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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. 10-CF-2870 |
| |) | |
| JEAN M. FAISON, |) | Honorable |
| |) | M. Karen Simpson, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant was properly convicted of aggravated kidnaping in addition to attempted first-degree murder, as the evidence established that defendant moved the victim to her basement not to merely continue beating her but to put her beyond the reach of help; (2) defendant's convictions of attempted murder and armed violence violated the one-act, one-crime rule, as the State treated the underlying acts as a single attack, so we vacated the armed-violence convictions; (3) defendant's lesser conviction of possession without a FOID card vacated because defendant's multiple convictions of unlawful possession of a weapon violated the one-act, one-crime rule; (4) the written sentencing order was corrected to show, in accordance with the court's oral judgment, only one conviction of attempted murder.

¶ 2 Defendant, Jean M. Faison, was convicted of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), two counts of armed violence (720 ILCS 5/33A-2(a) (West 2010)), aggravated kidnaping (720 ILCS 5/10-2(a)(3) (West 2010)), unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), and unlawful possession of a weapon without a firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1) (West 2010)), resulting from the beating of Cher Baez. The trial court sentenced him to an aggregate term of 40 years' imprisonment. Defendant appeals, contending that (1) the aggravated kidnaping conviction must be reversed because the victim's detention was merely incidental to the beating; (2) he was prejudiced by multiple convictions arising from identical conduct; and (3) the written sentencing order must be modified to conform to the court's oral pronouncement. We affirm as modified in part and vacate in part.

¶ 3 We need summarize only briefly the trial evidence. Defendant and Baez occupied adjoining duplexes. Baez knew defendant and his girlfriend, Montserrat "Monsy" Arreola. On November 19, 2010, the three went drinking. They bought some beer and wine and returned to Baez's side of the duplex. At some point, defendant became abusive toward Montserrat, and Baez asked them to leave. Defendant threw Montserrat out of the house. She returned and began attacking Baez.

¶ 4 Montserrat punched Baez in the face and she retaliated. The fight continued until defendant put a shotgun in Baez's face and told her to stop fighting. Baez was eventually pushed down the basement stairs. Montserrat continued the beating in the basement with defendant standing over Baez with the shotgun. After Montserrat cut Baez with a knife, defendant told Montserrat that she had gone too far and that they needed to get Baez out of there. He dragged her upstairs by her hair.

In the living room, he stood Baez against the wall and told her that if she tried to run he would kill her kids. He then took her to the front door, where she noticed that defendant's car trunk was open. She thought they intended to put her in the trunk. Defendant became distracted and Baez ran away. The parties stipulated that defendant had never been issued a FOID card and that he had a prior felony conviction.

¶ 5 The jury found defendant guilty of two counts of attempted first-degree murder, two counts of aggravated kidnaping, two counts of armed violence, two counts of aggravated battery, battery, aggravated unlawful restraint, unlawful possession of a weapon by a felon, and unlawful possession of a weapon without a FOID card. The trial court sentenced defendant to 40 years' imprisonment for attempted murder, 40 years for aggravated kidnaping, 20 years and 15 years for the armed violence convictions, 12 years for unlawful possession of a weapon by a felon, and 8 years for possession of a weapon without a FOID card. The court merged the remaining convictions into those for which defendant was sentenced. The court ordered the sentences to be served concurrently. However, the written sentencing order states that defendant was sentenced on counts I and II, which both charged attempted murder. Defendant timely appeals.

¶ 6 Defendant first contends that his aggravated kidnaping conviction must be reversed because his detention of Baez was merely incidental to the beating. He contends that he and Montserrat took Baez to the basement only to continue the beating, not for the independent reason of secretly confining her.

