

2018 IL App (2d) 160726-U
No. 2-16-0726
Order filed December 10, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 14-CF-2008
)	
TIRITA PRYOR,)	Honorable
)	Linda Abrahamson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court did not abuse its discretion by refusing to instruct the jury that it could infer that the contents of a missing video recording of defendant’s interrogation were against the State’s interest: defendant did not show bad faith by the State, and the evidence otherwise established that the recording would have been cumulative of defendant’s testimony and written statement; (2) the State proved defendant guilty beyond a reasonable doubt of aggravated battery, specifically that the victim suffered “great bodily harm”: the victim’s four profusely bleeding lacerations, for which a doctor recommended stitches, were sufficient.
- ¶ 2 Following a jury trial, defendant, Tirita Pryor, was convicted of aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2014)) and sentenced to 24 months of probation. On appeal, she

claims that (1) the court erred when it declined to give the jury an instruction indicating that it could infer that the contents of a missing video recording were detrimental to the State and (2) the State failed to prove beyond a reasonable doubt that the victim suffered great bodily harm. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Before defendant's trial began, she moved to dismiss the indictment, claiming that her due process rights were violated when the State failed to preserve material and exculpatory evidence. Specifically, defendant noted that a video recording of her interrogation with the police was made; she moved to compel the police to produce that recording; and the police failed to give her that evidence, explaining that that evidence had been recorded over. Defendant indicated that the evidence was material and exculpatory in that it "described [her] individual version of events" and "is *** potential impeachment evidence that can no longer be relied upon." The State argued that the indictment should not be dismissed, because the recording was only potentially exculpatory. The State noted that, in addition to the recording, defendant prepared a written statement that was "exceptionally similar" to the recording and contained inculpatory evidence. Following a hearing on the motion, where the police explained that, for unknown reasons, the recording was not "pulled" and thus was recorded over, the court denied defendant's motion to dismiss. Because no showing had been made that the recording was exculpatory, the court determined that defendant needed to establish that the police acted in bad faith when they failed to preserve the evidence. The court found that defendant did not meet this threshold.

¶ 5 Evidence presented at trial revealed that, on November 9, 2014, at approximately 10 p.m., defendant and her friend, Jasmine Hicks, went to the nearby apartment of Hicks's friend to

collect money that Hicks was owed. While the women were outside the friend's door, which was near Kierra Anderson's apartment, Anderson opened her door, believing that someone was knocking on her door. Anderson and Hicks, who was smoking a cigarette, then began talking. During their conversation, Hicks blew smoke in Anderson's face, Anderson knocked the cigarette out of Hicks's hand, Hicks punched Anderson in the face, and the two women began fighting. Although Anderson believed that defendant was carrying a glass of alcohol and recording the fight on her cellular phone, defendant claimed that she did not have anything in her hands and was merely observing what was happening.

¶ 6 Leon Moore, Anderson's boyfriend, heard what was going on and went to the front door. He claimed that Hicks had Anderson pinned against a wall in Anderson's apartment, with her hands around Anderson's neck, and that he intervened to break up the fight. Defendant contended that Moore, although acting like he was going to break up the fight, punched Hicks in the face and tried to move Anderson out of the way. Defendant claimed that she asked Moore not to hit Hicks and that Moore punched her in the forehead. Defendant, who was stunned from the punch, looked down at the floor, saw a glass cup or vase, and threw it at Moore. Moore stated that, as he was trying to break up the fight between Hicks and Anderson, defendant yelled, " 'Aww, hell no. You ain't trying to jump on my girl.' " At that point, defendant threw a glass she was holding at Moore, hitting him in the forehead. Moore claimed that, before this, he did not touch defendant.

¶ 7 Anderson heard glass shatter, she looked over at Moore, and she saw a cut on his forehead that was bleeding into his eyes. Anderson also saw blood on Moore's clothes, the floor, and the walls. Anderson described Moore's injuries, which consisted of four cuts, as "[d]eep cuts, lacerations," or "deep wounds."

¶ 8 Anderson contended that she and Hicks continued to fight while Moore “tussl[ed]” with defendant to get her out of the apartment. Anderson explained that Moore grabbed defendant and eased her toward the front door. Defendant claimed that Moore charged at her, hitting her in the waist with his head and pushing her out the door.

