

No. 1-13-0079

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 11329
)	
FREDERICK MOORE,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 **Held:** Because armed robbery with a dangerous weapon is not a lesser-included offense of armed robbery with a firearm, defendant's convictions for armed robbery with a dangerous weapon and sentences for that offense are vacated. Convictions are entered on the lesser-included offense of robbery, and the case is remanded for sentencing on those convictions and for the issuance of a corrected mittimus awarding defendant 531 days of sentencing credit.

¶ 2 Following a bench trial, defendant, Frederick Moore, was convicted of two counts of armed robbery with a dangerous weapon other than a firearm. The trial court sentenced him to concurrent eight-year prison terms, awarding him 529 days' credit for presentence incarceration.

Defendant appeals, asserting (1) his convictions were improper because armed robbery with a dangerous weapon other than a firearm was not an included offense of armed robbery with a firearm, and (2) his mittimus should be corrected to reflect 531 days' credit. For the following reasons, we vacate defendant's convictions and sentences for armed robbery with a dangerous weapon, enter judgment on the lesser-included offense of armed robbery, and remand for sentencing on the armed robbery convictions and correction of the mittimus to award defendant 531 days of sentencing credit.

¶ 3 A grand jury indicted defendant with two counts of armed robbery, two counts of aggravated unlawful restraint, and three counts of aggravated battery. The armed robbery indictments were premised on defendant knowingly taking property from Ashaunta Heard-Dawson and Jiel Henderson by the use or threat of force while carrying or otherwise being armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)).

¶ 4 At trial, Jiel Henderson testified that he and Ashaunta Heard-Dawson purchased a bottle of Long Island Iced Tea at a liquor store at 87th and Commercial at around 11 p.m. on June 17, 2011. Henderson had \$162 that evening. Inside the store, Henderson saw a short man wearing braids. After they left the store, Henderson and Heard-Dawson were subsequently mugged by six men at 87th and Exchange. Specifically, the man Henderson saw in the liquor store approached him with a gun and asked for money. He then "rushed" Henderson, and another man with dreadlocks put Henderson in a choke hold. The man with the gun hit Henderson in the ribs and reached into his pocket. Defendant punched Henderson in his chest six or seven times and also went into his pocket.

¶ 5 Henderson eventually passed out and woke up to Heard-Dawson standing over him. Henderson's wallet and hat were gone. Heard-Dawson's purse and bottle of Long Island Iced Tea

were also missing. Heard-Dawson and Henderson flagged down two police officers who were conducting a traffic stop, got into their car, and drove around for approximately three minutes. Eventually, they spotted three of their attackers, including defendant, on the next block. The short man from the liquor store ran away, and police arrested defendant and the other man. Henderson saw his hat on the ground near where police detained the men, and he saw another man who was standing near the group but was not involved in the attack holding Heard-Dawson's Long Island Iced Tea. Henderson sustained "minor" injuries, and he observed Heard-Dawson had a cut on her nose and a swollen face.

¶ 6 Ashaunta Heard-Dawson testified consistently with Henderson, adding that defendant took Henderson's wallet out of his pocket. She also testified that after Henderson passed out, a man who police did not catch took her purse. She chased after the man, but the short guy with braids followed, and the two engaged in physical combat. Eventually, four women approached, at which point the men all ran away.

¶ 7 Chicago police officer Alejandro Cabral testified Henderson and Heard-Dawson approached him and his partner, Officer Czubak, as they were finishing a traffic stop. Henderson and Heard-Dawson got into Cabral and Czubak's unmarked squad car, and the four "proceeded to tour the area" to look for the people who had attacked and robbed Henderson and Heard-Dawson. They eventually spotted three or four men, and Henderson and Heard-Dawson identified defendant as one of their attackers. Cabral arrested defendant. The parties stipulated that during a custodial search of defendant, the officers recovered \$80.

