

No. 1-11-0463

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 10132
)	
LARRY WOHLGEMUTH,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Trial court did not err in barring irrelevant evidence and any error was harmless, and one-act, one-crime doctrine was not violated where evidence of separate acts supported defendant's respective convictions for forgery and theft.

¶ 2 Defendant, Larry Wohlgemuth, was found guilty of forgery and theft following a bench trial and was sentenced to two concurrent sentences of 4½ years in prison. On appeal, defendant contends: (1) the trial court erred when it prevented him from eliciting certain testimony from a witness on cross-examination, thereby ruling that the existence of other fraudulent checks was not relevant to defendant's case; and (2) defendant's convictions for forgery and theft violate the one-act, one-crime doctrine and, thus, must be vacated. We affirm.

¶ 3 Defendant was charged with one count of forgery, one count of theft based on obtaining unauthorized control, and one count of theft based on deception. The charges stemmed from an allegation that defendant cashed a forged check in the amount of \$3,5000 on April 24, 2010.

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Defendant waived his right to a jury trial.

¶ 4 During the bench trial, Andrew Pierzchalski testified he was a teller at a currency exchange located at 1556 West 35th Street in Chicago. On April 24, 2010, at around 11:30 a.m., defendant approached Mr. Pierzchalski's window at the currency exchange. Defendant was a regular customer at the currency exchange, and Mr. Pierzchalski had cashed several paychecks for defendant in the past. Defendant produced a check in the amount of \$3,500 from a large United States Postal Service Express Mail envelope. Defendant signed the check and asked Mr. Pierzchalski to cash it for him. Mr. Pierzchalski sought and received permission from his boss to cash the check. As Mr. Pierzchalski prepared to cash the check, defendant explained to him that the check was the result of a settlement related to a motorcycle accident that he had been involved in. Defendant then showed Mr. Pierzchalski a scar on his face. Mr. Pierzchalski cashed the check and gave defendant the cash, minus a service fee. Later, the currency exchange was notified by the bank that the check was an "altered/fictitious item." The bank never paid the currency exchange for the check. Mr. Pierzchalski identified People's exhibit number 1 as the check presented by defendant, which was a check drawn on the account of Husch Blackwell Sanders LLP (Husch Blackwell). This exhibit was later admitted into evidence.

¶ 5 Jenny Brown, a 13-year employee of Husch Blackwell, a law firm, was called as a witness. She testified that part of her duties involved keeping track of checks issued by the firm. Ms. Brown examined People's exhibit number 1 and said that the check appeared to have been issued on April 19, 2010, in the amount of \$3,5000, by Husch Blackwell on an account with Commerce Bank. Ms. Brown confirmed that the check was not issued from the firm noting the check was "similar" to checks issued by the firm, but that the font and writing on the check were somewhat different. Ms. Brown further testified that Husch Blackwell never issued a check to defendant and that defendant was never a client of the firm.

¶ 6 During cross-examination, the following colloquy occurred:

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"DEFENSE COUNSEL: Ms. Brown, in the spring of this year, there had been multiple counterfeit checks issued on Husch Blackwell Sanders' account, correct?

BROWN: Yes.

STATE: Objection.

COURT: What's the relevance that there had been?

DEFENSE COUNSEL: This is just relevant to the fact that other counterfeit checks had been issued on the account and that they were aware of them in this case, Judge.

COURT: Let's assume they were and the company was aware of them. What is the relevance of that?

DEFENSE COUNSEL: This is a forgery case involving a counterfeit check. The fact that *** there's been similar checks issued to individuals all throughout the country goes to show that [defendant] might not in fact have known."

COURT: I mean, I don't think it does. Sustained."

