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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. 12-CF-1377
)	
BLAKE DURBIN,)	Honorable
)	Allen M. Anderson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* We vacated one of defendant's convictions of stalking, which was based on the same act as his conviction of aggravated domestic battery, but we affirmed the other, which was based on the additional act of transmitting a threat.

¶ 2 Defendant, Blake Durbin, appeals from the judgment of the circuit court of Kane County, contending that his two convictions of stalking must be vacated for violating the one-act, one-crime rule and, alternatively, that one of his stalking convictions must be vacated because the unit of prosecution for the stalking statute does not provide for multiple convictions based on the

same act. Because one of defendant's convictions of stalking violates the one-act, one-crime rule, but the other does not, we vacate one conviction and affirm the other.

¶ 3

I. BACKGROUND

¶ 4 Defendant was indicted on one count of aggravated domestic battery based on strangulation (count I) (720 ILCS 5/12-3.3(a-5) (West 2012)), one count of aggravated battery in a public place based on bodily harm (count II) (720 ILCS 5/12-3(a)(1), 3.05(c) (West 2012)), one count of aggravated battery in a public place based on contact of an insulting or provoking nature (count III) (720 ILCS 5/12-3(a)(2), 3.05(c) (West 2012)), one count of stalking based on causing emotional distress (count IV) (720 ILCS 5/12-7.3(a)(2) (West 2012)), one count of stalking based on transmitting a threat of immediate harm or future bodily harm, confinement, or restraint (count V) (720 ILCS 5/12-7.3(a-3)(1) (West 2012)), one count of domestic battery based on bodily harm (count VI) (720 ILCS 5/12-3.2(a)(1) (West 2012)), and one count of domestic battery based on contact of an insulting of provoking nature (count VII) (720 ILCS 5/12-3.2(a)(2) (West 2012)).

¶ 5 Relevant to this appeal, count I alleged that defendant committed aggravated domestic battery when he "knowingly strangled Trevah [T.]" Count IV alleged that defendant committed stalking when he "knowingly used a device to track the location of Trevah [T.] and/or sought out the location of Trevah [T.] at a local domestic violence shelter and/or appeared in the presence of Trevah [T.] and/or appeared at the home of Trevah [T.] and/or drove by the home of Trevah [T.] and/or approached Trevah [T.] in a public place and/or strangled Trevah [T.] and/or threatened the safety of Trevah [T.] and in doing so, caused Trevah [T.] emotional distress." Count V alleged that defendant committed stalking when he "knowingly used a device to track the location of Trevah [T.] and/or sought out the location of Trevah [T.] at a local domestic violence

shelter and/or appeared in the presence of Trevah [T.] and/or appeared at the home of Trevah [T.] and/or drove by the home of Trevah [T.] and/or approached Trevah [T.] in a public place and/or strangled Trevah [T.] and transmitted a threat of immediate or future bodily harm, confinement, or restraint.”

¶ 6 The following evidence is from defendant’s jury trial. In 2011, Trevah and her three children lived with defendant in Kansas. According to Trevah, defendant physically abused her, and in June 2012 she and her children moved to Elgin to live with a friend, Nicole Ramirez-Lyons. She did not tell defendant where she was moving.

¶ 7 In July 2012, defendant began calling the Ramirez-Lyons residence and leaving voicemail messages for Trevah. On July 9, 2012, defendant pulled up in a car in front of the house. To protect her children, Trevah met with defendant in his car.

¶ 8 Trevah and defendant drove to a nearby store so that defendant could exchange some clothing. While there, defendant became angry and yelled at Trevah. Eventually, he drove her back to the house and parked the car.

¶ 9 They talked for a few minutes, and then Trevah attempted to exit the car. Defendant grabbed her “by the back of [her] neck” with his right hand. Defendant told her that he was going to make her life miserable and that “he [had] a knife and [he was] going to stick her in the ribs.” Trevah told him to “just do it.” Defendant responded by putting his left hand “over [her] esophagus and then he started squeezing.” For a “few moments” Trevah could not breathe. Defendant then released his hold on her neck, and she exited the car and ran into the house. After Ramirez-Lyons gave him gas money and told him not to come back, defendant left.

