

No. 1-12-3100

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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. 11 CR 17897
)	
DERRICK MATTHEWS,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's conviction for the uncharged offense of armed robbery committed with a dangerous weapon other than a firearm is vacated because that was not a lesser-included offense of the charged crime. In addition, defendant's aggravated unlawful restraint conviction is vacated because that offense charged defendant with using a firearm. Defendant's offenses are reduced to robbery and unlawful restraint, and the case is remanded for resentencing on those crimes.
- ¶ 2 Defendant Derrick Matthews was charged with violating section 18-2(a)(2) of the armed robbery statute (720 ILCS 5/18-2(a)(2) (West 2010)) by committing the offense of robbery while carrying a firearm. After a bench trial, defendant was convicted of violating section 18-2(a)(1) of

the armed robbery statute by committing robbery while armed with a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2010)). Defendant also was convicted of aggravated unlawful restraint. The trial court imposed respective sentences of 16 years and 10 years, to be served concurrently.

¶ 3 On appeal, defendant contends: (1) he was denied due process of law by being convicted of the uncharged offense of armed robbery with a weapon other than a firearm because that offense was not a lesser-included offense of the charged crime; (2) his aggravated unlawful restraint conviction should be vacated because it violates the one-act, one-crime rule, and his sentence for that offense should be reduced because it exceeded the statutory sentencing range; and (3) several fines and fees imposed against him should be vacated or offset by credit for time he spent in presentence custody. For the reasons that follow, defendant's convictions for armed robbery and aggravated unlawful restraint are reduced to robbery and unlawful restraint, his sentences on the original convictions are vacated, and we remand for resentencing on those offenses. We also reject defendant's one-act, one-crime argument. In addition, three fees and fines imposed against defendant are vacated, and the fines and fees order is corrected to reflect that several charges are offset by credit for time that defendant spent in presentence custody.

¶ 4 Defendant was arrested in connection with the September 28, 2010, robbery of Joseph Kappel near 110 East 18th Street in Chicago. In a two-count complaint, defendant was charged with armed robbery for taking Kappel's property by the use or threat of force while carrying on or about his person or being otherwise armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)). The second count of the complaint charged defendant with aggravated unlawful restraint

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for detaining Kappel while using a deadly weapon, specifically, a firearm (720 ILCS 5/10-3.1(a) (West 2010)).

¶ 5 The following testimony is relevant to the issues raised on appeal. At trial, Kappel testified that at about 10:45 p.m., he was walking to his car alone and was approached by defendant. The following colloquy occurred during the State's questioning of Kappel:

"Q. What happened when the defendant approached you?

A. He pulled out a gun.

Q. Now, when you say a gun –

MR. WILL [assistant public defender]: Objection, your Honor.

THE COURT: Basis.

MR. WILL: Well, first of all, what a gun is I believe calls for a legal conclusion.

He can only describe what he saw.

THE COURT: I think it's something (unintelligible). Over your objection, the objection is overruled. Go ahead, finish your answer. He pulled out a gun.

A. And asked me for my stuff.

MS. HANUS [assistant State's Attorney]: When he asked you for your stuff, do you remember exactly what it is he said to you?

A. He asked me for my wallet [and] cell phone.

Q. Now, you said that the defendant had a gun, is that correct?

A. That's correct.

Q. Can you describe what that gun looked like[?]

A. It was black. I know it was a semi-automatic, not a revolver. And I would say it was four to five inches in length."

¶ 6 Kappel testified that defendant held the gun in his right hand and pointed it at Kappel's waist. Kappel gave defendant his phone and wallet, and defendant asked if he had anything else. Defendant "patted [him] down" by running his hands down the outside of his legs and patting his sweatshirt. Defendant did not take any additional items from Kappel after patting him down.

¶ 7 Defendant ran toward a nearby alley and got into a parked vehicle. Kappel noted the vehicle's license plate number and reported it to police. About a week later, Kappel identified defendant in a police photo array. One year later, Kappel identified defendant in a police lineup.

¶ 8 On cross-examination, Kappel said defendant was holding a semiautomatic weapon. Defense counsel questioned Kappel about his ability to observe defendant.