¶ 7 Detective Emmet Welch of the Chicago Police Department testified that on May 3, 2010, he was assigned to the investigation of a forged check that defendant had cashed at a currency exchange and that defendant had contacted him before Detective Welch had received any documentation from the currency exchange. On May 23, 2010, Detective Welch, and his partner, Detective Patricia Walsh, spoke in person with defendant with regard to the circumstances that lead up to defendant cashing the forged check. Detective Welch stated defendant informed him that he believed the check that he had received in the mail was a settlement check from a class action lawsuit for medical complications defendant suffered after being prescribed the drug Heparin while in custody. Defendant showed Detective Welch separate letters he had received from Goldwater & Associates, and Arnold & Itkin. Defendant told Detective Welch he had spent the money he received from the

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check on some pizzas, clothing, and on his children. Defendant claimed that this was not a case of forgery and, if he went to jail, the currency exchange would never be reimbursed for the money.

¶ 8 In addition to the check, the State introduced the following evidence: a United States Postal Service Express Mail envelope addressed to defendant at 3115 South Archer Avenue in Chicago, with the return address of Lee Barnard, 171 West Lake Circle, Sarasota, Florida, and requiring postage-due payment; a two-page letter from the Goldwater Law Firm dated June 3, 2009, addressed to defendant at 914 North Beverly Lane, Arlington Heights, which verified the Goldwater Law Firm's receipt of defendant's information regarding a "potential claim" resulting from his exposure to Heparin; and a one-page letter from Arnold & Itkin dated January 18, 2010, addressed to defendant at 914 Beverly Lane, Buffalo Grove, Illinois, which mentioned defendant's "potential Heparin claim" and sought additional information from defendant with regard to that claim, with a deadline date of February 1, 2010, sent by paralegal Lorena DiBello.

¶ 9 Defense counsel moved for a judgment of acquittal which the trial court denied after argument.

¶ 10 Lieutenant Robert Kero of the Chicago Police Department testified he was working at the 9th District police station located at 31st and Halsted Streets on a Saturday in April 2010 when defendant walked into the station. Defendant had a large envelope with him. Defendant explained to Lieutenant Kero that he had received a check in the mail from a law firm, whose name he did not recognize, for a lawsuit he had been involved in regarding his reaction to a drug, and that there had been no other accompanying paperwork in the envelope. Defendant said he cashed the check and purchased a big-screen television with the money. Lieutenant Kero suggested to defendant that he should call the law firm on Monday morning to confirm that he was indeed the proper recipient of the check. Lieutenant Kero "half-jokingly" told defendant to be prepared to pay back the money if he was not the proper recipient.

¶ 11 Defendant testified that in 2008, he had received a check for a small settlement from a class

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action lawsuit brought against the Cook County Sheriff's Department. Defendant was also involved in a second potential lawsuit related to the fact that he was given the drug Heparin during a time he was incarcerated and had experienced an adverse reaction to the drug. Between 2008 and 2010, defendant had received correspondence related to the Heparin case from the law firms of Jim Adler & Associates, Goldwater & Associates, and Arnold & Itkin. Defendant was under the impression that he would soon receive a settlement as a result of his correspondence and conversations with these law firms.

¶ 12 Defendant stated that on a Saturday in April 2010, he had received a check from the law firm of Husch Blackwell. Defendant believed that perhaps a different law firm than those with whom he had been corresponding might have issued a payment regarding the Heparin case and, thus, he did not take note of the name of the law firm that was printed on the check. Defendant stated that he cashed the check immediately at the currency exchange and had spent half of the money. Two days later, defendant called Arnold & Itkin, and spoke to a secretary there. Defendant stated that he had thanked the secretary for sending the settlement check for the Heparin lawsuit. The secretary replied that the Heparin case was still pending and had not been resolved. She told him Husch Blackwell had nothing to do with the Heparin suit. Defendant then attempted to reach someone at Husch Blackwell, but was not successful. Defendant claims he left several messages at Husch Blackwell.

