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2012 IL App (3d) 110017-U

Order filed September 25, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois
Plaintiff-Appellee,)	
v.)	Appeal No. 3-11-0017
)	Circuit No. 10-CF-106
TERRY I. BROWN,)	Honorable
Defendant-Appellant.)	James B. Stewart, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* In a case in which the defendant was convicted of unlawful possession of a weapon by a felon, disarming a police officer, aggravated assault, and resisting a police officer, the defendant challenged the sufficiency of the evidence to convict him of the first three offenses. The appellate court rejected these challenges, holding, *inter alia*, that the weed-cutting tool wielded by the defendant constituted a "dangerous weapon" under the statutory scheme that addressed unlawful possession of a weapon by a felon. The defendant also argued on appeal that his convictions for unlawful possession of a weapon by a felon and aggravated assault violated the one-act, one-crime rule. The appellate court agreed and vacated the defendant's less-serious conviction of aggravated assault.
- ¶ 2 The defendant, Terry I. Brown, was convicted of unlawful possession of a weapon by a

felon (720 ILCS 5/24-1.1(a) (West 2010)), disarming a police officer (720 ILCS 5/31-1(a) (West 2010)), aggravated assault (720 ILCS 5/12-2(a)(6) (West 2010)), and resisting a police officer (720 ILCS 5/31-1(a) (West 2010)). He was sentenced to concurrent terms of three years in prison, five years in prison, and 364 days in jail. On appeal, the defendant argues that: (1) the evidence was insufficient to find him guilty of unlawful possession of a weapon by a felon; (2) the evidence was insufficient to find him guilty of disarming a police officer; (3) the evidence was insufficient to find him guilty of aggravated assault; and (4) his convictions for unlawful possession of a weapon by a felon and for aggravated assault violated the one-act, one-crime rule. We affirm in part and vacate in part.

¶ 3

FACTS

¶ 4 On August 16, 2010, the defendant was charged by amended information with the above-listed offenses. The State alleged that the defendant "knowingly held and shook a wooden-handled serrated steel weed whip over his head" while approaching a police officer, that he resisted arrest, and that he attempted to take an officer's weapon.

¶ 5 At the defendant's bench trial, Galesburg police officer James Kubis testified that on March 14, 2010, he responded to a call about a man on a bicycle digging through trash in front of a residence. When Kubis arrived and as he was getting out of his vehicle, the defendant began yelling at him, claiming that he was not doing anything wrong. Kubis tried calming the defendant and asked him for his name, but the defendant began cursing at Kubis. During that confrontation, the defendant began to walk away from Kubis. Kubis told him not to walk away from him, and the defendant responded by saying "you better leave me alone or I'll hurt you" and by walking across the street. Kubis was surprised by the defendant's reaction, as he typically just

tells people who are digging through someone else's trash to move along.

¶ 6 Kubis called for backup as he slowly followed the defendant across the street while keeping a distance. The defendant continued to threaten Kubis and grabbed a tree branch (also referred to as a "stick" at trial). The defendant threatened to hit Kubis with the stick, but he ended up dropping the stick and walked around the back of a house.

¶ 7 Kubis testified that he was not concerned by the defendant wielding a stick, but he became concerned when the defendant picked up what was variously referred to at trial as a "grass reaper" or "weed whip" (hereinafter, the tool). Kubis testified that, at a distance of approximately 10 to 15 yards, the defendant raised the tool above his head with both hands, threatened to hit Kubis with it, and advanced a couple of steps toward Kubis. Kubis, who stated that he felt that he was in danger of being hit, drew his taser and was within effective distance to tase the defendant when officer Jason Paulsgrove pulled up. The defendant dropped the tool and ran away behind some houses. Kubis chased the defendant, who eventually slipped and fell and was apprehended.

¶ 8 The tool was not described through trial testimony, but it was introduced into evidence. It had a wood handle that was approximately 30 inches long and 1¼ inches to 1½ inches in diameter. Two metal arms extended from the end of the handle to an angled blade, which added approximately 6½ inches to the length of the tool. The blade was approximately 14 inches long and 2¼ inches wide, and had 28 small and mostly dull teeth on both of the long edges. The metal parts of the tool were mostly rusted, and the tool weighed approximately 2½ pounds.