¶ 9 Once defendant was in the hallway outside of the apartment, Moore locked the door. Moore subdued Hicks, and Anderson called the police. While Anderson and Moore were waiting for the police to arrive, defendant’s brother kicked Anderson’s door in, and Hicks left with defendant and defendant’s brother.

¶ 10 Officers Gary LaBarbera and Matthew Miller arrived at the apartment complex later that night. Miller went to Anderson’s apartment and saw Moore sitting on the couch with a towel on his forehead, which was bleeding. Miller also saw blood all over the walls. Pictures admitted at trial showed blood stains around the apartment and blood-soaked towels. Miller called an ambulance, and Moore was transported to the hospital.

¶ 11 Miller then went to Hicks’s apartment where he and LaBarbera spoke with defendant. The officers told defendant about Moore’s injuries, and defendant denied being involved in what happened, because she did not want to get in trouble.

¶ 12 Defendant was then transported to the police station where the police learned that defendant had a bump and two minor abrasions on her forehead. Defendant told the police that Moore had punched her in the forehead. The police then interrogated defendant, making a recording of that conversation. Although the recording was no longer available, as it had been recorded over, Miller indicated that he put in his police report what defendant said on the recording. According to Miller, defendant told the police that the glass she threw at Moore was on the floor of the hallway outside of Anderson’s apartment.

¶ 13 In addition to the recording, defendant voluntarily gave a written statement. She stated in this written statement that Moore only acted like he was going to break up the fight. That is, when Moore intervened, he began fighting Hicks with Anderson. Defendant told Moore to stop, Moore threatened to harm defendant, and then Moore hit defendant in the head. At that point, defendant picked up a glass, cup, or vase located by the door and “chucked” it at Moore. Defendant indicated that the recorded statement was the “same” as her written statement.

¶ 14 At the hospital, Moore was told that he would need stitches. Afraid that stitches would affect his employment, he persuaded the doctor to try gluing his cuts instead. Although the doctor had doubts that gluing would work on the deeper cuts, gluing proved to be successful.

¶ 15 During the jury instruction conference, defendant sought to have the jury instructed that it could infer that the recording of defendant’s interrogation was adverse to the State. Specifically, that instruction provided:

“If a party to this case has failed to offer evidence within his power to produce, you may infer that the evidence would be adverse to that party if you believe each of the following elements:

1. The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence.
2. The evidence was not equally available to an adverse party.
3. A reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him.
4. No reasonable excuse for the failure has been shown.”¹

¹ Although defendant indicated on the proposed instruction that it was not an Illinois Pattern Jury Instruction, it appears that the instruction was based on Illinois Pattern Jury

The court denied the motion, but it advised defendant that she could make whatever kind of argument she wished to about the fact that the recording was not produced.

¶ 16 During closing argument, the State commented that defendant had the glass object she threw at Moore in her hand when she and Hicks confronted Anderson. Defendant, who conceded that she caused Moore bodily harm, argued that she discovered the glass object on the floor after Moore punched her in the forehead. Defendant also argued that she was credible, as she admitted that she was not forthcoming with the police when she spoke to them in Hicks's apartment, and she commented on the State's failure to preserve the recording. In rebuttal, the State contended that defendant was not truthful. In doing so, the State commented that defendant was impeached with what Miller said was in the recorded statement and that defendant told different stories at the apartment, on the recording, in her written statement, and at trial. Elaborating on this point, the State noted that defendant changed accounts of where the glass object was before she threw it at Moore.

¶ 17 The jury found defendant guilty, and she filed a posttrial motion, claiming, among other things, that (1) the court erred in refusing to instruct the jury that it could infer that the recording was detrimental to the State's case and (2) the State failed to prove beyond a reasonable doubt that defendant caused Moore great bodily harm. The trial court denied the motion. In doing so, the court observed that, because nothing indicated that the recording contained exculpatory evidence that the police destroyed in bad faith, the proposed instruction was properly denied. The court also noted that whether Moore sustained great bodily harm was a question for the jury. Given the amount of blood, the fact that stitches were recommended, and the fact that the jury "saw what they saw" when Moore pointed to his forehead indicating the location of the

Instructions, Civil, No. 5.01 (2011) (hereinafter, IPI Civil (2011)).

lacerations, the court concluded that a rational trier of fact could have found that Moore sustained great bodily harm.