¶ 13 Defendant stated that he was concerned, and realized "something was going on." He went to the Chicago Police Department's 9th District station. There, defendant explained to Lieutenant Kero what had happened. Lieutenant Kero suggested defendant should "work it out" with the currency exchange. Defendant then called the currency exchange and offered to set up a payment plan to repay the money. The currency exchange would not accept his offer. Defendant later spoke to Detective Welch and was arrested.

¶ 14 In rebuttal, the parties stipulated to defendant's prior convictions for aggravated battery to a merchant, four felony retail thefts, two forgeries and two felony thefts. The trial court noted the

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convictions were admissible only as to defendant's credibility.

¶ 15 After closing arguments, the trial court noted that intent and knowledge can be proven by circumstantial evidence. The trial court found defendant's version of events and his testimony to be incredible. Further, the trial court said its findings were made without taking defendant's prior multiple felony convictions into consideration. The trial court stated, *inter alia*, that it was "hard to believe" that a law firm would send a check, with no accompanying cover letter, in a United Postal Service Express Mail envelope, without it bearing the name of the law firm on the return address. The trial court noted defendant had initially informed the currency exchange that the check was a settlement from a motorcycle accident, but then later changed his story. The trial court found defendant delivered the check to the currency exchange knowing it was counterfeit. Finally, the trial court noted defendant "did get the money, so you have a theft and a forgery." The trial court found defendant guilty of forgery and theft by unauthorized control, merging the count of theft by deception into that theft count.

¶ 16 On appeal, defendant contends the trial court erroneously prevented him from eliciting from Jenny Brown on cross-examination that multiple counterfeit checks had been issued from the same Husch Blackwell account as the check that he tendered to the currency exchange. Defendant argues that this fact made it more likely he had received the check "accidentally and innocently," and that it was relevant to his state of mind at that time—i.e., whether or not he knew the check was forged and, thus, whether he presented the check to the currency exchange with the intent to defraud.

¶ 17 A defendant has a sixth amendment right to present evidence in his defense. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). However, rulings regarding the admissibility of evidence are within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). Evidence is admissible if it tends to prove or disprove the offense charged, and is relevant in that it tends to make the question of guilt more or less probable. *Id.* A trial court may "reject offered evidence offered on grounds of irrelevancy

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if it has little probative value due to its remoteness, uncertainty, or possible unfair and prejudicial nature.'" *Id.* (quoting *People v. Harvey*, 211 Ill. 2d 368, 392 (2004) (citing *People v. Ward*, 101 Ill. 2d 443, 455 (1984))). An abuse of discretion will be found only " 'where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.'" *Id.* at 133 (quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)).

¶ 18 Further, "when a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.'" *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773 (2002)).

As our supreme court has stated:

"The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper. [Citation.] The failure to make an adequate offer of proof results in a waiver of the issue on appeal. [Citation.]

Where an objection is sustained to the offered testimony of a witness, an adequate offer of proof is made if counsel makes known to the trial court, with particularity, the substance of the witness' anticipated answer. [Citation.] An offer of proof that merely summarizes the witness' testimony in a conclusory manner is inadequate. [Citation.] Neither will the unsupported speculation of counsel as to what the witness would say suffice. [Citation.] Rather, in making the offer of proof, counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony. [Citation.] The offer serves no purpose if it does not demonstrate, both to the trial court and to reviewing courts, the admissibility of the testimony which was foreclosed by the sustained objection." *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992).

¶ 19 Before sustaining the State's objection to defense counsel's question about the alleged checks,

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the trial court inquired as to the relevancy of the evidence sought to be elicited. After defense counsel argued that the evidence was relevant to show defendant "may not have known" the check he presented was forged, the trial court disagreed. Defendant did not make an adequate offer of proof in this case in light of the requirements enunciated by the supreme court. Counsel failed to "explicitly state" what Ms. Brown's testimony in response to defense counsel's questions might be. Nor did the defense counsel ask for leave to conduct a full formal offer of proof in order to ask Ms. Brown about these issues. *Pelo*, 404 Ill. App. 3d at 875 ("The traditional way of making an offer of proof is the 'formal' offer, wherein counsel offers the proposed evidence or testimony by placing a witness on the stand, outside the jury's presence, and asking him questions to elicit with particularity what the witness would testify to if permitted to do so."). At most, the offer of proof contained a conclusory summary of what the subject matter of the *questions* to Ms. Brown would be. Defendant has waived his argument as to this claim of error.