¶ 9 Officer Paulsgrove testified that he saw the defendant holding the tool above the defendant's shoulder. Both Paulsgrove and officer Donovan Godsil testified that the defendant

walked to the squad car without incident, but began to resist when they searched him and tried putting him in the car. Paulsgrove felt that the defendant tried to kick the officers, and the defendant was tased after failing to comply with several verbal warnings.

¶ 10 The defendant was taken to the emergency room after complaining of pain. He was taken to a room for x-rays, and he was handcuffed to the hospital bed. The x-ray staff asked Kubis and officer Maurice Johnson to change the handcuffs, though, as they needed the defendant to raise an arm for the x-ray. Kubis stated that the defendant was sitting in a reclined position on the hospital bed, with each hand in separate handcuffs secured to the bed.

¶ 11 Kubis testified that Johnson was on the defendant's right side and reached across to undo the handcuffs on the left side. Johnson was at least within a foot of the defendant, and his weapon was holstered on his right side. As Johnson was raising the defendant's left arm, the defendant started to raise his right hand off his right leg. Kubis stated that Johnson "was close with his duty weapon to the bed so I stood by his side and just kind of watched his -- [the defendant's] hand continued to rise and then one of the x-ray techs grabbed his hand and put it down." Kubis stated that despite the handcuffs, the defendant still had "quite a bit of room" to move and came within about six inches of Johnson's weapon. Kubis also stated that as the x-ray tech slapped the defendant's hand down, the defendant "stated that if [Kubis] hadn't been watching and the x-ray tech hadn't of moved his hands, he would have attempted to grab Mr. -- Officer Johnson's duty weapon and shoot him with it."

¶ 12 Godsil testified largely in line with Kubis's version of the events at the hospital.

¶ 13 Johnson's version of events at the hospital differed in several respects from the other officers. Johnson testified that when he changed the position of the defendant's handcuffs, he

changed the defendant's right hand first, then walked around the back of the bed to the defendant's left side. Johnson also stated that his weapon was secured in a "rocking holster," which meant that "[i]n order to remove [the gun], you would have to push down, push forward and then remove the hand hammer, remove the weapon." Johnson also testified that he was not aware that the defendant reached for his weapon; the other officers and the technician told him after they left the x-ray room. Johnson did confirm that the defendant was making statements that if Johnson were not paying attention, the defendant would have grabbed Johnson's gun.

¶ 14 X-ray technician Leann Graul testified that Johnson was on the defendant's right side when he began to change the handcuff positions. He raised the defendant's left hand first to the top of the bed. Graul testified that she noticed the defendant, whose right hand was still handcuffed to the right side of the bed, reach for Johnson's weapon with his right hand. She believed the defendant's right hand came within three or four inches of Johnson's weapon. She "smacked" him on the hand and told him to stop, at which point the defendant "kind of smirked and giggled."

¶ 15 The defendant testified that Kubis drove around the block three times before he decided to stop. Kubis got out of his car and asked the defendant what he was doing. The defendant said he was not doing anything but looking through the trash. He told Kubis that "he didn't want to be bothered with it," so he started walking across the street away from Kubis. He had picked up a "little short stick" and took it across the street with him. He dropped it when he noticed that Kubis was following him. He ran toward the back of a house and picked up the tool. Kubis was approximately 15 to 20 yards away. He denied raising the tool above his head or taking steps toward Kubis. He claimed that he shook the tool at Kubis and told Kubis to leave him alone. He

claimed he dropped the tool and ran when he noticed another officer draw a taser.

¶ 16 After he was apprehended and taken to the car, he stated that his handcuffs were too tight and he apparently tried adjusting them while the officers were searching his pockets. He testified that he was not given any warnings before he was tased in the ribs: "[the officer] shot a tase and shot in my ribs and I -- as it was shocking me, I'm telling him, man, quit shocking me like that trying [sic] to get off the car, pushing off the car with my feet. And then when he got -- finally got me in the car, you know, he took the Taser off me, I quit." On cross-examination, he claimed that he was tased only because that officer had tased him before in 2007.

¶ 17 The defendant also testified that he never reached for Johnson's weapon at the hospital. He stated that as Johnson was changing the defendant's handcuff positions, he accused Johnson of trying to set him up by putting the weapon on him.

