2016 IL App (1st) 133324-U

FIFTH DIVISION
August 19, 2016

No. 1-13-3324

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. 12 CR 13522
	)	
DIEGO MARTINEZ,	)	Honorable
	)	Noreen Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm defendant's conviction for aggravated vehicular hijacking over his contention that his trial counsel was ineffective, but remand the matter for a new sentencing hearing on that conviction where the trial court misapprehended the minimum sentence for the offense. We vacate defendant's conviction for armed robbery as he was charged and convicted of an offense that does not exist and merge his conviction for possession of a stolen motor into his conviction for aggravated vehicular hijacking as a lesser-included offense under one-act, one-crime doctrine. Mittimus and fines and fees order corrected.

¶ 2 Following a bench trial, defendant Diego Martinez was convicted of aggravated vehicular hijacking with a firearm and armed robbery with a firearm based on accountability, and possession of a stolen motor vehicle.[1] He was sentenced to 22 years' imprisonment, 21 years' imprisonment and 3 years' imprisonment, respectively, to be served concurrently. On appeal, defendant contends that: (1) his trial counsel was ineffective when, during opening statements, he promised to present evidence to support a theory of defense and then failed to present that evidence at trial; (2) his conviction for armed robbery predicated on taking the victim's vehicle must be vacated as the offense does not exist; (3) his conviction for possession of a stolen motor vehicle must be vacated as a lesser-included offense of aggravated vehicular hijacking under the one-act, one-crime doctrine; and (4) his sentence for aggravated vehicular hijacking must be reduced to 21 years where the trial court was mistaken regarding the minimum sentence for the offense. Defendant also requests additional presentence incarceration credit, and contests his fines and fees order. We affirm defendant's conviction for aggravated vehicular hijacking, but remand the matter for a new sentencing hearing on that conviction, vacate his conviction for armed robbery and merge his conviction for possession of a stolen motor vehicle into his conviction for aggravated vehicular hijacking. We also correct his mittimus, and fines and fees order.

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[1] It is unclear from the record whether the trial court found defendant guilty of possession of a stolen motor vehicle based on accountability or his own possession of the vehicle. The evidence adduced at trial, however, supports a finding under either theory. See *People v. Anderson*, 188 Ill. 2d 384, 390-93 (1999).

¶ 3 The State jointly charged defendant and his codefendant Wayne Mitchell (who is not a party to this appeal) with multiple offenses. The State, however, proceeded to trial against defendant on only three counts: aggravated vehicular hijacking based on taking a motor vehicle while armed with a firearm (Count 1); armed robbery based on taking "a 2001 Chevrolet Malibu" while armed with a firearm (Count 2); and possession of a stolen motor vehicle (Count 8).

¶ 4 At trial, the State waived its opening statement. In defense counsel's opening statement, he stated that the evidence would show defendant was not accountable for the hijacking actions of Mitchell. Counsel asserted that "[t]here is going to be testimony" that defendant did not know Mitchell, had just met him on the day of the offenses, that Mitchell had smoked "wicky sticks, which is marijuana mixed with PCP" and the events in question happened "so abruptly." Counsel posited that "at no time further is there actual actions of the vehicular hijacking." He contended that defendant did not encourage Mitchell's conduct and the situation was one where defendant "just *** doesn't know what to do, doesn't know what's going on."

¶ 5 Charles Deleonardis testified that, at approximately 11 p.m. on June 27, 2012, he had just parked and locked his 2001 Chevrolet Malibu on a street in Cicero. He attached a club to the steering wheel to further secure his vehicle. After Deleonardis had walked only a few steps away from his vehicle, two men "walking together" approached him. The men were 8 to 10 feet away from each other, but Deleonardis did not see them talking as they approached. One of the men had a firearm, pointed it at Deleonardis and asked him, "[d]o you want to die today?" Deleonardis told the men not to hurt him. The men continued to stand 8 to 10 feet away from each other. Although the man without the firearm did not say anything, he was "with" the man

holding the firearm. The man with the firearm demanded Deleonardis' vehicle. Deleonardis manually unlocked the driver's door and opened the vehicle.