¶ 10 The next morning, defendant pulled up to the house. Ramirez-Lyons ran outside, and she and defendant swore at each other. Ramirez-Lyons then called the police.

¶ 11 According to Trevah, she was terrified because of defendant's phone calls and voice messages, his coming to the house twice, and the "strangulation, [and] the threat." She believed that he would actually carry out his threat and stab her.

¶ 12 According to Ramirez-Lyons, she spoke to defendant a few times when he called the house, but she never told him where the house was or invited him there. On July 9, 2012, when defendant arrived at her house and began walking up the driveway, Trevah ran out of the house because she did not want defendant coming into the house.

¶ 13 While Trevah was outside with defendant, Ramirez-Lyons fed their children and got them ready to go to a Bible study. After dropping the children off, Ramirez-Lyons returned home. Trevah told her that she and defendant were going for a drive.

¶ 14 Defendant and Trevah returned after a brief time and sat in the parked car. As Ramirez-Lyons looked out the kitchen window, she saw that defendant "had [Trevah] by the throat in the car." When she ran out of the house, defendant let Trevah go. According to Ramirez-Lyons, Trevah was "shaking and crying and panicked" and had "marks on her neck [that] looked like cuts almost."

¶ 15 On July 10, 2012, defendant returned to the house. He pulled into the driveway and was screaming that Ramirez-Lyons could not keep Trevah from him. Ramirez-Lyons called the police, locked the doors, and put the children in the basement. Defendant left.

¶ 16 Officer Zachary McCorkle of the Elgin police department was dispatched to look for defendant. He located him in a nearby city park and arrested him.

¶ 17 After obtaining defendant's consent to search his car, Officer McCorkle found a composition-style notebook. The notebook contained handwritten notes regarding directions and various streets in Elgin. According to Detective Scott St. John of the Elgin police department,

the notebook included the Ramirez-Lyons' telephone number and a notation that stated, "going into the night now, no tracks of her, nothing at any time."

¶ 18 Officer Rick Demierre of the Elgin police department interviewed defendant after his arrest. Defendant told him that after Trevah left Kansas he "pinged her cellular phone to find out where she was at."¹

¶ 19 On July 9, 2012, Maureen Chambers, a receptionist at a community crisis center in Elgin, allowed defendant entry into the crisis center. Defendant told her that he had come from Kansas and that a friend was staying at the crisis center. Although she could not remember the name, defendant provided her with a female's name, and she paged that person. When no one responded to the page, defendant asked her where other area shelters were. She became suspicious at that point and asked defendant to complete a "request for services form." He did so, but he then left without waiting for assistance.

¶ 20 At the close of all the evidence, defendant moved for a directed verdict on all the counts. As to count IV, the State responded that it had introduced evidence of emotional distress, including "[d]riving by her home, appearing in her presence, strangling her [and] grabbing her." As to count V, the State explained that it needed to prove that defendant transmitted a threat. In that regard, the State argued that "in addition to what [it] just argued for emotional distress, [defendant said] when they were in the car that he would stab her with a knife," which was "transmitting a threat of bodily harm at that time." The trial court denied the motion.

¶ 21 The trial court instructed the jury that the elements of a charge of "stalking, transmitting a threat of immediate or future bodily harm" required at least two separate occasions of following

¹ Pinging a cell phone means locating the tower of origin of the last signal that the phone received. See <http://www.ehow.com/electronics>.

or placing Trevah under surveillance and also required the transmission of a threat to Trevah of immediate or future bodily harm. As for the offense of “stalking, emotional distress,” the court instructed the jury that the elements were that defendant engaged in a course of conduct that he knew or should have known would cause Trevah emotional distress and that a reasonable person would suffer emotional distress under the circumstances. The court defined “course of conduct” to include when a defendant, “by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, engages in other non-consensual contact, or interferes with or damages a person’s property or pet.” The court defined “non-consensual contact” as including, but not limited to, being in the physical presence of the victim, appearing within sight of the victim, approaching or confronting the victim, appearing at the workplace or residence of the victim, entering onto or remaining on property occupied by the victim, or placing on or delivering an object to property occupied by the victim.

