10, 2013. During a court appearance in that case, on May 28, 2013, defendant was arrested for further alleged acts of stalking and harassing Mahieu occurring on April 11, 2013. The cases were heard together.

¶ 10 Defendant was not prosecuted for any offenses arising from him allegedly breaking into Mahieu's apartment and throwing a bottle at her or for allegedly slashing her tires. The State originally sought to prosecute defendant for that conduct but abandoned those charges at an earlier stage of the case. Before trial, the State filed a motion to admit "other crimes evidence" with the aim of eliciting testimony about those two occurrences. The trial court allowed evidence

of those occurrences to be admitted. A bench trial ensued in front of a different judge.

¶ 11 At trial, Mahieu testified consistently with the facts set forth above. She recounted some specific instances by date and produced recordings and text messages that appeared to be from defendant. Many of the recordings and messages contain graphic and crude language and overt threats of harm. Mahieu testified about the negative impact the threats and harassment had on her life and on her family and described the situation as a nightmare. Mahieu testified about the incidents when defendant entered her apartment without authority and hit her with a bottle and when he slashed her tires.

¶ 12 Defendant mounted a vigorous defense. Defendant produced evidence that he had loaned Mahieu a large sum of money. Defendant produced a promissory note, but Mahieu said her signature was forged. She testified that the money was given as gifts. Defendant requested that Mahieu repay him in 2011 and he filed suit on January 26, 2012 for repayment. The filing of that lawsuit predates any of the allegations giving rise to this case.

¶ 13 One of defendant's former attorneys, Matthew Layman, testified on defendant's behalf. While representing defendant in his effort to recover money from Mahieu, Layman was also representing defendant against Mahieu's attempts to get an order of protection against him. Layman testified that he had a conversation with Mahieu after a court appearance where she referred to the order of protection proceedings and told Layman that "none of this would be happening if Mark Schelling hadn't sued me."

¶ 14 Layman also testified that while he was investigating the case, he came across a number that appeared frequently in Mahieu's phone records. The number belonged to Nick Ciccarelli, a lifelong friend of Mahieu. Layman testified that when he spoke to Ciccarelli, Ciccarelli told him that Mahieu had instructed him to call her from a blocked number. Some of the calls about which

Mahieu complains came temporally very close to calls from Ciccarelli. Layman suspected that Mahieu and Ciccarelli were dating. Defendant's theory was that Ciccarelli and Mahieu were colluding to fabricate the harassment and make it look like defendant was the perpetrator.

¶ 15 Several of defendant's family members also testified about specific times they were with defendant and at which defendant could not have been calling and harassing Mahieu because he was with them or did not have access to a phone. Their collective testimony suggested that, during the relevant period, defendant could not have been making hundreds or thousands of calls to Mahieu without them noticing. Defendant did not testify.

¶ 16 The trial court acquitted defendant of two of the charges against him, but found him guilty of the rest. Defendant was sentenced to four years' probation with the first 180 days to be served in Cook County jail. Fines and fees were assessed. Defendant appeals his convictions and certain of the fines and fees assessed against him.

¶ 17 ANALYSIS

¶ 18 Defendant argues that he was denied a fair trial because the trial court admitted other crimes evidence that defendant maintains was too dissimilar from the charged acts and was highly prejudicial. In particular, defendant contends that the trial court should not have allowed the State to elicit testimony about an instance in which Mahieu claims defendant entered her condominium without authority, attempted to take her television off the wall, and threw a wine bottle at her that injured her. Defendant also contends that the trial court should not have allowed the State to elicit testimony about Mahieu's tires being slashed.

¶ 19 Defendant did not raise any of the issues he currently raises concerning the other crimes evidence in a posttrial motion. The failure to assert the existence of an allegedly errant ruling in a posttrial motion results in a forfeiture of that issue on appeal. *People v. Piatkowski,* 225 Ill. 2d

551, 564 (2007). Accordingly, the arguments defendant asserts regarding other crimes evidence are forfeited on appeal. We will nonetheless examine those issues for plain error. See *People v. Enoch,* 122 Ill. 2d 176, 198 (1988).

¶ 20 Under plain error review, we will grant relief in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) if the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Redmond,* 2018 IL App (1st) 151188, ¶ 14. The plain error rule is not a general savings clause preserving all errors affecting substantial rights whether or not they have been brought to the attention of the trial court; rather, it is a narrow and limited exception to the general waiver rule and its purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process. *Id*. at ¶ 15.