¶ 6 Once inside, Deleonardis "was fumbling around" because he was nervous and could not immediately unlock the club attached to the steering wheel. The man with the firearm poked Deleonardis' in the back of the head with the weapon and told him to hurry up. The man without the firearm stood on the driver's side behind Deleonardis eight or nine feet away from the man with the firearm. Deleonardis eventually unlocked the club and exited the vehicle. The man with the firearm entered the driver's seat and told Deleonardis to get into the backseat of the vehicle. The man without the firearm, meanwhile, entered the vehicle's front passenger seat. Deleonardis thought the men "might have said a few words" to one another while they entered the vehicle. As Deleonardis was about to enter the vehicle, a dog came running "out of nowhere" and startled the man with the firearm. He told Deleonardis to shut the door, which Deleonardis did, and the men drove off. The entire ordeal took a "few minutes." Deleonardis called 911 to report the crime.

¶ 7 Deleonardis was unable to identify defendant in court as one of the men "at [his] car that evening," stating "I really can't say. *** It happened so fast. I can't remember." Deleonardis acknowledged the man without the firearm never said anything to him, never touched him, never threatened him and did not have anything in his hands.

¶ 8 Berwyn Police Detective John Hadjioannou testified he was in an unmarked police vehicle when he observed another vehicle coming toward him from behind at a "high rate of speed." Hadjioannou activated his sirens, and the vehicle pulled over three or four blocks later. Hadjioannou approached the driver's side. The driver, whom Hadjioannou identified in court as

Mitchell, could not roll down his window, so he opened the door. Hadjioannou also observed a person in the front passenger seat, whom he identified in court as defendant. After Mitchell exited the vehicle, Hadjioannou smelled alcohol on him. Mitchell told Hadjioannou that he did not have his driver's license, and Hadjioannou instructed him to walk to the rear of the vehicle. Shortly thereafter, Hadjioannou received a radio transmission that the vehicle had just been reported stolen in Cicero. Hadjioannou subsequently detained Mitchell.

¶ 9 Twenty minutes later, Deleonardis and Cicero Police officers arrived at the scene. There, Deleonardis observed Berwyn Police officers taking two men out of his vehicle. The police conducted a showup with both occupants of the vehicle, and they were subsequently turned over to the Cicero police. Neither Deleonardis nor Hadjioannou testified to any identifications made as a result of the showup. In the vehicle, Hadjioannou saw a loaded revolver sticking out under the front passenger seat.

¶ 10 At the conclusion of the State's case, the parties stipulated that no fingerprints suitable for comparison were recovered from the firearm or ammunition.

¶ 11 Defense counsel moved for a directed finding, arguing that Deleonardis could not identify defendant as one of the offenders and, even if the court found a sufficient identification of defendant, the State failed to prove his accountability for the offenses. Counsel asserted that the State's evidence only demonstrated defendant's "mere presence" at the scene of the crimes and not his active participation in them. Additionally, counsel highlighted Mitchell's odor of alcohol, which showed Mitchell might have been under the influence of alcohol. The court denied the motion and granted counsel leave to confer with his client. Defense counsel then

informed the trial court that defendant did not want to testify. Defendant confirmed this was his decision, and no witnesses testified for the defense.

¶ 12 During closing argument, defense counsel argued that defendant and Mitchell were not together, and Mitchell "could have been acting on his own." Counsel stated the evidence only established that defendant entered the vehicle at the end of Mitchell's crimes.

¶ 13 The court found defendant guilty of aggravated vehicular hijacking with a firearm and armed robbery with a firearm based on accountability, and possession of a stolen motor vehicle.[2] The court noted that defendant's "mere presence" at the scene would have been insufficient to convict him, but observed that he entered the vehicle and left the scene with Mitchell "[w]ithout any direction." Additionally, the court found defendant had abundant time to leave the scene during the time Deleonardis removed the club from the steering wheel with Mitchell right by him, but defendant chose to stay. The trial court subsequently denied defendant's motion for a new trial.

¶ 14 Defendant's presentence investigation report revealed he was 19 years old when he committed the offenses, and his criminal background consisted of a conviction for driving while under the influence.