¶ 9 At the close of the State's case, the court denied the defense motion for a directed verdict, stating:

"I will indicate that I believe that I could not find or would not find that the object was proven to be a firearm in possession of the weapon [*sic*]. While I am denying [the defense motion], I will indicate there is no evidence in that regard that the object held by the *** person committing the armed robbery was a firearm. Granted in part. Denied in part."

¶ 10 The defense presented no witnesses. The court found defendant's guilt was proved beyond a reasonable doubt based on Kappel's testimony and his identification of defendant and the license plate information. The court then stated: "I will enter findings of guilty for [the]

offense of armed robbery and aggravated criminal restraint [*sic*]" and recommended a sentencing date. The following exchange then occurred:

"THE COURT: So I am finding him not guilty on the armed robbery.

MR. WILL [assistant public defender]: So is that a finding of not guilty on the robbery?

THE COURT: No. It's a robbery but not with a gun. It wasn't brandished in a fashion that would make it armed robbery. Armed robbery with an object but not with a firearm."

¶ 11 The court's written order of defendant's conviction stated: "Guilty of armed robbery/no firearm 720 [ILCS] 5/18-2(a)(1)." The mittimus describes defendant's armed robbery conviction as being imposed under that section and also lists a conviction for aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2010)).

¶ 12 At sentencing, the State presented evidence of defendant's criminal background. The court sentenced defendant to 16 years for the Class X felony of armed robbery and to an extended term of 10 years for the Class 3 felony of aggravated unlawful restraint, with those sentences to be served concurrently.

¶ 13 On appeal, defendant contends the trial court erroneously convicted him of the uncharged offense of armed robbery with a dangerous weapon other than a firearm under section 18-2(a)(1). He argues that due process precludes his conviction on an uncharged offense unless it is a lesser-included offense of the charged crime.

¶ 14 Defendant asserts that even though he did not object to his conviction on the uncharged offense, this court can consider the issue either as structural error under the second prong of the

plain error doctrine or as a claim of ineffective assistance of trial counsel. The second prong of plain error implicates errors so serious that they affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Eppinger*, 2013 IL 114121, ¶ 32.

¶ 15 A defendant in a criminal prosecution has a fundamental due process right to notice of the charges brought against him. *People v. Kennebrew*, 2013 IL 113998, ¶ 27. " 'For this reason, a defendant may not be convicted of an offense he has not been charged with committing.' " *Kennebrew*, 2013 IL 113998, ¶ 27 (quoting *People v. Kolton*, 219 Ill. 2d 353, 359-60 (2006)). A defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument. *Kennebrew*, 2013 IL 113998, ¶ 27.

¶ 16 A person commits armed robbery when he or she commits the offense of robbery and carries or is armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1) (West 2010). A person also can commit armed robbery when committing robbery while he or she carries or is armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). Although defendant was charged with armed robbery while carrying a firearm under section 18-2(a)(2), he was convicted of armed robbery without a firearm under section 18-2(a)(1). Therefore, defendant was convicted of an uncharged offense. Moreover, this court has found that the offenses of armed robbery pursuant to section 18-2(a)(1) and section 18-2(a)(2) are "mutually exclusive of each other," and therefore, a violation of section 18-2(a)(1) does not qualify as a lesser-included offense of the other section. *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38 (noting the element of possession of a firearm either is or is not included in each statutory section).

¶ 17 The State asserts defendant's conviction should be affirmed because armed robbery while carrying a weapon other than a firearm is a lesser-included offense of the charged crime of armed robbery while carrying a firearm. The State challenges the reasoning in *Barnett* by asserting that the two versions of armed robbery in the statute somehow can be read together. Therefore, the State contends defendant cannot establish plain error or the ineffectiveness of counsel. The State further contends that any error was invited by the defense's failure to object to the trial court's verdict.