¶ 21 Evidence of other crimes may not be introduced in an attempt to show a defendant's bad character. *People v. Walston,* 386 Ill. App. 3d 598, 609-10 (2008); see also Ill. R. Evid. 404(a) (eff. Jan. 1, 2011). Other crimes evidence is admissible when it is relevant for any purpose other than to show the defendant's propensity to commit a crime. *People v. Heard,* 187 Ill. 2d 36, 58 (1999); *People v. Robinson,* 391 Ill. App. 3d 822, 838 (2009). Other crimes evidence may be introduced against a defendant, for example, for the purpose of showing *modus operandi,* intent, identity, motive, or absence of mistake. *Walston,* 386 Ill. App. 3d at 610; see also 725 ILCS 5/115-7.4(a) (West 2016) (setting forth the standard for admissibility of other crimes in domestic violence cases). A trial court must weigh the prejudicial effect of admitting the other crimes evidence against its probative value. *People v. Johnson,* 2014 IL App (2d) 121004, ¶ 47. Even though we are reviewing defendant’s claims for plain error, we note that the

admissibility of other crimes evidence rests within the sound discretion of the trial court, and a reviewing court will not overturn a trial court's decision on the admission of other crimes evidence absent a "clear abuse of discretion." *People v. Wilson,* 214 Ill. 2d 127, 136 (2005).

¶ 22 It was not error, let alone plain error, for the trial court to admit the complained-of evidence. The testimony about defendant breaking into Mahieu's apartment and about slashing her tires was admissible for a number of reasons and because of its highly probative nature. The testimony is part of a continuing narrative of the harassment—it provided context. The trial judge rightly observed that "in this type of case, I think history and context of the relationship is fair and relevant." These "other" incidents of harassment were in the same time period as the charged offenses, concerned the same parties, and represent a pattern of conduct that render them helpful to illuminate the then-existing circumstances for the trier of fact. There are significant similarities so as to satisfy the similarity requirement for other crimes evidence under Illinois law.

¶ 23 The other crimes evidence was consistent with the content of the calls and text messages and their overbearing manner in being representative of a pattern of aggression and intimidation aimed at Mahieu after she broke up with defendant. Mahieu's testimony was that the calls and text messages threatened in-person harm and acts of aggression, and the other crimes evidence was used to show that Mahieu should have and did take them seriously. Based on the charges, the State had to prove that there was legitimate reason for Mahieu to fear for her safety, suffer emotional distress, or feel threatened with bodily harm. The other crimes evidence tended to support Mahieu's belief that defendant was not all talk or making hollow threats. She was entitled to tell the fact finder that defendant had followed up on his plans to intimidate her before and was not only engaged in threatening communications, but threatening acts.

¶ 24 The other crimes evidence was also relevant to the charged crimes because it provided the basis for some of the charges. The events illustrated by the other crimes evidence were part of the basis for the protective order Mahieu secured. Part of the State's case was proving that even though Mahieu got the protective order based on the other crimes, defendant persisted in his harassment. It was also relevant to rebut defendant's defense. Defendant had a theory that Ciccarelli was involved and was the one making the calls. The State was entitled to show that there was no mistake in identity by highlighting the other crimes. Defendant was also attempting to convey that the claims made by Mahieu were a fabrication in retaliation for him filing a civil case against her for unpaid loans. Her motivation for involving police and pursuing the charges is relevant and permissible—not that she was exacting revenge, but that she was scared.

¶ 25 Defendant argues that the trial court ignored the potential prejudicial effect of the other crimes evidence altogether. The record does not support defendant's assertions. The matter of prejudice was addressed in the parties' motion and response regarding other crimes evidence. Both judges who considered the issue mentioned and considered prejudice, but found that the probative value of the evidence was greater. In fact, defendant was acquitted on counts 7 and 8 so it is not as if the trial judge decided defendant was guilty of everything based on the other crimes evidence. Instead, the trial judge rightfully examined each count and assessed the proof.

¶ 26 Defendant is correct to point out that the charged crimes all involved offenses over the telephone while the other crimes involved in-person acts of aggression, but the acts are correlated on a number of levels to make the existence of consequential facts more or less probable. The record makes clear that this case did not devolve into a mini-trial of the collateral offenses, but that the evidence was used for a suitable purpose. Trial judges are presumed to consider only admissible evidence and to consider evidence admitted for a limited purpose for

that proper purpose only. *People v. Avery*, 227 Ill. App. 3d 382, 392 (1991).