¶ 15 During the sentencing hearing, defense counsel argued, based on defendant's youth and his "very minimal role" in the offenses, that a sentence of 22 years' imprisonment for aggravated vehicular hijacking was appropriate. Counsel asserted this was the minimum sentence allowable

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[2] As noted previously, it is unclear whether the trial court found defendant guilty of possession of a stolen motor vehicle based on accountability or his own possession of the vehicle. A conviction under either theory is amply supported by the evidence given that defendant was found in a vehicle he knew had just been taken from its owner at gunpoint.

for the offense. Counsel also referred to a statement defendant made to the police, which was "somewhat exculpatory" and he argued showed defendant's mindset at the time of the offenses. Counsel stated:

> "[Defendant] was unaware that this was going to actually happen. This was a situation that he just met Mr. Mitchell that night. They were drinking with other people. Mr. Mitchell allegedly had smoked some wicky sticks or what I believe to be marijuana dipped with PCP or some kind of embalming fluid ***. And he just acted out very – surprisingly to [defendant] and [defendant] in his [presentence investigation report] stated he was very scared. He didn't know what to do, and he jumped in the car."

The court questioned counsel about the statement, observing "[y]ou in your opening made that remark, but there was never a statement that was presented." Counsel agreed the statement was not admitted but asked the court to consider the statement in mitigation during sentencing. The court declined.

¶ 16 Prior to sentencing defendant, the court told him that "[t]here are minimums that I have to sentence you to in this matter." After acknowledging defendant's youth, the court stated "[m]y hands are tied. The minimum on the aggravated vehicular hijacking is 22 years because there was a firearm involved. So it's going to be 22 years' [imprisonment]." The court additionally sentenced defendant to 21 years' imprisonment for armed robbery and 3 years' imprisonment for possession of a stolen motor vehicle, both minimum sentences, to be served concurrently. In advising defendant regarding his right to appeal, it told him "what I sentenced you to is the

minimum that I could possibly give you." Defendant did not file a postsentencing motion. This appeal followed.

¶ 17 Defendant first contends his trial counsel was ineffective where he presented a defense theory during opening statements that defendant was not accountable for Mitchell's hijacking of the vehicle and subsequently failed to support the theory at trial with the evidence promised during opening statements. Defendant states counsel "promised" he would present testimony that would show defendant never planned to hijack Deleonardis' vehicle and instead, Mitchell spontaneously decided to commit the offense after smoking marijuana laced with PCP. Defendant asserts this promised testimony could have come from himself, Mitchell or "the people" he and Mitchell were with immediately prior to committing the offenses. Defendant argues this evidence would have supported the defense theory that he did not share Mitchell's criminal intent and was not accountable for Mitchell's actions.

¶ 18 We review claims of ineffective assistance of counsel pursuant to the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Domagala*, 2013 IL 113688, ¶ 36. To succeed, defendant must demonstrate that (1) his counsel's performance was deficient and (2) the deficiency prejudiced him. *Id.* To prove a deficient performance, defendant must demonstrate "that counsel's performance was objectively unreasonable under prevailing professional norms." *Id.* To prove prejudice, defendant must demonstrate that there is a reasonable probability that, but for his counsel's alleged errors, the result of his trial would have been different. *Id.* Both prongs of the *Strickland* test must be met, otherwise the claim fails. *People v. Kirklin*, 2015 IL

App (1st) 131420, ¶ 109. Consequently, if we find defendant was not prejudiced by counsel's alleged errors, we need not address counsel's performance. *Id.*

¶ 19 We find that, had defendant's trial counsel followed through on his assertion during opening statements that he would provide the specified evidence, the result of defendant's trial would not have changed. As relevant here, section 5-2(c) of Criminal Code of 2012 (Code) (720 ILCS 5/5-2(c) (West 2012)) states a defendant may be legally accountable for the conduct of another if "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he *** solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." To prove that a defendant had the intent to promote or facilitate the offense, the State has to present evidence that either (1) the defendant shared the criminal intent of another or (2) there was a common criminal design. *People v. Fernandez*, 2014 IL 115527, ¶ 13.