¶ 18 The State's position is illogical because the offense of armed robbery with a "dangerous weapon other than a firearm" cannot be a lesser-included offense of armed robbery with a firearm. The lesser-included offense doctrine does not apply where the two offenses at issue in a particular case involve the same issues of disputed fact. *People v. Meor*, 233 Ill. 2d 465, 471 (2009). Moreover, as defendant points out, the case law relied upon by the State involves the version of the armed robbery statute that was in effect prior to 2000, while *Barnett* addresses the current version that distinguishes between being "armed with a dangerous weapon other than a firearm" and being "armed with a firearm." *Barnett*, 2011 IL App (3d) 090721, ¶ 32.

¶ 19 Here, Kappel testified that defendant had a gun but the court found there was "no evidence" that defendant held a firearm when he approached Kappel and took his personal property. The court convicted defendant of an uncharged offense, namely, committing robbery while armed with a dangerous weapon other than a firearm pursuant to section 18-2(a)(1). Because that uncharged offense was not a lesser-included offense of the charged crime, the trial court erred in convicting defendant under section 18-2(a)(1). That error constituted structural error because a conviction of a crime which was not charged and was not the lesser-included

offense of a charged crime affects the integrity of the judicial process. *People v. McDonald*, 321 Ill. App. 3d 470, 472 (2001).

¶ 20 We also reject the State's contention that defendant invited this error by failing to object to the trial court's finding of guilt of armed robbery with a dangerous weapon when the court issued its decision. The State asserts that defense counsel did not object when the court found him guilty of that offense.

¶ 21 Under the doctrine of invited error, a defendant "may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Put another way, "a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) (noting it would be "manifestly unfair" for a party to benefit upon the "basis of error which that party injected into the proceedings").

¶ 22 In this case, however, defendant did not request any particular course of action, induce the State or the court to make an error, or inject any error into the proceedings. *Cf. People v. Curry*, 2013 IL App (4th) 120724, ¶ 88 (defense counsel answered "yes" when asked if a response should be made to a juror's note, thus precluding defendant from objecting on appeal to the instruction given in reply). Here, defendant's failure to object to the court's decision does not constitute an invitation to error because such a finding would lead to an unworkable standard for invited error. Thus, the State's contention of invited error is rejected. Because we have concluded that defendant and his counsel did not invite the error, we need not consider defendant's alternate contention of his trial counsel's ineffectiveness.

¶ 23 Pursuant to Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967), a reviewing court has the authority to reduce the offense of which a defendant convicted to a lesser offense where the reduced offense is a lesser-included offense of the charged offense. See *Kennebrew*, 2013 IL 113998, ¶ 34 (an uncharged offense is considered a lesser-included offense if each element of the uncharged offense is contained in the indictment or can be reasonably inferred from the indictment allegations). Accordingly, defendant's armed robbery conviction is reduced to robbery (720 ILCS 5/18-1 (West 2010)), defendant's armed robbery sentence is vacated, and this case is remanded for sentencing on the robbery conviction.

¶ 24 Defendant next contends his conviction for aggravated unlawful restraint violates the one-act, one-crime rule because it was based on the same physical act as his armed robbery conviction. He also contends on appeal, and the State concedes, that the 10-year sentence imposed for aggravated unlawful restraint was not authorized by statute because where a defendant has been convicted of offenses of differing classes, an extended-term sentence can only be imposed for the conviction within the most serious class. See *People v. Thompson*, 209 Ill. 2d 19, 23 (2004). Defendant's conviction for armed robbery, a Class X offense, was the conviction in the most serious class in this case.

¶ 25 A person commits the offense of aggravated unlawful restraint when he or she commits unlawful restraint while using a deadly weapon. 720 ILCS 5/10-3.1(a) (West 2010). Unlawful restraint occurs when a person knowingly and without legal authority detains another person. 720 ILCS 5/10-3 (West 2010). Here, the State charged defendant with detaining Kappel knowingly and without legal authority "while using a deadly weapon, to wit: a firearm."

¶ 26 It is for the trier of fact to determine whether the weapon used is a deadly weapon based on the manner of its use and circumstances of the case. *People v. Stanley*, 369 Ill. App. 3d 441, 445-46 (2006). Here, in rejecting the version of armed robbery charged by the State, the court expressly found no evidence was presented that "the object held by the *** person committing the armed robbery was a firearm." The trial court did not specify the basis for its finding of defendant's guilt on the aggravated unlawful restraint count; in fact, the court's order does not mention that offense and only specifies the armed robbery conviction (though both counts are listed in the mittimus). Therefore, the evidence did not establish the use of a firearm and cannot support defendant's conviction for aggravated unlawful restraint, and that conviction is vacated.