¶ 18 After the trial, the circuit court found the defendant guilty on all four counts. In so finding, the court stated that the defendant was not as credible as the other witnesses. At sentencing, on his unlawful possession of a weapon by a felon conviction, the defendant was sentenced to three years of imprisonment. On his disarming a police officer conviction, the defendant was sentenced to five years of imprisonment. On his resisting a peace officer and aggravated assault convictions, the defendant was sentenced to 364 days in jail. All sentences were to run concurrently. The defendant appealed.

¶ 19 ANALYSIS

¶ 20 The defendant's first argument on appeal is that the evidence was insufficient to find him guilty of unlawful possession of a weapon by a felon. The defendant argues that the "weed whip" is not specifically prohibited by the applicable statutes and does not constitute a "dangerous or

deadly weapon."

¶ 21 When a defendant challenges the sufficiency of the evidence to convict, we view the evidence in the light most favorable to the State and assess whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 22 In relevant part, section 24-1.1(a) of the Criminal Code of 1961 (Code) provides that "[i]t is unlawful for a person to knowingly possess on or about his person *** any weapon prohibited under Section 24-1 of this Act *** if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2010). The weapons prohibited by section 24-1(a)(2) of the Code are: "a dagger, dirk, billy, dangerous knife, razor, stiletto, broken bottle or other piece of glass, stun gun or taser or any other dangerous or deadly weapon or instrument of like character." 720 ILCS 5/24-1(a)(2) (West 2010).

¶ 23 Our supreme court has defined a "dangerous weapon" as including: "(1) objects that are dangerous *per se*, such as loaded guns; (2) objects that are not necessarily dangerous, but were actually used in a dangerous manner during the robbery; and (3) objects that are not necessarily dangerous, but may become dangerous when used in a dangerous manner." *People v. Ross*, 229 Ill. 2d 255, 275 (2008). The defendant initially contends that this definition should be limited to the context in which it appeared in *Ross*—*i.e.*, the armed robbery context—and should not apply to this case. We disagree. The *Ross* court referred to "the common law definition of dangerous weapon" when it set forth the three aforementioned categories of dangerous weapons. *Ross*, 229 Ill. 2d at 275. Moreover, "dangerous weapon" is not defined within the statutory scheme that addresses unlawful possession of a weapon by a felon. 720 ILCS 5/2-0.5 to 22, 24-1, 24-1.1

(West 2010). For these reasons, we will use our supreme court's common law definition as it appears in *Ross*. See *People v. McBride*, 2012 IL App (1st) 100375, ¶ 43.

¶ 24 Whether an object can be classified as a "dangerous weapon" presents a question of fact, unless the object's character permits only one conclusion. *McBride*, 2012 IL App (1st) 100375, ¶ 40. Our review of the record in this case reveals that the evidence supports the circuit court's ruling that the tool constituted a "dangerous weapon." While the tool was not described through trial testimony, it was admitted into evidence, and an examination of it supports a finding that it is an object that is not necessarily dangerous but could become dangerous when used in a dangerous manner. As noted above, the wood handle was approximately 30 inches long and 1¼ inches to 1½ inches in diameter. The blade was attached to the handle by two metal arms, which added another approximately 6½ inches to the length of the tool. The blade, which was approximately 14 inches long and 2¼ inches wide, had 28 small and mostly dull teeth on both of the long edges. The tool's metal parts were mostly rusted, and it weighed approximately 2½ pounds. Trial testimony established that the defendant brandished the tool at Kubis; two officers testified that the defendant raised the tool above his shoulders. The defendant verbally threatened to hit Kubis with the tool and took several steps toward him. While the tool is not dangerous *per se*, the threatening manner in which the defendant brandished the tool indicates that it was used in a dangerous manner. Under these circumstances, we hold that the evidence was sufficient to find the defendant guilty of unlawful possession of a weapon by a felon.

¶ 25 The defendant's second argument on appeal is that the evidence was insufficient to find him guilty of disarming a police officer.

¶ 26 When a defendant challenges the sufficiency of the evidence to convict, we view the

evidence in the light most favorable to the State and assess whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261.