¶ 20 A defendant's "intent may be inferred from the character of [his] acts as well as the circumstances surrounding the commission of the offense." *People v. Perez*, 189 Ill. 2d 254, 266 (2000). While active participation in the offense is not required, an individual's mere presence at the scene of the crime alone is insufficient evidence to prove accountability. *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 38. Factors indicative of a defendant's accountability include his "approving presence at the scene of the crime," a close affiliation with his companion after the commission of the crime, flight from the scene and failure to report the crime. *Id.*

¶ 21 In finding defendant guilty on a theory of accountability, the trial court relied on two aspects of defendant's conduct. The court initially focused on his failure to disassociate himself

from the crimes while Mitchell was preoccupied with Deleonardis as he unlocked his vehicle and removed the club from the steering wheel. The court also observed defendant entered the vehicle with Mitchell without any demand to do so after the crimes occurred, and they left together. As the trial court found, this evidence demonstrated defendant was not merely present at the scene of a crime. Rather, he was legally accountable for Mitchell's conduct, as defendant's actions after arriving at the vehicle supported the inference he intended to commit the crimes with Mitchell. See *Perez*, 189 Ill. 2d at 266; *Jaimes*, 2014 IL App (2d) 121368, ¶ 38.

¶ 22 Had defense counsel presented the evidence he proffered during opening statements, either through defendant who voluntarily chose not to testify, Mitchell or "the people" defendant and Mitchell allegedly were with immediately prior to the offenses, it would not have changed the evidence the court relied on to find defendant accountable. The evidence previewed during opening statements merely would establish that defendant had just met Mitchell *prior* to committing the offenses, Mitchell had been smoking marijuana laced with PCP and Mitchell spontaneously decided to commit the crimes. None of this evidence affects what happened *after* defendant and Mitchell arrived together at Deleonardis' vehicle.

¶ 23 The proffered evidence would not have changed the fact that defendant walked with Mitchell to Deleonardis' vehicle, did not remove himself from the scene while Deleonardis struggled to remove the club from the steering wheel, voluntarily got into the front passenger seat of Deleonardis' vehicle, and remained in the vehicle when Mitchell sped away. Additionally, it would not have changed the fact that the police found a firearm underneath the front passenger seat where defendant had been sitting shortly after the offense occurred. In light of the foregoing,

even if counsel had presented the evidence he previewed during opening statements, there is no reasonable probability that the result of defendant's trial would have been different. Absent prejudice from counsel's alleged error, defendant's claim of ineffective assistance of counsel fails. See *Kirklin*, 2015 IL App (1st) 131420, ¶ 109.

¶ 24 Defendant's analogy to *People v. Bryant*, 391 Ill. App. 3d 228 (2009) is unpersuasive. In *Bryant*, a jury found codefendants, a husband and wife, guilty of murdering a drug dealer. *Id.* at 229. They were represented by the same defense counsel, who asserted during opening statements that his clients were sleeping during the time the offenses were committed and thus could not have participated in the victim's murder. *Id.* at 230. Counsel stated " '[m]y clients will testify in this trial, make no bones about it. We know you want to hear it from their mouths.' " *Id.* At trial, the codefendants did not testify, and counsel failed to present any other evidence that they were asleep when the murder occurred or otherwise did not participate. *Id.* at 235. On review, the appellate court found defendants' counsel was ineffective, concluding the codefendants were prejudiced "[g]iven the import of the testimony that counsel promised to present but failed to deliver." *Id.* at 242. In *Bryant*, the purported evidence would have directly contradicted the very evidence relied upon by the jury in convicting the defendants. Here, in contrast, the purported evidence would not refute the evidence relied upon by the court in finding defendant guilty on a theory of accountability, namely defendant's conduct after arriving at Deleonardis' vehicle.

¶ 25 Defendant next contends that his conviction for armed robbery must be vacated, as the offense was predicated upon taking Deleonardis' vehicle, which is an offense that does not exist.

Defendant acknowledges failing to preserve the issue for review by not contesting the validity of the conviction at trial or in a posttrial motion, but argues in his reply brief that we may review the claim of error for second-prong plain error. Defendant's invocation of plain error for the first time in his reply brief is sufficient to allow us to review the issue for plain error. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010). Under second-prong plain error, we may excuse an unpreserved claim of error when "a clear or obvious error occurred and that error is so serious that it *** challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in a plain-error analysis is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 26 In Count 2 of the indictments, the State charged defendant and Mitchell with armed robbery in that they "knowingly took property, to wit: a 2001 Chevrolet Malibu, from the person or presence of Charles Deleonardis" while armed with a firearm. Armed robbery is committed when a defendant commits robbery and certain aggravating factors are present. 720 ILCS 5/18-2(a) (West 2012). Robbery is committed when a defendant "takes property, *except a motor vehicle* *** from the person or presence of another by the use of force or by threatening the imminent use of force." (Emphasis added.) 720 ILCS 5/18-1(a) (West 2012). This court has previously found that an armed robbery predicated on the taking of a victim's vehicle is a nonexistent offense. *In re Ricardo A.*, 356 Ill. App. 3d 980, 993-94 (2005) ("[T]he trial court's finding, that the State proved the elements of the offense of armed robbery based on the taking of [the victim's] car, was erroneous" because "there is no such offense and the State incorrectly charged respondents with same and the trial court erroneously found the State had proven

