

(count VI); and (7) aggravated battery with a firearm for shooting Alexander (count VII).

¶ 4 The defendant's trial began on June 9, 2008, and the jury returned a verdict on June 13, 2008. The jury found the defendant guilty of three of the charges: armed violence for shooting Foster, aggravated battery with a firearm for shooting Foster, and aggravated battery with a firearm for shooting Alexander. The jury found the defendant not guilty of armed violence with regard to Alexander. A mistrial was declared with regard to count I (first-degree murder of Williams), count II (attempted first-degree murder of Alexander), and count III (attempted first-degree murder of Foster) because the jury was unable to reach a unanimous verdict on these charges.

¶ 5 On August 26, 2008, the trial court sentenced the defendant to 30 years in prison on the armed-violence conviction (victim Foster) and 10 years in prison for the aggravated-battery-with-a-firearm conviction (victim Alexander). The sentence for aggravated battery with a firearm was to be served consecutively to the armed-violence sentence. No sentence was imposed on the aggravated-battery-with-a-firearm conviction committed against Foster because it was based on the same act as the armed-violence conviction.

¶ 6 Thereafter, the defendant appealed his convictions and sentences and this court affirmed. *People v. Perkins*, No. 5-08-0574 (Feb. 23, 2011) (unpublished order pursuant to Illinois Supreme Court Rule 23 (eff. Jan. 1, 2011)).

¶ 7 The State filed a three-count indictment seeking to reprosecute the defendant for the following three charges: first-degree murder of Williams (count I), attempted first-degree murder of Alexander (count II), and attempted first-degree murder of Foster (count III).

¶ 8 On February 8, 2011, the defendant filed a motion to dismiss counts II and III of the indictment on the grounds of double jeopardy. The defendant did not file a motion to dismiss with regard to the first-degree-murder charge. On May 16, 2011, the trial court denied the defendant's motion to dismiss. Specifically, the court concluded that the jurors' inability to

convict or acquit unanimously should not be considered as a silent or implied acquittal on those counts. On June 22, 2011, the defendant filed a motion to reconsider, which was denied by the trial court on August 15, 2011. The defendant appeals.

¶ 9 On appeal, the defendant argues that double jeopardy prevents the State from re-prosecuting him with respect to the attempted-first-degree murder charges. Specifically, the defendant argues that the jury's finding of guilty on the aggravated-battery-with-a-firearm charges operated as an implied acquittal on the charges of attempted first-degree murder because aggravated battery with a firearm is a lesser-included offense of attempted murder and the prosecutions of the crimes were predicated on a single physical act.

¶ 10 The double-jeopardy clauses of the federal and Illinois constitutions provide that no person shall be put in jeopardy twice for the same criminal offenses. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. The double-jeopardy principles protect a defendant from three specific actions: (1) a second prosecution following an acquittal, (2) a second prosecution following a conviction, and (3) multiple punishments for the same offense. *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005). To determine whether a constitutional double-jeopardy violation has occurred, the court employs the "same elements test" originally established in *Blockburger v. United States*, 284 U.S. 299 (1932). *Id.* "Under the *Blockburger* same-elements test, multiple prosecutions are permissible under constitutional principles of double jeopardy if each of the offenses contains at least one element not present in the others." *People v. Gray*, 214 Ill. 2d 1, 6 (2005).

¶ 11 However, before applying the same-elements test, we must first determine whether the prosecutions of the two offenses are predicated on a single physical act. *People v. Sienkiewicz*, 208 Ill. 2d 1, 6 (2003). "[I]f the prosecutions are predicated on different criminal acts, then the prohibition against double jeopardy is not violated." *Id.* However, if the prosecutions are based on a single physical act, the court must apply the *Blockburger*

same-elements test to determine whether one charge is a lesser-included offense of the other.
Id.

¶ 12 Assuming *arguendo* that the defendant's prosecutions for aggravated battery with a firearm and attempted first-degree murder were predicated on the same physical acts, we conclude that the reprosecution of the defendant for the two counts of attempted first-degree murder did not violate double-jeopardy principles under *Blockburger's* same-elements test.

¶ 13 Section 12-4.2 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-4.2(a)(1) (West 2004)) provides that a person commits the offense of aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm causes any injury to another person. Additionally, section 9-1(a)(1) of the Criminal Code (720 ILCS 5/9-1(a)(1) (West 2004)) provides that a person who kills an individual without lawful justification commits first-degree murder if he either intends to kill or do great bodily harm to that individual or another or knows that his actions will cause death to the individual or another. A person commits attempted first-degree murder when he intends to commit first-degree murder and he commits any act which constitutes a substantial step toward the commission of first-degree murder. 720 ILCS 5/8-4(a) (West 2004). The specific intent to kill is an essential element for attempted murder. *People v. Velasco*, 184 Ill. App. 3d 618, 632 (1989).