¶ 7 "Kidnaping occurs when a person knowingly and secretly confines another against his will." *People v. Enoch*, 122 Ill. 2d 176, 194 (1988). As charged here, a kidnapper commits aggravated kidnaping when he or she inflicts great bodily harm or commits another felony on the victim during

the kidnaping. *Id.* at 194-95. Responding to a dissent argument, the *Enoch* majority agreed “that an aggravated kidnaping conviction should not be sustained where the asportation or confinement may constitute only a technical compliance with the statutory definition but is, in reality, incidental to another offense.” *Id.* at 197. However, the majority found that the case before it was not such a case, citing evidence that the defendant confined the victim in her home for approximately 45 minutes in the course of killing her. *Id.*

¶ 8 In *People v. Eycler*, 133 Ill. 2d 173 (1989), the defendant argued, citing *Enoch*, that his kidnaping conviction should be vacated because confining the victim was merely incidental to murdering him. The supreme court disagreed, finding that the evidence supported the conclusion that although the defendant induced the victim to go to the defendant’s apartment “for the supposed purpose of prostitution, defendant had something else in mind: to bind (and most likely gag), torture, and stab his victim before murdering him, in a place where the victim was beyond the reach of anyone who could help him. The confinement necessary to accomplish this cannot be said to be incidental to the crime of murder.” *Id.* at 200.

¶ 9 The appellate court has developed a list of considerations in deciding whether confining the victim is a separate crime or merely incidental to some other purpose, including:

“ ‘(1) [T]he duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.’ ” *People v. Smith*, 91 Ill. App. 3d 523, 529 (1980) (quoting *Government of the Virgin Islands v. Berry*, 604 F.2d 221, 227 (3d Cir. 1979)).

¶ 10 Defendant argues that this case presents the situation envisioned, but not presented, in *Enoch* and *Eyler*, where the confinement was merely incidental to accomplishing some other criminal purpose. He contends that the victim was taken to the basement “to continue a beating, rather than for the distinct purpose of ‘secretly confining’ her.” We disagree.

¶ 11 The short answer to defendant’s argument is that, had he and Montserrat merely wanted to continue the beating, they could have kept the victim where she was. Rather, it is reasonable to conclude that they took her to the basement to make detection and escape more difficult, *i.e.*, to take the victim to “a place where the victim was beyond the reach of anyone who could help” her (*Eyler*, 133 Ill. 2d at 200). In order to prevent the victim from escaping, defendant held a shotgun on her while Montserrat administered the majority of the beating. Even after the three returned to the main floor, defendant continued to threaten the victim to discourage her escape. Thus, her confinement was not merely incidental to the assault.

¶ 12 The First District rejected a similar argument in *People v. Watson*, 342 Ill. App. 3d 1089 (2003). There, where the defendant forcibly removed the victim from her car and took her to his apartment and sexually assaulted her, he argued that the detention and asportation of the victim were “ ‘for the sole purpose of committing’ ” a sexual assault. *Id.* at 1099. The court noted that the defendant did not have to take the victim out of the car in order to sexually assault her. Discussing the third factor listed in *Smith*, whether the detention of the victim was inherent in the offense, the First District interpreted that factor to mean that the detention of the victim was an element of the offense, not merely that it occurred during the commission of another offense, and the court noted that the asportation of the victim was not an element of sexual assault. *Id.*

¶ 13 Other cases have held that the victims' detentions were not merely incidental, and thus supported separate kidnaping convictions. In *People v. Quintana*, 332 Ill. App. 3d 96, 107-08 (2003), the court affirmed the defendants' kidnaping convictions where they held the victim in a van for approximately 10 minutes and a mile and a half while sexually assaulting her. In *People v. Thomas*, 163 Ill. App. 3d 670 (1987), the victim was ordered at gunpoint into a van as part of a robbery attempt. Although she escaped through the back door after the van had traveled half a block, the court held that the detention was sufficient to support an independent kidnaping conviction.

¶ 14 The present case is similar to those in which kidnaping convictions have been upheld. Defendant moved the victim from the main floor to the basement for the apparent purpose of preventing detection or escape. He held the victim at gunpoint while Montserrat continued the beating. Although Baez could not testify precisely how long the detention lasted, she stated that it "seemed like forever." Under the circumstances, the detention was not merely incidental to the other offenses.

