2018 IL App (1st) 160147-U

No. 1-16-0147

Order filed May 4, 2018

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JEROME McINTOSH, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 14 CR 60131 Honorable James Michael Obbish, Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's conviction for aggravated domestic battery over his contention that the State failed to prove he knowingly caused great bodily harm to the victim. We vacate the improperly-assessed DNA fee.

¶ 2 Following a bench trial, defendant Jerome McIntosh was found guilty of armed robbery with a dangerous weapon (720 ILCS 5/18-2(a)(1) (West 2014)) and aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2014)) and sentenced to two concurrent six-year terms of

imprisonment. On appeal, he argues his aggravated domestic battery conviction should be reversed or, in the alternative, reduced to the lesser offense of reckless conduct, because the State failed to prove he knowingly caused great bodily harm to the victim. He further argues the DNA fee was improperly assessed and should be vacated. We affirm and vacate the DNA fee.

¶ 3 Defendant was charged with two counts of aggravated vehicular hijacking, two counts of aggravated domestic battery, one count of armed robbery with a dangerous weapon, and one count of domestic battery stemming from events on November 8, 2014 in Chicago. At trial, the following evidence was presented.

¶ 4 Gladystine Butler, defendant's 77-year-old grandmother, testified that, on November 7, 2014, she was at home with defendant, who was living with her. Butler owned a 2011 Chevy Malibu, which was parked in a driveway near her house. In the evening, defendant entered her bedroom and asked her to drive him somewhere. Butler told defendant that he could use her car and that the keys were on top of her dresser. When defendant entered the bedroom, he was holding a "little small pen knife," which had a "tiny blade." Butler testified that defendant was going out on the streets and needed the knife for protection. Before defendant left the bedroom, Butler tried to take the knife from him by grabbing it with her hand. Her hand touched the blade, causing her fingers to start bleeding.

¶ 5 Defendant left the bedroom with the keys. Butler later realized he took the car. She wrapped up her fingers to stop the bleeding and called the police. She later sought medical help and received seven stitches in one finger and eight in another.

¶ 6 At 10:50 p.m. on November 9, Butler spoke with Chicago police detectives Williams and Thomas and Assistant State's Attorney Erika Gilliam-Booker at the police station and gave a statement. Butler testified that, while giving this statement, she was "confused." She identified

a typewritten statement containing her signature, and "guessed" it was the statement she gave but was "not sure" whether it was in the same or substantially same condition when she made corrections and signed it. She also identified a photograph of herself holding the statement.

¶ 7 Butler testified that she did remember telling the detectives and the assistant state's attorney that defendant demanded her car keys and denied telling them she was not sure what defendant would do with the knife. She further denied being afraid when she saw defendant holding the knife. She did not remember saying that she and defendant began to tussle, causing her to fall on the floor, but did recall saying that defendant smelled of alcohol and that she said she would not drive him anywhere.

¶ 8 On cross-examination, Butler explained that, when she gave the statement, it was "a pretty stressful time" and that she was confused. She acknowledged that, while she may have said certain things in her statement, they were not necessarily accurate. She testified that she was certain defendant never threatened her with the knife, pointed the knife at her, demanded her car, swung the knife at her, or tried to cut her with the knife. Butler testified that she called the police because she and defendant had a "[f]amily misunderstanding" regarding defendant's drinking.

¶ 9 The parties stipulated that Gilliam-Booker would testify that she took a statement from Butler at 10 p.m. on November 9 in the presence of Chicago police detectives Williams and Thomas. Butler stated that she was treated well, was not under the influence of drugs or alcohol, and no promises or threats were made in order to compel her statement. Gilliam-Booker typed a written statement based on their conversation. Butler read the statement, signed each page, and made corrections.

¶ 10 The State introduced Butler's typewritten statement into evidence as a prior inconsistent statement. According to the statement, defendant came home around 11 p.m. on November 7,

2014 and spoke with Butler before he went to his apartment in the basement. At some point in the early morning hours, defendant walked into her bedroom and asked her to drive him somewhere. Defendant had been drinking and smelled of beer. Butler refused to drive him, and realized defendant was holding a kitchen knife at his side. Defendant then demanded Butler's car keys as he was standing over her. When Butler saw the knife, she was afraid and did not know what defendant was going to do with it. She grabbed the knife because she was afraid.