¶ 27 In relevant part, section 31-1a(b) of the Code provides:

"A person who, without the consent of a peace officer *** attempts to take a weapon from a person known to him or her to be a peace officer *** while the peace officer *** is engaged in the performance of his or her official duties or from an area within the peace officer's *** immediate presence is guilty of a Class 2 felony." 720 ILCS 5/31-1a(b) (West 2010).

¶ 28 "A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2010).

¶ 29 In this case, the evidence supports the conclusion that the defendant intended to disarm Johnson and took a substantial step toward the completion of the offense. While the defendant testified that he was merely being set up by Johnson allegedly placing his holstered weapon near the defendant's hand, credible testimony was received that indicated the defendant intended to take Johnson's weapon. Officers Kubis and Godsil both testified that they saw the defendant reach for Johnson's weapon as Johnson was changing the position of the defendant's handcuffs on the hospital bed. X-ray technician Graul also testified that the defendant reached for Johnson's weapon. The defendant still had some freedom to move his hands while handcuffed to the sides of the hospital bed, and came within three to six inches of Johnson's weapon. Graul stopped the defendant's attempt by smacking his hand down and reprimanding his action. While the

defendant denied making any comments, the court found him less credible than the other witnesses who testified that the defendant made comments to the effect that he was going to take Johnson's weapon and shoot him with it. See, e.g., *People v. Kotlarz*, 193 Ill. 2d 272, 298 (holding that a reviewing court will not substitute its judgment for that of the circuit court on matters of witness credibility and evidentiary weight). Thus, not only did the defendant's conduct give rise to an inference that he was attempting to disarm Johnson, he actually expressed his intent. Under these circumstances, it is reasonable to infer that the defendant possessed the intent to disarm Johnson. See, e.g., *People v. Kirchner*, 2012 IL App (2d) 110255, ¶ 17 (holding that intent to commit an offense does not have to be expressed, and can be inferred from the accused's conduct and from the surrounding circumstances).

¶ 30 To prove an attempt, the State must also prove that the defendant took a substantial step toward the completion of an offense. 720 ILCS 5/8-4(a) (West 2010). An accused takes a substantial step when he or she comes within a "dangerous proximity to success in carrying out the intent." *People v. Paluch*, 78 Ill. App. 2d 356, 259 (1966); see also *Kirchner*, 2012 IL App (2d) 110255, ¶ 18. Such a determination requires a court to consider the specific circumstances of the case. *Kirchner*, 2012 IL App (2d) 110255, ¶ 18.

¶ 31 In this case, it is of no consequence that the defendant was handcuffed or that Johnson's weapon was secured in a rocking holster, which requires certain actions to free the weapon. Impossibility is not a defense to an attempt charge (720 ILCS 5/8-4(b) (West 2010)), nor is completion or failure to complete the offense (*People v. McMillan*, 239 Ill. App. 3d 467, 499 (1993)). Given that the defendant was handcuffed to hospital bed rails with two different sets of handcuffs, he still had some freedom to move his hands. The testimony indicated that the

defendant reached for Johnson's weapon and came within three to six inches of it. Any further movement was stopped by Graul smacking the defendant's hand down and verbal reprimand. Under these circumstances, we hold that the evidence supports the conclusion that the defendant took a substantial step toward disarming Johnson. Accordingly, we hold that the evidence was sufficient to find the defendant guilty of disarming a police officer under section 31-1a(b).

¶ 32 The defendant's third argument on appeal is that the evidence was insufficient to find him guilty of aggravated assault.

¶ 33 When a defendant challenges the sufficiency of the evidence to convict, we view the evidence in the light most favorable to the State and assess whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261.

¶ 34 At the time of the offense and in relevant part, section 12-2(a)(6) of the Code provided that an accused committed aggravated assault when he or she knew the individual assaulted to be a peace officer engaged in official duties, and the assault did not involve the discharge of a firearm in the direction of the officer or a vehicle occupied by the officer. 720 ILCS 5/12-2(a)(6) (West 2010).

¶ 35 The only element challenged by the defendant is the assault element itself—that Kubis was not in reasonable apprehension of incurring a battery from the defendant due to the distance between the two at the time the defendant wielded the tool.