same.") *overruled on other grounds by In re Samantha V.*, 234 Ill. 2d 359 (2009). Therefore, the State charged defendant with, and the trial court found him guilty of, an offense that did not exist.

¶ 27 Nevertheless, the State, while acknowledging an armed robbery conviction may not rest alone on the taking of a motor vehicle, argues that the phrase "to wit: a 2001 Chevrolet Malibu" is surplusage. Therefore, it asserts Count 2 contains the essential elements of armed robbery without the phrase. For support, the State cites *People v. Collins*, 214 Ill. 2d 206, 219 (2005), where our supreme court stated that when "an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage." The essential elements of armed robbery are (1) those of robbery and (2) being armed. See *People v. Lewis*, 165 Ill. 2d 305, 340 (1995); *People v. Reese*, 2015 IL App (1st) 120654, ¶ 96. The being armed element is not at issue here. The essential elements of robbery are "taking property by force or threat of force." *Lewis*, 165 Ill. 2d at 340.

¶ 28 The State, pointing to *People v. Lawler*, 23 Ill. 2d 38 (1961) and *Reese*, 2015 IL App (1st) 120654, argues the precise identity of the property need not be recognized. See *Lawler*, 23 Ill. 2d at 39 ("Under an indictment for robbery it is not necessary to prove the particular identity or value of the property taken, further than to show it was the property of the victim or in his care and had a value."); *Reese*, 2015 IL App (1st) 120654, ¶ 96 ("[T]he naming [in the indictment] of the item that defendant attempted to take from [the victim] was surplusage."). Consequently, the State asserts that Count 2 of the indictments was sound despite identifying the property taken as Deleonardis' vehicle and sufficiently proven at trial when the State demonstrated defendant took

property located inside of the vehicle. The State posits it proved this when it introduced, and later admitted into evidence, photographs of the interior of the vehicle showing water bottles, a crate, keys and other objects, which Deleonardis testified truly and accurately represented the interior of his vehicle on the night in question.

¶ 29 We disagree with the State's argument that the conviction should stand because the essential elements of armed robbery were included in the indictment. At trial, there were scant references to the property inside Deleonardis' vehicle and only in vague, nonspecific terms. One occurred when Deleonardis, during direct examination, agreed that a photograph truly and accurately reflected the interior of his vehicle on the night in question and stated "[y]es, stuff in the backseat." A second occurred during Deleonardis' direct examination when, in reference to Mitchell wanting him to enter the backseat of the vehicle, Deleonardis stated "[a]s you can see by the photo, I had a bunch of stuff in the back." The last occurred during direct examination of Detective Hadjioannou, when he identified the photograph of the interior of Deleonardis' vehicle as "the backseat" of the vehicle he pulled over.

¶ 30 Even though the photographs were introduced and admitted into evidence, the State made no attempt to clarify what Deleonardis' "stuff" in the backseat was and did not reference the property in the interior of Deleonardis' vehicle during closing argument. Similarly, the trial court's only mention of the property in the interior of the Deleonardis' vehicle was when it stated Deleonardis was told to get into the vehicle despite "all the junk" inside. It is clear that the State did not base defendant's armed robbery charge on the taking of the property in the interior of the

vehicle, only on the taking of the vehicle itself. Similarly, it is clear the court convicted him of armed robbery based on the taking of the vehicle itself.

¶ 31 The taking of a motor vehicle is a vehicular hijacking, a separate statutory offense from robbery. See 720 ILCS 5/18-1(a), 18-3(a) (West 2012). "[T]he intent of the legislature in enacting the vehicular hijacking statute was to recognize the seriousness of taking a motor vehicle, versus taking another type of property, and increase the penalty for that offense accordingly." *Reese*, 2015 IL App (1st) 120654, ¶ 62. To that end, the legislature specifically excluded the taking of a motor vehicle from the robbery statute when it enacted the vehicular hijacking statute. See 720 ILCS 5/18-1(a) (West 2012). As defendant was charged with armed robbery based on taking Deleonardis' vehicle, a nonexistent offense, and not based on the property inside the vehicle, defendant's armed robbery conviction was in error.