¶ 22 During closing argument, the State addressed the two counts of stalking. In doing so, the State explained as to count IV that the course of conduct must include “nonconsensual contact” and that in this case that was “obviously the strangulation.” As for count V, the State explained that it had to prove that there was a “threat of immediate or future bodily harm” and that in this case it satisfied that element with Trevah’s testimony that defendant said that he had a knife and would stick her in the ribs. The State argued that that was “enough” to prove the transmission-of-threat element of count V. The State never mentioned strangulation when talking to the jury about count V.

¶ 23 During rebuttal argument, the State, when discussing the evidence regarding count V, stated that on July 9, 2012, defendant, in addition to following and surveilling Trevah, threatened

to stab her. When referring to count IV, the State identified, as part of the nonconsensual contact, the incident “when [defendant] strangled [Trevah].”

¶ 24 The jury found defendant guilty of all counts. Following the denial of defendant’s motion for a new trial, the trial court sentenced defendant to five years’ imprisonment on count I and to three years’ imprisonment each on count IV and count V. The court found that counts II, III, VI, and VII merged with count I. Defendant filed this timely appeal.

¶ 25

II. ANALYSIS

¶ 26 On appeal, defendant raises two issues. He contends that both of his convictions of stalking must be vacated for violating the one-act, one-crime rule, because they were based on the same act, strangling the victim, that was alleged in count I. Alternatively, he argues that one of the two convictions of stalking must be vacated, because the unit of prosecution for the stalking statute does not provide for multiple convictions based on the same act.

¶ 27 The State responds that the conviction on count V was not based on the same act as count I. The State concedes, however, that the conviction on count IV must be vacated, because it was based on the same act (strangulation) as count I. Finally, the State concedes that count IV, assuming that it is not vacated under the one-act, one-crime rule, must be vacated because it involved the same acts (pinging Trevah’s cell phone, looking for her at the crisis center, and driving by her residence) as count V.

¶ 28 We begin with defendant’s concession that he failed to raise the one-act, one-crime violation in the trial court. Notwithstanding such a failure, a reviewing court may consider an argument raised for the first time on appeal if plain error occurred. *People v. Carter*, 213 Ill. 2d 295, 299 (2004). The plain-error doctrine allows a reviewing court to address defects that affect substantial rights if: (1) the evidence is closely balanced; or (2) fundamental fairness so requires.

Carter, 213 Ill. 2d at 299. A violation of the one-act, one-crime rule satisfies the fundamental-fairness prong, because it affects the integrity of the judicial process. *Carter*, 213 Ill. 2d at 299. Therefore, we will address the merits of defendant's one-act, one-crime contention.

¶ 29 The one-act, one-crime rule requires a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, the court must decide whether the defendant's conduct involved multiple acts or a single act. *Miller*, 238 Ill. 2d at 165. Second, if the conduct involved multiple acts, the court must decide whether any of the offenses are lesser included. *Miller*, 238 Ill. 2d at 165. Multiple convictions are improper either if they are based on a single act or, if based on multiple acts, any of the offenses are lesser included. *Miller*, 238 Ill. 2d at 165.

¶ 30 An act is defined as any outward manifestation that will support a separate offense. *People v. Crespo*, 203 Ill. 2d 335, 341 (2001). In order for multiple convictions to stand, a charging instrument must indicate that the State intended to treat the defendant's conduct as multiple acts. *Crespo*, 203 Ill. 2d at 345. Prosecutorial intent, as reflected in the wording of the charging instrument, is a significant factor in deciding whether the defendant's conduct constitutes separate acts capable of multiple convictions. *People v. Pulgar*, 323 Ill. App. 3d 1001, 1011 (2001). Further, the State's theory at trial, which can be shown by its closing argument, is relevant to whether it intended to prosecute a defendant for multiple offenses based on a single act. *Crespo*, 203 Ill. 2d at 344.