¶ 20 Even if we were to consider the issue, we would find that the trial court did not err in ruling that the cross-examination was irrelevant as to whether defendant was guilty of the charges. A defendant is guilty of forgery if he knowingly delivers any document with intent to defraud. 720 ILCS 5/17-3(a)(2) (West 2010). A defendant is guilty of theft if he knowingly obtains unauthorized control over the property of another. 720 ILCS 5/16-1(a)(1) (West 2010).

¶ 21 Ms. Brown's testimony—that additional forged checks bearing the same account information were in existence at the time defendant cashed his check—was not relevant to the material issue of defendant's state of mind at the time he cashed the check. Even if multiple forged checks did exist, this fact alone would not necessarily tend to show defendant indeed received one of them "accidentally and innocently," as he argues on appeal. Moreover, defendant's state of mind was only relevant at the time he presented the check to the currency exchange, then subsequently departed with the money. We find the trial court's ruling in this regard was not arbitrary, fanciful, or unreasonable.

¶ 22 Even assuming, *arguendo*, that the trial court should have allowed defendant to question Ms. Brown about the other alleged forged checks, any error was harmless. We note first that defendant urges us to apply the elevated harmless beyond a reasonable doubt standard for review of alleged constitutional error discussed in *People v. Patterson*, 217 Ill. 2d 407 (2005). This standard was applied in *Patterson* to alleged confrontation clause violations. *Id.* at 428.

¶ 23 There is no confrontation clause issue here, because defendant had the opportunity to cross-examine Jenny Brown. Defendant instead argues the trial court improperly excluded admissible evidence.

¶ 24 The exclusion of admissible evidence is subject to a harmless-error analysis. *People v. Sipp*, 378 Ill. App. 3d 157, 171 (2007). We will not reverse a conviction based on the exclusion of admissible evidence unless the evidence reasonably could have affected the outcome of the trial. *Id.*

¶ 25 Here, defendant's primary defense was that he was expecting a settlement check from a law firm for a potential lawsuit related to an adverse reaction he suffered from the drug Heparin while in custody. Defendant testified he had believed a settlement would arrive soon, and he had cashed the check when it arrived. Once defendant realized "something was going on," he had testified he attempted to remedy the situation by contacting the currency exchange and the police. The letters defendant offered to police in support of his theory were introduced at trial, though none of the letters mention a forthcoming settlement, or that defendant's claim actually would be part of any lawsuit. In finding defendant guilty, however, the trial court noted, *inter alia*, that defendant's testimony as a whole was "incredible," and stated that it was "hard to believe" any of the law firms involved in an ongoing class action case would send defendant a settlement check, without a cover letter or other relevant materials, in a United States Postal Service Express Mail envelope, or without a return address that references the firm. The trial court also stated that it believed defendant presented the check to the currency exchange fully knowing it was a counterfeit check. The trial court noted that, initially, defendant had told the teller at the currency exchange that the check was

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from a vehicular accident settlement, then told a different story to police. Thus, we find any evidence of the alleged additional forged checks would not reasonably have affected the outcome of defendant's trial, and any error was harmless.

¶ 26 Defendant next contends the one-act, one-crime doctrine requires that we vacate his theft conviction, which defendant argues is "less serious" than the forgery conviction. Specifically, defendant argues his theft and forgery convictions were improperly based on the same physical act of presenting the check to the currency exchange. Defendant concedes that he failed to raise the issue previously, but urges us to review it under the plain-error doctrine.