¶ 32 The State's reliance on *Lawler*, 23 Ill. 2d at 39-40 and *Reese*, 2015 IL App (1st) 120654, ¶¶ 93-99, for the proposition that the identity of the property taken is not a necessary element of robbery, is unconvincing. In neither case was there an indication that the defendants' charging documents alleged they committed a nonexistent offense, as occurred here, an offense specifically excluded from the robbery statute by the legislature.

¶ 33 Having determined that error occurred, we must determine whether it was plain error. See *Thompson*, 238 Ill. 2d at 613. We agree with defendant that convicting him of a nonexistent offense is so serious as to challenge the integrity of the judicial process, thus rising to the level of plain error. See *People v. LaRue*, 298 Ill. App. 3d 89, 91-92 (1998) (finding the defendant could not forfeit contention that he was convicted of nonexistent offense); *People v. Wasson*, 175 Ill.

App. 3d 851, 854 (1988) (recognizing plain-error doctrine applied to "complaint to charge the defendant with an offense not yet covered by the charging statute"); see also *People v. Maldonado*, 402 Ill. App. 3d 1068, 1069 (2010) ("[A]s sentencing defendant under a nonexistent law would violate his substantial rights," plain-error review is appropriate). Accordingly, pursuant to our ability to vacate a conviction without remand (see *People v. Lee*, 2012 IL App (1st) 101851, ¶ 55; Ill. S. Ct. R. 615(b)(1)), we vacate defendant's conviction for armed robbery.

¶ 34 Defendant next contends, and the State concedes, that his conviction for possession of a stolen motor vehicle must be vacated as a lesser-included offense of aggravated vehicular hijacking under the one-act, one-crime doctrine. Although defendant failed to preserve this claim of error for review, plain-error review is appropriate. See *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009) (" '[A]n 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.' ") (quoting *People v. Harvey*, 211 Ill. 2d 368, 389 (2004)). We agree that, on these facts, possession of a stolen motor vehicle is a lesser-included offense of aggravated vehicular hijacking under the one-act, one-crime doctrine.

¶ 35 The one-act, one-crime doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we must determine whether the defendant's conduct involved multiple acts or a single act. *Id.* If there was only a single act, multiple convictions from the single act cannot stand. *Id.* Second, if the conduct involved multiple acts, we must determine whether any of the offenses are lesser-included offenses. *Id.* If an offense is a lesser-included offense, multiple convictions cannot stand. *Id.*

¶ 36 Here, defendant's convictions were based on multiple acts: taking a motor vehicle (aggravated vehicular hijacking) and possessing a motor vehicle (possession of a stolen motor vehicle). Further, on these facts, possession of a stolen motor vehicle is a lesser-included offense of aggravated vehicular hijacking. See *People v. Eggerman*, 292 Ill. App. 3d 644, 647-50 (1997) (comparing the elements of both offenses in the context of a double-jeopardy analysis). Although the State agrees with defendant's requested relief of vacating the conviction for possession of a stolen motor vehicle, we do not have to accept the State's concession. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Under the circumstances, we find the more appropriate remedy is to merge the lesser-included offense into the greater offense. See *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007). Accordingly, we merge defendant's conviction for possession of a stolen motor vehicle into his conviction for aggravated vehicular hijacking.

¶ 37 We note, however, that while defendant's mittimus currently reflects his convictions and sentences for aggravated vehicular hijacking and armed robbery, it does not reflect his conviction for possession of a stolen motor vehicle. Instead, the mittimus shows a conviction for aggravating kidnaping, of which defendant was not convicted. As we can correct a mittimus without remand (*Lee*, 2012 IL App (1st) 101851, ¶ 55; Ill. S. Ct. R. 615(b)(1))), we remove the conviction and sentence for aggravating kidnaping from defendant's mittimus.