¶ 27 As with defendant's armed robbery conviction in this case, pursuant to Supreme Court Rule 615(b)(3), we may reduce defendant's conviction for aggravated unlawful restraint to the lesser-included offense of unlawful restraint. See *Kennebrew*, 2013 IL 113998, ¶ 34. This case is remanded for sentencing on the unlawful restraint conviction. Given that outcome, defendant's challenge to his sentence for aggravated unlawful restraint is moot.

¶ 28 It remains necessary, however, to review defendant's contention that his two convictions, even in their reduced form, were based on the same physical act and thus violate the one-act, one-crime rule. Under that rule, a reviewing court must first determine whether the defendant's conduct involved multiple acts or a single act, because multiple convictions are improper if they are based on precisely the same physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996) (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)).

¶ 29 Defendant contends that the same act of pointing an object at Kappel to force him to hand over his cell phone and wallet was the basis for both of his convictions. He asserts the detention

of Kappel during the robbery also formed the basis of the unlawful restraint charge. The State responds that defendant committed separate acts by first taking Kappel's property and then patting Kappel's clothing.

¶ 30 We agree with the State that defendant engaged in separate acts to support two convictions and that the patting down of Kappel was not part of the robbery. This case is distinguishable from *People v. Lee*, 376 Ill. App. 3d 951, 954 (2007), on which defendant relies. In *Lee*, the victims were a father, mother and their 11-year-old son, and the evidence established that the father handed the defendant money after the defendant approached him from behind and demanded it. *Lee*, 376 Ill. App. 3d at 954. The defendant was convicted of one count of armed robbery and three counts of aggravated unlawful restraint. *Lee*, 376 Ill. App. 3d at 954. On appeal, the State conceded the conviction for aggravated unlawful restraint as to the father should be vacated pursuant to the one-act, one-crime doctrine. *Lee*, 376 Ill. App. 3d at 956-57.

¶ 31 Here, in contrast to *Lee*, defendant demanded and took Kappel's cell phone and wallet and then required Kappel to remain in place while patting him down in search of more valuables. The act of patting down the victim constituted a detention to support the unlawful restraint charge. Therefore, an unlawful restraint conviction does not violate the one-act, one-crime rule.

¶ 32 Defendant's remaining contentions on appeal involve the imposition of various fees and fines. Specifically, defendant contends the \$25 Court Services fee (55 ILCS 5/5-1103 (West 2010)) should not have been imposed because he was not convicted of any of the enumerated offenses in the statute. He also argues two assessments in the amount of \$2 each were improperly imposed in the category of "DUI offenses." In addition, defendant contends that various fees and fines should be offset by the \$5-per-day credit for the time that he spent in

custody prior to his sentencing. Those charges include the \$10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2010)), the \$5 Youth Diversion/Peer Court fine (55 ILS 5/5-1101(e) (West 2010)), the \$5 Drug Court fine (55 ILCS 5/5-1101(f)(2) (West 2010)), the \$30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2010)), and the \$30 Fine to Fund Juvenile Expungement (730 ILCS 5/5-9-1.17(a) (West 2010)).

¶ 33 The State correctly concedes that each of those charges was erroneously entered. On remand, we direct the court to correct the fines and fees order. The \$429 in fines and fees assessed against defendant should be reduced by \$109, for a new total of \$320 in costs imposed against defendant.

¶ 34 In conclusion, we vacate the armed robbery conviction and its attendant sentence of 16 years in prison. We enter a conviction of the lesser-included offense of robbery and remand for sentencing on that offense. We vacate the aggravated unlawful restraint conviction and its attendant sentence of 10 years in prison. We enter a conviction on the lesser-included offense of unlawful restraint and remand for sentencing on that offense. On remand for sentencing, a corrected fines and fees order should be issued in accordance with this decision.

¶ 35 Convictions vacated, new convictions entered, remanded for resentencing and correction of fines and fees order.