¶ 8 Codefendants Derrell Johnson and Thomas McClain both testified that they participated in the robbery and denied defendant was involved. Nikisha Jones, the mother of defendant's daughter, testified that she was with defendant on her friend April's porch for about a half hour

prior to his arrest. They were talking about their daughter and defendant gave her a "couple of hundred" dollars. Jones said defendant was already on the block when she arrived at April's house at around 10:30 p.m. She did not remember telling Detective Gorman that she picked up defendant around 8 or 9 p.m. at 71st and Indiana and drove him to the place where he was arrested.

¶ 9 Defendant testified and denied any involvement in the robbery and denied ever seeing Henderson or Heard-Dawson before he was arrested that night. He arrived at April's porch about 10 or 15 minutes before Jones arrived. He gave Jones \$250 to \$300 and had \$450 or \$500 leftover. He said he received the money from working at Starlight barbershop, testifying that on "a good day," he earned between \$400 and \$600. The State impeached defendant with prior convictions for possession of a stolen motorcycle, aggravated unlawful use of a weapon, and unlawful use of a firearm by a felon.

¶ 10 Detective Gorman, a Chicago police officer, testified in rebuttal that he interviewed Nikisha Jones, who told Gorman she was with defendant from 8 or 9 p.m. until the time police pulled up. Jones said she picked up defendant at 71st and Indiana and drove him to the location where police later arrested him.

¶ 11 The trial court found that Henderson and Heard-Dawson were credible while "[t]he defense witnesses, quite frankly, were extraordinarily lacking in credibility." However, the court stated as follows:

"The finding though will not be as charged, I don't believe given the status of the evidence here that the fact that a firearm was used has been proven beyond a reasonable doubt. I believe that some type of bludgeoned weapon was exhibited, which perhaps the

complaining witnesses were identifying as a gun, but, certainly, Mr. Henderson was even struck with the bludgeoned [*sic*], or whatever it was, but I don't believe that there's proof beyond a reasonable doubt that that item was, in fact, a firearm."

Defendant's sentencing order lists his convictions as "armed robbery/no firearm" with a citation to section 18-2(a)(1) of the Criminal Code of 1963 (Code) (720 ILCS 5/18-2(a)(1) (West 2010)).

¶ 12 Defendant made no objection to the trial court's findings of guilt on armed robbery with a dangerous weapon and did not include the issue in his post-trial motion. At a November 2012 hearing, the trial court denied defendant's motion for new trial and sentenced him to eight years in prison on each armed robbery count, ordering the sentences to run concurrently. The court awarded defendant 529 days' credit for time spent in presentencing custody. This appeal followed.

¶ 13 On appeal, defendant first asserts his convictions must be reversed because armed robbery with a dangerous weapon other than a firearm is not a lesser-included offense of armed robbery with a firearm. Defendant acknowledges he failed to object when the court found him guilty of armed robbery with a dangerous weapon, but he contends the matter is reviewable under the second prong of the plain-error doctrine. The State responds that counsel invited any error by failing to object to the convictions. In the alternative, the State asserts defendant has failed to establish plain error.

¶ 14 We disagree with the State's contention that defense counsel invited error in this case by failing to object. The doctrine of invited error precludes a party from requesting the court to proceed in one manner and then later arguing on appeal that such a course of action was erroneous. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). However, for the doctrine of invited

error to apply, a defendant must take some type of affirmative action either urging the court or acquiescing in its decision to proceed in a manner later claimed to be improper. See, e.g., *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010) (counsel waived ability to challenge the trial court's response to a jury question because counsel invited the error by assisting in drafting that response). In this case, counsel did not encourage the court to find defendant guilty of armed robbery with a dangerous weapon or take any affirmative steps to acquiesce in the court's finding. To the contrary, counsel merely failed to object. Accordingly, the invited error doctrine does not apply, and we will review defendant's contentions for plain error.