¶ 36 Whether an individual was placed in a reasonable apprehension of incurring a battery is judged by an objective standard: "the apprehension must be one which would normally be aroused in the mind of a reasonable person." *In re Interest of C.L.*, 180 Ill. App. 3d 173, 178

(1989) (quoting Prosser and Keeton on Torts § 10, at 44 (W. Page Keeton et al. eds., 5th ed. 1984)). It is not necessary for the victim to testify that he or she feared a battery would occur; "[r]ather, reasonable apprehension may be inferred from the evidence presented at trial, including the conduct of both the victim and the respondent." *In re Gino W.*, 354 Ill. App. 3d 775, 778 (2005).

¶ 37 In this case, the evidence supports the circuit court's finding that the defendant committed aggravated assault. Kubis testified that he was not concerned about the fact that the defendant had a stick in his hand, but became concerned when the defendant later picked up the tool. The defendant raised the tool above his shoulders and verbally threatened Kubis, saying that he would hit Kubis with the tool. He also advanced a few steps toward Kubis, and was approximately 5 to 10 yards away from Kubis. Kubis testified that he in fact feared a battery would occur, and he drew his taser. While the defendant points out on appeal that he testified that he was 10 to 15 yards away from Kubis, the court found the defendant to be less credible, and we will not disturb that finding on review. See, e.g., *Kotlarz*, 193 Ill. 2d at 298 (holding that a reviewing court will not substitute its judgment for that of the circuit court on matters of witness credibility and evidentiary weight). Given the defendant's conduct of brandishing the tool at Kubis, the verbal threats he made, and his advancing several steps toward Kubis, we agree with the circuit court that Kubis was in reasonable apprehension of receiving a battery. Accordingly, we hold that the defendant was properly found guilty of aggravated assault.

¶ 38 The defendant's fourth argument on appeal is that the one-act, one-crime rule prohibits his simultaneous convictions for unlawful possession of a weapon by a felon and aggravated assault. We may review this issue even though it has been forfeited on appeal. *People v. Schmidt*, 405 Ill.

App. 3d 474, 486 (2010).

¶ 39 Whether a defendant's convictions violate the one-act, one-crime rule involve a two-step analysis:

"First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper."

People v. Miller, 238 Ill. 2d 161 165 (2010).

¶ 40 An "act" for the purposes of this analysis is defined as "' any overt or outward manifestation which will support a different offense.'" *People v. Horrell*, 381 Ill. App. 3d 571, 573-74 (2008) (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). We review a defendant's claim that his convictions violated the one-act, one-crime rule under the *de novo* standard.

People v. Mimes, 2011 IL App (1st) 082747, ¶ 45.

¶ 41 In this case, the defendant contends that his unlawful possession of a weapon by a felon and aggravated assault convictions were based on the single act of threatening Kubis with the tool. We agree. The defendant's conviction for aggravated assault was predicated on him using the tool to place Kubis, a peace officer, in a reasonable apprehension of incurring a battery. The defendant's conviction for unlawful possession of a weapon by a felon was predicated on him possessing a dangerous weapon, but the tool was rendered dangerous only through the threatening manner in which he used it, which the State had to prove as an element of the offense. Thus, we hold that the defendant's convictions for unlawful possession of a weapon by a

felon and aggravated assault were predicated on the same act.

¶ 42 When a defendant has been convicted of two offenses based upon the same act, the less serious offense must be vacated. *People v. Ellis*, 401 Ill. App. 3d 727, 729 (2010). The defendant's unlawful possession of a weapon by a felon conviction was a Class 3 felony that carried a sentencing range of 2 to 10 years of imprisonment. 720 ILCS 5/24-1.1(a), (3) (West 2010). The defendant's aggravated assault conviction was a Class A misdemeanor that carried a sentencing range of no more than one year of imprisonment. 720 ILCS 5/12-2(a)(6), (b) (West 2010); 730 ILCS 5/5-4.5-55 (West 2010). Because the defendant's conviction for aggravated assault is the less serious offense, we vacate that conviction. See *People v. Lee*, 213 Ill. 2d 218, 228 (2004) (noting that "[i]t is common sense that the legislature would provide greater punishment for crimes it deems more serious").

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we vacate the defendant's conviction for aggravated assault and affirm the judgment of the circuit court of Knox County in all other respects.

¶ 45 Affirmed in part and vacated in part.