¶ 11 Butler and defendant then began to "tussle," which resulted in her falling to the floor. During the tussle and after Butler fell, defendant was leaning over her. Butler realized that her fingers were bleeding and told defendant to take the keys. Defendant took the keys and left the house, and Butler called the police. She refused medical transportation by ambulance and instead had her friend drive her to the hospital. Butler had cuts to two fingers and received eight stitches on one finger and seven stitches on the other.

¶ 12 The court granted defendant's motion for a directed finding with respect to the vehicular hijacking counts, one count of aggravated domestic battery, and the domestic battery count. Defendant then entered a stipulation that Officer Theresa Nazario would testify that, on November 8 at 11:20 p.m., Butler told her that she gave defendant the keys to the car but defendant had not returned with it. Butler told Nazario she is the titleholder of the car and it has never been stolen.

¶ 13 The circuit court found defendant guilty of armed robbery with a dangerous weapon and one count of aggravated domestic battery. It noted that Butler was "detailed and specific" in her prior statement and there was no indication she was confused. The court explained that "[defendant] showed up in the bedroom armed with a kitchen knife," and demanded Butler's car

keys. When Butler refused, "defendant couldn't accept that" and "ended up causing her to have either somewhere between 13 to 15 stitches in her hand."

¶ 14 After denying defendant's written motion for a new trial, the court sentenced him to two concurrent terms of six years' imprisonment. The court also stated: "[c]redit for 380 days time served, fees and costs, DNA ordered, writ will not be extended." Defendant did not file a written motion to reconsider sentence, but he did file a timely notice of appeal.

¶ 15 On appeal, defendant does not challenge his conviction for armed robbery with a dangerous weapon. Rather, he argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of aggravated domestic battery, because the State failed to prove that he knowingly caused great bodily harm to Butler. He asks us to reverse this conviction outright or reduce it to the lesser-included offense of reckless conduct.

¶ 16 When reviewing the sufficiency of the evidence, we determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Hardman*, 2017 IL 121453, ¶ 37. A reviewing court will not substitute its own judgment for the trier of fact on issues of the weight of the evidence or the credibility of witnesses. *People v. Moore*, 2016 IL App (1st) 133814, ¶ 54. In a bench trial, the trial judge, as the trier of fact, has the duty of determining the credibility of witnesses, weighing the evidence and any inferences derived, and resolving any conflicts in the evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 39. We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it justifies a reasonable doubt of a defendant's guilt. *People v. Gray*, 2017 IL 120958, ¶ 35.

¶ 17 As charged here, in order to sustain the conviction for aggravated domestic battery, the State must prove that defendant, while committing a domestic battery, knowingly caused great bodily harm to Butler. See 720 ILCS 5/12-3.3(a) (West 2014). A person commits domestic battery when he knowingly causes bodily harm to any family or household member. 720 ILCS 5/12-3.2(a)(1) (West 2014). Here, defendant only challenges the evidence that he knowingly caused great bodily harm to Butler. He asserts that his conduct, at most, shows that he acted recklessly.

¶ 18 A person acts knowingly if he "is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2014); *People v. Steele*, 2014 IL App (1st) 121452, ¶ 23. On the other hand, a person acts recklessly if he "consciously disregards a substantial and unjustifiable risk that *** a result will follow." 720 ILCS 5/4-6 (West 2014); *People v. Lattimore,* 2011 IL App (1st) 093238, ¶ 43. "Recklessness is a less-culpable mental state than knowledge, and evidence of recklessness is insufficient to prove that a person acted knowingly." (Internal quotation marks omitted) *Lattimore*, 2011 IL App (1st) 093328, ¶ 43. Further, "[w]hether a person acted knowingly with respect to bodily harm resulting from one's actions is, due to its very nature, often proved by circumstantial evidence, rather than by direct proof." *People v. Hall*, 273 Ill. App. 3d. 838, 842 (1995).

¶ 19 Viewing the evidence in the light most favorable to the State, we cannot say the trial court erred in finding defendant acted knowingly beyond a reasonable doubt. The evidence showed that defendant came into Butler's room wielding a kitchen knife and demanded the keys to Butler's car as he stood over her. Butler grabbed the knife because she was afraid and then began to "tussle" with defendant. During the tussle and after Butler fell to the floor, defendant

was leaning over her. Butler realized that her fingers were bleeding and told defendant to take the keys. Defendant took the keys and left the house.