¶ 14 Comparing aggravated battery with a firearm and attempted first-degree murder, it is apparent that each offense requires proof of an element not required in the other. Aggravated battery with a firearm requires proof that the defendant discharged a firearm and caused an injury, two elements not required to establish attempted first-degree murder. In contrast, attempted first-degree murder requires proof that the defendant had the specific intent to kill and committed a substantial step toward the commission of first-degree murder. Neither element is necessary to prove aggravated battery with a firearm.

¶ 15 Nevertheless, the defendant cites *People v. Brock*, 64 Ill. App. 3d 64 (1978), *People v. Smith*, 59 Ill. App. 3d 480 (1978), *People v. Walker*, 26 Ill. App. 3d 955 (1975), and *People v. Cross*, 84 Ill. App. 3d 868 (1980), in support of his conclusion that aggravated battery with a firearm is a lesser-included offense of attempted murder. In *Cross*, 84 Ill. App. 3d at 872, and *Brock*, 64 Ill. App. 3d at 68, the First District noted that aggravated battery was a lesser-included offense of attempted murder when considering whether the defendants were improperly convicted of both aggravated battery and attempted murder.

¶ 16 Although the court in *Cross*, 84 Ill. App. 3d at 873, noted that aggravated battery was a lesser-included offense of attempted murder, it concluded that the defendant could properly be convicted and sentenced for both because the charges arose from two separate, distinct acts. In contrast, the court in *Brock*, 64 Ill. App. 3d at 68, concluded that the defendant could not be convicted of both offenses because aggravated battery was a lesser-included offense of attempted murder and the aggravated battery arose from the same incident as the attempted murder. Similarly, in *Smith*, 59 Ill. App. 3d at 493, and *Walker*, 26 Ill. App. 3d at 960, the First District vacated the defendants' convictions for aggravated battery because the charges arose out of the same course of conduct as the defendants' charges for attempted murder.

¶ 17 The defendant further argues that a conviction on a lesser-included offense and without a finding as to the greater-included offense operates as an implied acquittal on the greater offense. The defendant cites *People v. Fisher*, 259 Ill. App. 3d 445 (1994), and *People v. Timberson*, 213 Ill. App. 3d 1037 (1991), as support for this argument. In *Fisher*, 259 Ill. App. 3d at 446, the defendant was charged with armed violence, aggravated battery, and attempted first-degree murder. The jury found the defendant guilty of aggravated battery, and a mistrial was declared as to the armed-violence and attempted-first-degree-murder charges. *Id.* The trial court subsequently dismissed the charge of armed violence on the basis that the jury's finding of guilty on the aggravated-battery charge, a lesser-included

offense of armed violence, was tantamount to a not guilty finding on the armed-violence charge. *Id.* On appeal, this court concluded that aggravated battery was a lesser-included offense of armed violence and, therefore, the jury's guilty verdict on aggravated battery was an implied acquittal on the armed-violence charge. *Id.* at 452-53.

¶ 18 In *Timberson*, 213 Ill. App. 3d at 1038-39, the defendant was charged with first-degree murder, and the jury was instructed on first-degree murder and second-degree murder. The jury returned a verdict of guilty on second-degree murder. *Id.* at 1039. The verdict was silent on the charge of first-degree murder. *Id.* After the conviction was reversed on appeal, the defendant was found guilty by a second jury of first-degree murder. *Id.* On appeal, this court concluded that the defendant's conviction for second-degree murder constituted an implied acquittal of first-degree murder and that second-degree murder was a lesser-included offense of first-degree murder. *Id.* at 1040. Therefore, the court determined that the defendant's second trial for first-degree murder violated double-jeopardy principles. *Id.*

¶ 19 First, the Illinois Supreme Court recognized in *People v. Miller*, 238 Ill. 2d 161, 174 (2010), that the *Blockburger* same-elements test should be used to determine whether an offense is a lesser-included offense for double-jeopardy purposes. We note that the four cases (*Brock*, *Smith*, *Walker*, and *Cross*) cited by the defendant to support his conclusion that aggravated battery with a firearm is a lesser-included offense of attempted murder do not apply the *Blockburger* same-elements test or involve a double-jeopardy issue.

¶ 20 *Fisher* stands for the proposition that a conviction for a lesser-included offense is an implied acquittal for the greater offense. Additionally, we note that the *Timberson* court recognized that second-degree murder was a lesser-included offense of first-degree murder. However, in the present case, applying the *Blockburger* same-elements test reveals that aggravated battery with a firearm is *not* a lesser-included offense of attempted first-degree murder for double-jeopardy purposes. Therefore, the defendant's arguments are

unpersuasive. Accordingly, we find that the defendant may be retried on the attempted-first-degree-murder charges without violating double-jeopardy principles.

¶ 21 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 22 Affirmed.