¶ 18 This timely appeal followed.

¶ 19 **II. ANALYSIS**

¶ 20 On appeal, defendant argues that (1) the court erred when it declined to instruct the jury that it could infer that the contents of the missing video recording were detrimental to the State and (2) the State failed to prove beyond a reasonable doubt that Moore suffered great bodily harm. We consider each argument in turn.

¶ 21 **A. Jury Instruction**

¶ 22 The first issue we address is whether the jury should have been given the instruction that it could infer that the contents of the missing recording were detrimental to the State. “Whenever applicable, an Illinois Pattern Jury Instruction (IPI) should be used whenever it accurately states the law.” *People v. Danielly*, 274 Ill. App. 3d 358, 367 (1995). This does not mean, however, that a seemingly relevant civil jury instruction should be given in a criminal case. See *People v. Cloutier*, 156 Ill. 2d 483, 509 (1993). Rather, the trial court has discretion to determine which instructions to give the jury, and that determination will not be disturbed absent an abuse of discretion. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002). “The standard for deciding whether a trial court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles.” *Id.* at 273-74.

¶ 23 The mere fact that the State was unable to tender evidence to the defendant does not mean that the defendant is entitled to an instruction that the jury may infer that the missing evidence was detrimental to the State. *People v. Montgomery*, 2018 IL App (2d) 160541, ¶ 20.

Rather, as the “Notes on Use” to IPI Civil (2011) No. 5.01 make clear, “the trial court must first determine that in all likelihood a party would have produced [evidence] under the existing facts and circumstances except for the fact that [the evidence] would be unfavorable.” Although this comment does not specifically indicate that the party seeking the instruction must establish bad faith on the part of his opponent, the United States Supreme Court has held that bad faith is required when a defendant claims that he was denied due process when the State failed to preserve potentially useful evidence. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). In our view, if a showing of bad faith is required when a defendant asserts a violation of his constitutional rights, it most certainly would be required in cases like this one, where the defendant is not asserting the violation of such a bedrock right. Moreover, we note that such an instruction is “not warranted when the unproduced [evidence] would be merely cumulative.” IPI Civil (2011) No. 5.01, Notes on Use.

¶ 24 Here, the police explained that recordings must be “pulled” so that they do not get recorded over. Although the recording of defendant’s interrogation was not pulled, nothing indicated that this was because the recording was unfavorable to the State. Rather, the only evidence presented on this issue indicated that the recording was not pulled because of some mistake. While the State should be cautioned not to allow this to happen in the future, we cannot conclude that the State’s inadvertence established some nefarious motive to avoid presenting unfavorable evidence. Moreover, the evidence indicated that the recording was cumulative of other evidence presented. That is, defendant testified that her written statement was the “same” as the recording, and her testimony was consistent with her written statement on the material facts.

¶ 25 Citing *Danielly*, defendant contends that she was automatically entitled to the instruction she proposed. We disagree. Not only is *Danielly* of questionable validity given our recent decision in *Montgomery*, but *Danielly* concerned the destruction of the victim's underwear, the condition of which was relevant in determining whether the defendant committed aggravated criminal sexual assault. See *Danielly*, 274 Ill. App. 3d at 360, 362. Here, defendant never suggested that the recording showed something different from what she asserted in her written statement and testified at trial. See *Montgomery*, 2018 IL App (2d) 160541, ¶ 21. Indeed, on appeal, she merely speculates that the recording “may have contained exculpatory evidence” and that certain parts of the recording “might have differed from the written statement.”

¶ 26 Defendant claims that the recording would have been beneficial given two contradictions in the evidence. Those contradictions concerned where the glass object was located before defendant hit Moore with it and whether defendant threw the glass object at Moore. More specifically, defendant indicated that the glass object was in Anderson's apartment, whereas Miller stated that defendant told him that the glass object was located in the hallway outside of the apartment, and defendant allegedly asserted that she threw the glass object at Moore, while Miller testified that defendant specifically said that she hit Moore in the head with the glass object. We find neither of these inconsistencies material. Defendant's theory at trial was that she threw the glass object at Moore in defense of herself and Hicks. In her written statement, she asserted that she “chucked” the glass object at Moore, and she conceded during closing argument that the glass hit him. Thus, the inconsistencies defendant cites are completely immaterial, and even if the instruction had been given, the results of the trial would not have been different. See *Youngblood*, 488 U.S. at 60 (Stevens, J., concurring) (in light of the entire case, “the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have

demonstrated that the defendant was not the assailant suggests that the lost evidence was ‘immaterial.’ ”).