¶ 27 The evidence was not admitted for the purpose of showing defendant had bad character or an overall propensity to commit crimes. The evidence of the other crimes occurrences could be properly admitted in this case to illustrate defendant's state of mind and for the purpose of showing intent, identity, absence of mistake, and other relevant considerations. The evidence showed that Mahieu knew defendant's identity and his tendencies, and shows how the charged conduct impacted her. The other crimes evidence demonstrates the circumstances and context from Mahieu's perspective in a nightmarish continuum from the parties' break up to defendant's arrest. Defendant had a full and fair opportunity to cross-examine Mahieu about these instances and the supposed lack of corroboration. Any issue with whether to believe Mahieu's testimony about these events is for the fact finder to grapple with—but whether the fact finder gets to hear the testimony is a separate question. The trial court did not err in allowing the other crimes evidence. The prejudicial effect of the evidence is not outweighed by its strong probative value.

¶ 28 Defendant argues that the State and the trial court both relied too heavily on the other crimes testimony, making it the focal point of the trial. But, as the State points out, the State simply presented its case chronologically and the other crimes instances occurred before the charged conduct. The State did not argue that defendant should be found guilty of the charged offenses because of uncharged conduct. The uncharged conduct just provided context for the allegations for which defendant stood trial. The trial judge similarly mentioned the other crimes incidents, but there is nothing in the record to support defendant's insinuation that his right to a fair trial on the charged conduct was affected by any uncharged incidents.

¶ 29 Before moving to defendant's argument that his trial counsel was ineffective, we address his concerns regarding the application of the one act, one crime rule. Defendant argues that

several of his convictions should be vacated under the one act, one crime rule because multiple convictions resulted from a single act. It is well-settled that multiple convictions arising from the same physical act cannot stand. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997). When multiple convictions of greater and lesser offenses are rendered for offenses arising from a single act, a sentence should be imposed on the most serious offense and the convictions on the less serious offenses should be vacated. *Id.* Although defendant did not raise this argument in a posttrial motion, an alleged violation of the one act, one crime principle affects a defendant's fundamental rights and, therefore, we review the claim under the plain error doctrine. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Whether a conviction should be vacated under the one act, one crime principle is a question of law that we review *de novo. People v. Peacock*, 359 Ill. App. 3d 326, 331 (2005).

¶ 30 The State agrees with defendant's position that several of the convictions were based on the same single act and that those convictions must be vacated. In case 13 CR 12014, all seven counts relate to defendant's contact with Mahieu on April 11, 2013. On direct examination by the State, Mahieu testified about being contacted by defendant on April 11, 2013. She recognized the voice on the phone as defendant and he was screaming, yelling, and threatening her and told Mahieu to drop the case against him. The State's own evidence was sufficient to give rise to a conviction for harassment of a witness (720 ILCS 5/32-4A(a)(2) (West 2012)) on April 11, 2013. Defendant proposes and the State agrees that we should vacate the convictions in that case on counts 2 through 7, allowing only the conviction on count 1 to stand. That is what we will order.

¶ 31 As for counts 1 through 6 in case 13 CR 6898, the indictment did not apportion phone calls or messages by any specific date, but simply described the crimes as occurring "between November 26, 2012 and March 10, 2013." On direct examination, Mahieu testified about the

period from November 2012 to March 2013 in which defendant repeatedly called her and threatened her with bodily harm. The indictment and the State's argument in the case demonstrate that it treated the harassment in this period as a single course of action. Therefore, not all six convictions can stand. But even though the State did not adequately elicit evidence about the dates of several specific instances in that time frame to substantiate six convictions, there was sufficient evidence about when the crimes occurred to support a single conviction for harassing a witness (720 ILCS 5/32-4A(a)(2) (West 2012)). Defendant proposes and the State agrees that we should vacate the convictions on counts 2 through 6. We will order that as well.

¶ 32 In case 13 CR 6898, defendant was also charged with counts 7 through 14 which each represent a separate act on a separate occurrence date. Per the indictment, these eight crimes occurred when defendant made harassing contact with Mahieu on separate dates: count 7 (October 21, 2011); count 8 (June 30, 2012); count 9 (August 8, 2012); count 10 (September 25, 2012); count 11 (September 29, 2012); count 12 (November 7, 2012); count 13 (November 26, 2012); and count 14 (March 10, 2013). This is where defendant's ineffective assistance of counsel claim comes in: defendant argues that the convictions on counts 7 through 14 were not proved by evidence elicited by the State, but were substantiated by his own counsel's questioning without which the convictions could not stand. The trial court acquitted defendant on counts 7 and 8, so his ineffective assistance claim really pertains to counts 9 through 14.