¶ 27 As defendant correctly argues, "'an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule.'" *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009) (quoting *People v. Harvey*, 211 Ill. 2d 368, 389 (2004)). Thus, we review defendant's claim.

¶ 28 In *People v. King*, 66 Ill. 2d 551 (1977), our supreme court set forth what has since come to be known as the one-act, one-crime doctrine. *Id.* at 566. As originally formulated, that doctrine concerned the potential for prejudice in the imposition of multiple convictions, and specifically provided:

"Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent

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sentences can be entered." *Id.*

As our supreme court has more recently noted:

"Decisions following *King* have explained that the one-act, one-crime doctrine involves a two-step analysis. [Citation.] 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).

Thus, even where "the convictions were based on interrelated acts rather than the same act, we proceed to the second prong [and ask]: are any of the offenses lesser-included offenses?" *People v. Peacock*, 359 Ill. App. 3d 326, 333 (2005).

¶ 29 Turning to that issue, we note that our courts "have identified three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the 'abstract elements' approach; (2) the 'charging instrument' approach; and (3) the 'factual' or 'evidence' adduced at trial approach." *Miller*, 238 Ill. 2d at 166. Nevertheless, in *Miller*, our supreme court has made it clear that in situations—such as the one presented here—where a defendant is *charged* with multiple offenses and the question is whether one of those *charged* offenses is a lesser-included offense of another *charged* offense, courts must apply the "abstract elements" approach. *Id.* at 174-75. As our supreme court has explained, under that approach:

"[A] comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. [Citations.] Although this approach is the most clearly stated and the easiest to apply [citation], it is the strictest approach in the sense that it is formulaic and rigid, and

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considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense.

[Citations.]" *Id.* at 166; see also *People v. Novak*, 163 Ill. 2d 93, 106 (1994).

One-act, one-crime challenges are reviewed *de novo*. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

¶ 30 In the instant cause, we must first determine whether defendant's conduct involved more than one act. Defendant presented the forged check to the currency exchange, then took the money that was given to him as a result of that transaction. Defendant left the currency exchange and subsequently used some of the money to make purchases. As such, we find defendant's exertion of unauthorized control over the money constituted an outward manifestation separate from the presentation of the forged check. Defendant's acts can be viewed as separate acts, but compromised "a series of incidental or closely related acts." *King*, 66 Ill. 2d at 566. Thus, we must proceed with the second step of the one-act, one-crime analysis and determine whether theft is, by definition, a lesser-included offense of forgery, such that multiple convictions are improper. *Miller*, 238 Ill. 2d at 165.

¶ 31 As discussed, a defendant is guilty of forgery if he—with intent to defraud—knowingly delivers any document apparently capable of defrauding another (720 ILCS 5/17-3(a)(2) (West 2010)), and is guilty of theft if he knowingly obtains unauthorized control over the property of another. 720 ILCS 5/16-1(a)(1) (West 2010). The theft charge includes an element of taking unauthorized control of someone's property. This element of taking unauthorized control over property is not present in forgery. Pursuant to the "abstract elements" test, it is both theoretically and practically possible to commit forgery without committing theft. As such, defendant's actions of presenting the forged check and then taking control of the cash are related but do not require a conclusion his convictions violated the principles of the one-act, one-crime doctrine.

¶ 32 Defendant's reliance on *People v. Austin*, 93 Ill. App. 3d 495 (1981), is unpersuasive. In

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Austin, defendant presented a forged check to a bank, but departed without actually receiving and leaving with the money—conduct we found could support either a forgery, or attempted theft by deception conviction—but not both. See *Id.* at 497. Here, as mentioned above, defendant's conduct—presentation of the check and actual taking of the money—supports convictions for both forgery and theft based on two distinct acts, and theft is not a lesser-included offense under the abstract elements test.

¶ 33 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 34 Affirmed.