¶ 15 Under the plain-error doctrine, we may consider unpreserved claims of error when a clear or obvious error occurred and either (1) the evidence is so closely balanced the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant bears the burden of persuasion under both prongs of the analysis. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Our first step in plain-error review is to determine whether error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 16 A criminal defendant has a fundamental due process right to notice of the charges against him. *People v. Kolton*, 219 Ill.2d 353, 359 (2006). Accordingly, a defendant may not be convicted of a crime with which he has not been charged. *Id.* However, a defendant can be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence supports a conviction on the lesser-included offense and acquittal on the charged offense. *Id.* at 360. To determine whether an uncharged offense is a lesser-included offense of a charged offense, Illinois courts employ the charging instrument

approach. *People v. Kennebrew*, 2013 IL 113998, ¶ 32. Under this approach, "[a] lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367. Whether an offense is a lesser-included offense of a charged crime is an issue of law we review *de novo*. *Kennebrew*, 2013 IL 113998, ¶ 18.

¶ 17 Defendant was charged with armed robbery under section 18-2(a)(2) of the Code, which provides that a person commits armed robbery when he commits robbery while carrying or being armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). He was convicted of armed robbery under section 18-2(a)(1) of the Code, which specifies that an individual commits armed robbery when he commits robbery and carries or is armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1) (West 2010).

¶ 18 We agree with defendant that his convictions for armed robbery with a dangerous weapon were improper. Directly on point is the decision in *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38, where the court concluded that armed robbery with a dangerous weapon was not an included offense of armed robbery with a firearm. The court reasoned that armed robbery with a dangerous weapon contained the additional element of dangerousness not required by the section pertaining to armed robbery with a firearm, and violations under each section of the armed robbery statute were mutually exclusive of each other. *Id.* ¶¶ 37-38. In other words, where the State charged a person with armed robbery based on using a "dangerous weapon," that weapon could not be a firearm, and where the State charged a person with armed robbery based on using a "firearm," it was not required to prove the firearm was dangerous. *Id.* ¶ 38; see also *People v. Toy*, 407 Ill. App. 3d 272, 291 (2011) (finding the armed robbery statute made clear

that armed robbery with a "dangerous weapon" and armed robbery with a "firearm" were different offenses under different subsections, and section 18-2(a)(1) specifically excluded a firearm from the "dangerous weapon" subsection).

¶ 19 According to the State, the *Barnett* court ignored *Kolton* and erroneously employed the abstract elements approach, finding the two armed robbery provisions were mutually exclusive by focusing "solely" on the fact that armed robbery with a weapon contained "the additional element of dangerousness, not required by section 18-2(a)(2)." *Barnett*, 2011 IL App (3d) 090721, ¶ 37. We disagree. As previously explained, the *Barnett* decision hinged on the court's recognition that under the clear language of the armed robbery statute, where a defendant was charged with armed robbery based on using a "dangerous weapon," that weapon could not be "a firearm." *Id.* ¶ 38 (citing 720 ILCS 5/18-2(a)(1) (West 2010)). Such reasoning comports with the charging instrument approach set forth in *Kolton* of ascertaining whether "any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367. Because here defendant's indictment alleged he committed armed robbery with a firearm and cited section 18-2(a)(2) of the Code, which defines armed robbery as robbery "while possessing a firearm," defendant could not reasonably infer that he faced charges for armed robbery for possessing "a dangerous weapon *other than a firearm*." (Emphasis added). 720 ILCS 5/18-2(a)(1) (West 2010).

¶ 20 We are not persuaded by the State's reliance on *People v. Washington*, 2012 IL 107993. There, the defendant was charged with armed robbery based on a prior version of section 18-2(a), which provided that a person committed armed robbery if, at the time of the offense, he "carried on or about his person or otherwise was armed with a dangerous weapon." *Id.* ¶¶ 6-7. As the *Washington* court noted, the legislature subsequently amended the armed robbery statute to

create substantively distinct offenses based on whether the armed robbery was committed with a dangerous weapon "other than a firearm" or committed with a "firearm." *Id.* ¶ 6. Because the *Washington* decision involved the prior version of the armed robbery statute, it has no bearing on the issue before us. For this same reason, the State's citation to *People v. Skelton*, 83 Ill. 2d 58 (1980), is also unavailing.