¶ 33 The basis for defendant's ineffective assistance of counsel claim is that, while the State failed to procure testimony from Mahieu about the specific dates of the harassing phone communications, defense counsel did so during cross-examination. Defendant maintains that by prompting Mahieu to fill in the gaps in the State's case, his counsel helped to elicit evidence to convict him on certain charges and was, therefore, ineffective. To be entitled to relief for

ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott,* 2015 IL App (1st) 131503, ¶ 27.

¶ 34 During the State's examination of her, Mahieu went back and forth from saying defendant called and texted her "hundreds" or "thousands" of times in the relevant time frame—light on specifics. The State did elicit testimony about defendant intimidating and harassing Mahieu generally from October 2012 to March 2013 (count 1 in case 13 CR 6898 (720 ILCS 5/32-4A(a)(2) (West 2012)) and specifically on September 25, 2012 (count 10 in case 13 CR 6898 (720 ILCS 135 1-1 (West 2012)) and April 11, 2013 (count 1 in case 13 CR 12014 (720 ILCS 5/32-4A(a)(2) (West 2012))). The rest of the date-specific charges were only substantiated by evidence elicited by defense counsel. The State never proved that defendant made contact with Mahieu on those dates—the only evidence of that came from defense counsel's questioning on cross-examination.

¶ 35 Defense counsel should have known that the date-specific offenses in counts 9 through 14 (with the exception of count 10) had not been proved by the State. The evidence elicited by the State during its examination of Mahieu was flatly insufficient to prove the charges. In fact, the State seemed relatively disinterested in proving the date-specific offenses as it often questioned Mahieu about broad time periods rather than specific instances. Had defense counsel not supplied the occurrence date evidence and then had moved for a directed verdict on counts 9, 11, 12, 13 and 14, defendant would have been entitled to an acquittal on those charges because there was insufficient evidence to support them.

¶ 36 Defense counsel elicited consequential and harmful testimony that resulted in the trial court hearing evidence on which it could convict defendant for the date-specific offenses charged

in counts 9 through 14. Where defense counsel elicits testimony that proves a critical element of the State's case after the State has failed to do so, defendant's right to effective assistance of counsel is violated because, without having the evidence elicited by defense counsel, the court could not have found defendant guilty. *People v. Jackson*, 318 Ill. App. 3d 321, 328 (2000). Moreover, there was no rational tactic or strategic purpose to justify defense counsel's elicitation of the date-specific evidence here. Despite the State's contentions to the contrary, the challenged action in this case cannot be considered sound trial strategy. Without defense counsel's questioning on the subject, the State would have failed to prove defendant guilty beyond a reasonable doubt on counts 9 through 14 (again, with the exception of count 10). Therefore, we reverse defendant's convictions on counts 9, 11, 12, 13, and 14.

¶ 37 Defendant also argues that part of the statute criminalizing "stalking" is unconstitutional. That statute states that "[a] person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to: (1) fear for his or her safety or the safety of a third person; or (2) suffer other emotional distress." 720 ILCS 5/12-7.3(a) (West 2016). Defendant argues that the statute violates his right to due process because it does not have a *mens rea* requirement. A portion of the statute was recently found unconstitutional by our supreme court. *People v. Relerford*, 2017 IL 121094, ¶ 63. However, and the parties agree to this, because the stalking convictions are vacated under the one act, one crime rule, there is no need to address the constitutional argument raised in defendant's brief.

¶ 38 Defendant's final argument is that certain fines and fees must be corrected. The State agrees with defendant's position here as well. All of the relief defendant requests regarding his fines and fees is awarded. We vacate both $100 street gang fines, both $200 protective order

violation fines, both $20 protective order violation fines, both $5 electronic citation fees, and both $5 court system fees. The $250 DNA testing fee for case 13 CR 12014 is also vacated as duplicative. Both $15 police operation fines are offset against presentence custody credit.

¶ 39 CONCLUSION

¶ 40 Accordingly, we: (1) affirm defendant's convictions for harassing a witness (count 1 in 13 CR 6898 and count 1 in 13 CR 12014) and telephone harassment (count 10 in 13 CR 6898); (2) vacate his remaining convictions in 13 CR 12014 under the one act, one crime rule (counts 2-7); (3) vacate his multiple convictions for a singular act in 13 CR 6898 under the one, act one crime rule (counts 2-6); (4) reverse his convictions substantiated by evidence elicited by defense counsel in 13 CR 6898 (counts 9, 11, 12, 13, and 14); and (5) order that the fees and fines assessed against defendant be corrected in accordance with this order (see *supra* ¶ 38).

¶ 41 Affirmed in part, reversed in part, vacated in part. Fee order modified.