¶ 31 When a common act is part of both offenses, or is part of one offense and the only act of another, multiple convictions can stand. *People v. Hagler*, 402 Ill. App. 3d 149, 153 (2010). Sharing a common act does not require that one of the two convictions be vacated, as long as one of the offenses required proof of an additional act. *Hagler*, 402 Ill. App. 3d at 154; *People v. Marston*, 353 Ill. App. 3d 513, 516-19 (2004).

¶ 32 Here, the State concedes that the conviction on count IV must be vacated, because it was based on the same act of strangulation as alleged in count I. That concession is appropriate as count I (aggravated domestic battery) was based exclusively on defendant's act of having "strangled Trevah [T.]" Count IV also relied, in part, on defendant having strangled Trevah. It did so by charging the strangling as one of several alternative acts that were part of the same "course of conduct," which "caused Trevah [T.] emotional distress." The course-of-conduct element was the only one in count IV that required proof of an act. Additionally, during closing argument, the State contended that the nonconsensual contact required by the course-of-conduct element of count IV was "obviously the strangulation." Therefore, because count IV was premised, in part, on the same physical act as count I, and did not require proof of an additional act, the conviction on count IV, as conceded by the State, violated the one-act, one-crime rule. Thus, we vacate the conviction on count IV.

¶ 33 The same cannot be said for count V. Count V set out two separate elements for that offense: following or surveilling and transmitting a threat of harm. See *People v. Bailey*, 167 Ill. 2d 210, 226-27 (1995) (transmission of a threat is a separate element from following/surveilling under the stalking statute). Although count V specified strangulation as one of the alternative acts of the element of following/surveilling, it also included the additional element of transmitting a threat. Indeed, after listing the various alternative acts of stalking, including strangulation, it used the word "and" before the language regarding the transmission of a threat. The structure of count V showed that the State intended to differentiate the various alternative acts of stalking from the distinct additional act of transmitting a threat.²

² The State certainly could have been clearer by expressly specifying the threat to stab Trevah as the threat in count V. It also arguably could have eliminated any reference to

¶ 34 That intent was further reflected in the State’s closing argument. The State explained as to count V that it was required to prove that defendant had committed an act constituting a “threat of immediate or future bodily harm.” It followed that up immediately by arguing that it had done so via Trevah’s testimony that defendant had told her that he had a knife and would stick her in the ribs. Further, it argued that that was “enough” to prove the transmission-of-threat element of count V. Again, in rebuttal, the State, referring to the evidence as to count V, argued that defendant, in addition to following and surveilling Trevah, threatened to stab her. The State did not refer to the strangulation when arguing that it had proved the element of a threat in count V. Clearly, to satisfy the threat-of-harm element of count V, the State exclusively relied on the threat to stab Trevah. Thus, the State’s closing argument demonstrated that it was relying on defendant’s threat to stab Trevah as the sole act for the threat element in count V.

¶ 35 Our conclusion is bolstered by the instructions. The instruction related to the elements of count V did not in any way suggest that defendant could be found guilty of transmitting a threat by the act of strangling Trevah.³ Thus, we need not vacate the conviction on count V.

¶ 36 Because we have vacated the conviction on count IV as being based on the same act as count I, we need not address defendant’s alternative contention that either count IV or count V must be vacated because the unit of prosecution for the stalking statute does not permit multiple strangulation in count V, as that act was arguably insufficient to satisfy the following/surveilling element.

³ Defendant does not contend that stalking, as charged in count V, was a lesser included offense of aggravated domestic battery as charged in count I. Thus, that potential issue is forfeited. See *People v. Evans*, 405 Ill. App. 3d 1005, 1007 (2010) (citing Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)).

convictions based on the same act. Nonetheless, were we to consider that argument, the State concedes that count IV must be vacated on that basis.

¶ 37

III. CONCLUSION

¶ 38 For the reasons stated, we vacate the judgment of the circuit court of Kane County as to defendant's conviction on count IV and otherwise affirm.

¶ 39 Affirmed in part and vacated in part.