¶ 20 On this evidence, a rational trier of fact could find defendant was consciously aware his conduct was practically certain to cause great bodily harm. His decision to enter the bedroom while holding the knife and engage Butler in a "tussle" could allow a rational trier of fact to conclude that defendant was consciously aware that tussling while holding a sharp kitchen knife would make it practically certain that he would cause great bodily harm to Butler. The evidence was not so improbable, unsatisfactory, or inconclusive that it justifies a reasonable doubt of a defendant's guilt. *Gray*, 2017 IL 120958, ¶ 35.

¶ 21 While defendant argues his conduct was "foolhardy" and merely shows that he acted recklessly, the court still could have found defendant knowingly caused great bodily harm to Butler. See *Lattimore*, 2011 IL App (1st) 093328, ¶ 35 ("If the evidence presented is 'capable to producing conflicting inferences, it is best left to the trier of fact for proper resolution' " (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995))). We find that a rational trier of fact could have found defendant was consciously aware that his conduct was practically certain to cause great bodily harm to his grandmother.

¶ 22 We find *People v. Roberts*, 265 Ill. App. 3d 400, 403 (1994), *People v. Willis*, 170 Ill App. 3d 638 (1988), *People v. Consago*, 170 Ill. App. 3d 982 (1988), and *People v. Sibley*, 101 Ill. App. 3d 953 (1981), relied upon by defendant for the proposition his conduct was reckless rather than knowing, to be misplaced. In those cases, the question was whether there was some evidence in the record to support a jury instruction on reckless conduct for a lesser-included offense. See *Roberts*, 265 Ill. App. 3d at 403-04; *Willis*, 170 Ill App. 3d at 641-42; *Consago*, 170 Ill. App. 3d at 985-86; *Sibley*, 101 Ill. App. 3d at 955-56. Here, our standard of review is

whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of aggravated domestic battery proven beyond a reasonable doubt. See *Hardman*, 2017 IL 121453, ¶ 37. Accordingly, *Roberts*, *Willis*, *Consago*, and *Sibley* are inapposite.

¶ 23 Defendant further contends the circuit court improperly assessed a $250 DNA fee where he was previously convicted of a felony and had already been assessed this fee. The State asserts that the record is unclear on whether defendant was even assessed the DNA fee but concedes that, if it was, it should be vacated.

¶ 24 The order in the common law record assessing fines and fees does not indicate that the $250 DNA fee was assessed against defendant. However, when imposing sentence the court stated, "[c]redit for 380 days time served, fees and costs, DNA ordered, writ will not be extended." We note that "[a]lthough a written order of the circuit court is evidence of the judgment of the circuit court, the trial judge's oral pronouncement is the judgment of the court." (Internal quotation marks omitted.) *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87; see *People v. Truesdell*, 2017 IL App (3d) 150383, ¶ 15. When the court's oral pronouncement conflicts with its written order, the oral ruling controls. *Carlisle*, 2015 IL App (1st) 131144, ¶ 87; see *Truesdell*, 2017 IL App (3d) 150383, ¶ 15. As the court stated in imposing sentence "fees and costs, DNA ordered," we therefore find the court did impose the $250 DNA fee.

¶ 25 However, defendant did not raise the issue regarding the improper imposition of the $250 DNA fee in the trial court. He asserts that, pursuant to our supreme court's decision in *People v. Caballero*, 228 Ill. 2d 79, 88 (2008), it may be raised for the first time on appeal. Here, because the State fails to argue against defendant's forfeiture of the issue, we will address the merits of

defendant's challenge to this fee. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 ("The rules of waiver also apply to the State, and where, as here, the State fails to argue that defendant has forfeited the issue, it has waived the forfeiture"). We review *de novo* the propriety of a court-ordered fee. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13.

¶ 26 The $250 DNA fee may only be imposed when a defendant is not currently in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Defendant was previously convicted of felony offenses requiring a DNA fee, including in 2014, and we therefore presume this fee has already been imposed. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Accordingly, we vacate this improperly-assessed $250 DNA fee.

¶ 27 We affirm defendant's conviction for aggravated domestic battery over his contention the State failed to prove that he acted knowingly. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we vacate the improperly assessed $250 DNA fee.

¶ 28 Affirmed as modified.