¶ 27 As a final matter, we note that, at oral argument, defendant contended that the State should not have been allowed to go into detail about the contents of the recording when the State was unable to produce the recording for defendant. Although we agree, and we caution the State not to detail at trial the contents of evidence that it is unable to produce for a defendant, defendant never raised this issue at trial or in her brief. Issues that parties fail to raise in their briefs may not be raised for the first time at oral argument. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); see also *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 143 n. 2 (2006). Accordingly, we find this issue forfeited. See *Schiller*, 221 Ill. 2d at 143 n. 2.

¶ 28 **B. Great Bodily Harm**

¶ 29 The next issue we address is whether the State proved beyond a reasonable doubt that Moore suffered great bodily harm. When a defendant challenges on appeal the sufficiency of the evidence, the relevant inquiry 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A criminal conviction will not be set aside unless the evidence when viewed in the light most favorable to the prosecution is so “unsatisfactory, improbable or implausible” that it creates a reasonable doubt of the defendant’s guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In deciding whether that threshold has been met, we will not substitute our judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009).

¶ 30 To convict defendant of aggravated battery, the State had to prove beyond a reasonable doubt that, in committing a battery, defendant intentionally or knowingly caused great bodily harm or permanent disability or disfigurement. 720 ILCS 5/12-3.05(a)(1) (West 2014). Although “great bodily harm” is not susceptible to a precise legal definition, it requires an injury greater and more serious than a simple battery. *People v. Lopez-Bonilla*, 2011 IL App (2d) 100688, ¶ 13. Bodily harm, for purposes of the simple battery statute, requires “some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent.” *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 29 (quoting *People v. Mays*, 91 Ill. 2d 251, 256 (1982)). This is not to say, however, that lacerations cannot amount to great bodily harm. See *People v. Cisneros*, 2013 IL App (3d) 110851, ¶¶ 16, 18. Rather, “to constitute great bodily harm, lacerations would have to be of a grave and serious character, as opposed to of a minor or trivial character.” *Id.* ¶ 27 (McDade, J., specially concurring). “To conclude that lacerations could never be great bodily harm would define the element as a matter of law, when instead it is a question of fact.” *Id.*; see also *Lopez-Bonilla*, 2011 IL App (2d) 100688, ¶¶ 13-14.

¶ 31 Viewed in the light most favorable to the State, we find that the evidence established Moore suffered great bodily harm. Specifically, the evidence established that Moore’s forehead was cut in four places and that these wounds were “deep.” Moore’s injuries caused him to bleed all over himself in addition to the floors and walls in the apartment. In an attempt to stop the bleeding, Moore placed towels on his forehead, which quickly became blood-soaked. At trial, the court commented that the jury saw Moore point to his injuries, and the jury determined that those injuries constituted great bodily harm. The court, which also saw those injuries, could not conclude that that finding was erroneous.

¶ 32 Defendant argues that, because Moore did not sustain a combination of injuries that required immediate medical care, it cannot be said that she caused Moore great bodily harm. We disagree. In *Cisneros*, a similar number and gravity of lacerations was found sufficient to establish great bodily harm. *Cisneros*, 2013 IL App (3d) 110851, ¶ 13 (five lacerations on different parts of the body caused excessive bleeding, but stitches were required for only two of the wounds). Although the victim in *Cisneros* required stitches and defendant avoided that, that fact does not mandate a conclusion that Moore’s injuries did not amount to great bodily harm. But for the fact that Moore pushed the doctor to glue his cuts, which the doctor was skeptical about doing, Moore would have had stitches like the victim in *Cisneros*. And more importantly, this court has determined that “[w]hat the victim did to treat the injuries is irrelevant” in determining whether the victim suffered great bodily harm. *Lopez-Bonilla*, 2011 IL App (2d) 100688, ¶ 13.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State’s request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 35 Affirmed.