¶ 21 Equally unpersuasive is the State's reliance on *People v. Garcia*, 188 Ill. 2d 265 (1999). The issue before the *Garcia* court was whether the trial court erred by *sua sponte* instructing the jury on a lesser-included offense, not whether the offense was, in fact, a lesser-included offense. *Id.* at 269-70. *People v. Ligon*, 365 Ill. App. 3d 109 (2006), also does not aid the State. The question in *Ligon* was whether evidence that the defendant used an unloaded BB gun as a bludgeon supported the defendant's conviction for aggravated vehicular hijacking for carrying a dangerous weapon other than a firearm. *Ligon*, 365 Ill. App. 3d at 115-17. Defendant, however, was charged with armed robbery based on using a firearm. Finally, because the language of the armed robbery statute is unambiguous, we will not consider the State's arguments concerning the legislative history behind the statute's amendment. See *People v. Collins*, 214 Ill. 2d 206, 214 (2005) (Where statutory language is plain and unambiguous, we must apply the statute as written without resort to aids of statutory construction such as legislative history).

¶ 22 In sum, we agree with defendant that armed robbery with a dangerous weapon was not an included offense of armed robbery with a firearm. We turn then to the second portion of our analysis, *i.e.*, whether defendant has satisfied either prong of the plain-error doctrine. Defendant contends only that his claim is reviewable under the second prong. To demonstrate plain error under the second prong, a defendant must show a clear or obvious error occurred and also "that the error was a structural error." *People v. Eppinger*, 2013 IL 114121, ¶ 19. "An error is typically

designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 609. The Supreme Court has found structural errors only in a limited class of cases not applicable here. See *id.* However, a defendant has a fundamental due process right to notice of criminal charges against him. *Kolton*, 219 Ill.2d at 359. Accordingly, our court has found that a conviction for a crime that is not charged and is not a lesser-included offense of a charged crime violates due process and must be reversed under the plain-error doctrine. *People v. McDonald*, 321 Ill. App. 3d 470, 474 (2001). Thus, we find defendant has established plain error occurred when the trial court convicted him of armed robbery with a dangerous weapon.

¶ 23 Having found his convictions were improper, defendant requests we reverse the convictions for armed robbery with a dangerous weapon and enter convictions on the lesser charge of robbery. "Rule 615(b)(3) provides the appellate court with broad authority to reduce the degree of a defendant's conviction, even when the lesser offense is not charged." *Kennebrew*, 2013 IL 113998, ¶ 25. Robbery is an included offense of armed robbery. *People v. Elliott*, 299 Ill. App. 3d 766, 778 (1998). We therefore reduce defendant's convictions from armed robbery to robbery, vacate his armed robbery sentences, and remand the matter to the trial court for sentencing on the robbery convictions.

¶ 24 Defendant next contends his mittimus should be corrected to reflect an award of 531 days' credit rather than 529 days' credit. The State concedes the issue. We accept the State's concession and agree.

¶ 25 A defendant is entitled to credit for each day he spends in custody as a result of the offense for which his sentence was imposed. 730 ILCS 5/5-4.5-100(b) (West 2010) (formerly 730 ILCS 5/5-8-7(b)). This includes the day a defendant is arrested but not the day he is

sentenced. *People v. Perry*, 2011 IL App (1st) 081228, ¶¶ 89-90. The record reflects defendant was arrested on June 17, 2011, and the parties agree he remained in custody until he was sentenced on November 29, 2012, a total of 531 days before the date of sentencing. Accordingly, we direct the trial court to correct the mittimus to reflect an award of 531 days' credit for presentence custody.

¶ 26 For the reasons stated, we vacate defendant's armed robbery convictions and corresponding sentences, enter convictions for the lesser-included offenses of robbery and remand for sentencing on those offenses. We also direct that the new sentencing order reflect an award of 531 days of credit.

¶ 27 Convictions vacated, new convictions entered, remanded for resentencing and correction of mittimus.