¶ 15 Defendant next contends that certain other convictions should be vacated under one-act, one-crime principles. Specifically, he argues that the two armed-violence convictions are based on the same conduct as the attempted murder conviction. We agree.

¶ 16 Absent a clear legislative intent, multiple convictions based on the same physical act are prohibited. In *People v. King*, 66 Ill. 2d 551, 566 (1977), the supreme court explained the rule as follows:

"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 review *de novo* whether a given conviction violates the one-act, one-crime rule. *People v. Johnson*, 368 Ill. App. 3d 1146, 1163 (2006).

¶ 17 Count I of the indictment, charging attempted murder, alleged that defendant, with the intent to kill, “struck and/or stabbed [the victim] about the head and body with a knife and while committing that offense the defendant was armed with a shotgun.” Count III, one of the armed-violence counts, alleged that defendant “knowingly caused great bodily harm to [the victim] in that he kicked and punched [the victim] in the face and body.” Count IV, the other armed-violence count, alleged that defendant “knowingly caused great bodily harm to [the victim] in that he kicked and punched [the victim] in the face and body.” The only difference in the armed-violence counts was the type of weapon: count III alleged that defendant was armed with a shotgun, while count IV alleged that he was armed with a knife.

¶ 18 In *People v. Crespo*, 203 Ill. 2d 335 (2001), the court held that multiple convictions could not stand when the State treated several acts as a single course of conduct. The defendant was charged with multiple offenses as a result of his repeatedly stabbing the victim, but neither the indictment nor the State at trial differentiated between the various acts. Rather, “the intent of the prosecution was to portray defendant’s conduct as a single attack.” *Id.* at 344. Thus, multiple convictions could not stand.

¶ 19 Here, too, although the indictment referred to different types of conduct that the prosecution could have treated as different acts, it chose to treat them as a single course of conduct. In closing argument, the prosecutor told the jury that defendant and Montserrat had performed a substantial step toward killing Baez, in that “they beat her across her entire body, and *** after doing that, they dragged her through the house.” The prosecutor concluded that “this is a substantial step toward” killing Baez. Similarly, the instructions defining the elements of attempted murder and armed violence did not attempt to apportion the various fist strikes, knife wounds, and strikes with the shotgun among the various offenses. These factors evince the prosecution’s intention to treat the entire beating as a single course of conduct, rather than attempting to attribute different acts to different offenses, as *Crespo* requires. Thus, we vacate the armed-violence convictions.

¶ 20 Defendant’s penultimate argument is that he could not be convicted of both unlawful possession of a weapon by a felon and possession of a weapon without a FOID card based on his possession of the shotgun. The State confesses error. We agree with the parties that the possession of a single weapon cannot support convictions of both unlawful possession by a felon and possession without a FOID card. See *People v. Carter*, 213 Ill. 2d 295, 303-04 (2004); *People v. Quinones*, 362 Ill. App. 3d 385, 396-97 (2005). Thus, we vacate defendant’s conviction of possession without a FOID card.

¶ 21 Defendant finally contends that the written sentencing order must be modified to conform to the trial court’s oral pronouncement. While the trial court merged the two attempted-murder convictions, the written order states that defendant was sentenced on both such counts. The State confesses error, and we agree.

¶ 22 A written sentencing order should conform to the court's judgment and this court has the power to correct a written order. *People v. Brown*, 255 Ill. App. 3d 425, 438 (1993); see Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967). The oral pronouncement is the court's judgment and the written order is merely evidence of the judgment. *People v. Williams*, 97 Ill. 2d 252, 310 (1983). As the trial court stated that defendant was convicted of only one count of attempted murder, we modify the written order to eliminate the reference to count II, thus conforming to the judgment.

¶ 23 The judgment of the circuit court of Kane County is affirmed as modified in part and vacated in part.

¶ 24 Affirmed as modified in part and vacated in part.