¶ 38 Defendant next contends that his sentence for aggravated vehicular hijacking should be reduced from 22 years to 21 years because the trial court incorrectly believed the minimum sentence for the offense was 22 years, and the record clearly demonstrates the court's desire to sentence him to the minimum sentence. While defendant failed to preserve this claim of error for

review by objecting at sentencing and including the issue in a postsentencing motion (*People v. Hillier*, 237 Ill. 2d 539, 544 (2010)), we find the alleged error reviewable for second-prong plain error. See *People v. Hausman*, 287 Ill. App. 3d 1069, 1071-72 (1997) ("A defendant is entitled to be sentenced by a trial judge who knows the minimum and maximum sentences for the offense" and therefore, "[a] misunderstanding as alleged here falls within the second prong of the plain error rule."). The State argues defendant was properly sentenced to the minimum 22 years for aggravated vehicular hijacking.

¶ 39 Both parties' positions are based on their respective interpretation of the sentencing subsection of the aggravated vehicular hijacking statute, which provides:

> "Aggravated vehicular hijacking in violation of subsections (a)(1) or (a)(2) is a Class X felony. A violation of subsection (a)(3) is a Class X felony for which a term of imprisonment of not less than 7 years shall be imposed. A violation of subsection (a)(4) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(5) is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(6) is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/18-4(b) (West 2012).

We review questions of statutory interpretation *de novo*. *People v. Bradford*, 2016 IL 118674, ¶ 15. The most important rule of statutory construction is to determine and give effect to the intent of the legislature. *Id.* "The best indication of this intent is the statutory language, given its plain

and ordinary meaning." *Id.* If the statutory language is clear and unambiguous, we must apply the statute as written without resorting to extrinsic aids of statutory construction. *Id.*

¶ 40 Defendant was convicted under subsection (a)(4) of the aggravated vehicular hijacking statute based on codefendant Mitchell being armed with a firearm. 720 ILCS 5/18-4(a)(4) (West 2012). "A violation of subsection (a)(4) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/18-4(b) (West 2012).

¶ 41 Defendant argues that the sentencing range for a Class X felony is 6 to 30 years (see 730 ILCS 5/5-4.5-25(a) (West 2012)), and therefore, the minimum sentence for his aggravated vehicular hijacking conviction is 21 years' imprisonment, 6 years plus an additional 15 years. Defendant additionally cites *People v. Andrews*, 364 Ill. App. 3d 253, 273-74 (2006), where this court stated, in reference to a defendant convicted under subsection (a)(4), "the applicable penalty upon conviction of aggravated vehicular hijacking while carrying a firearm is a range of 21 to 45 years' imprisonment."

¶ 42 The State does not address *Andrews* and instead argues that the aggravated vehicular hijacking statute includes a progressive sentencing scheme for more severe sentences as the offense becomes more dangerous. It points to the sentencing subsection of the statute (720 ILCS 5/18-4(b) (West 2012)), which states "[a] violation of subsection (a)(3) is a Class X felony for which a term of imprisonment of not less than 7 years shall be imposed." According to the State, 7 years' imprisonment is the baseline for all subsequent references to Class X felonies in the statute, including those applicable to a violation of subsection (a)(4). Thus, it argues the

minimum sentence for a violation of subsection (a)(4) is 22 years' imprisonment, 7 years plus an additional 15 years.

¶ 43 While we agree with the State that the statute sets forth a progressive sentencing scheme, we agree with defendant that the minimum sentence for his offense was 21 years' imprisonment. First, *Andrews* has specifically stated the minimum sentence for a conviction under subsection (a)(4) is 21 years' imprisonment. See *Andrews*, 364 Ill. App. 3d at 273-74. Second, defendant's interpretation follows the plain language of the statute, which is the most important tenet of statutory interpretation. See *Bradford*, 2016 IL 118674, ¶ 15. A violation of subsection (a)(3), where a defendant commits an aggravated vehicular hijacking by being armed with a dangerous weapon other than a firearm, is a Class X felony. See 720 ILCS 5/18-4(b) (West 2012). However, the statute provides the minimum sentence for this offense is seven years' imprisonment rather than the usual six years for a Class X felony. See 720 ILCS 5/18-4(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 44 This provision in subsection (b) is wholly distinct from the following provisions in that subsection describing the penalties for violating subsections (a)(4), (a)(5) and (a)(6), all of which include a firearm element. There is no indication that the language imposing a sentence for a violation of subsection (a)(3) was meant to apply to violations of the other subsections of the statute. Rather, the language of the remaining portion of the sentencing subsection specifically provides that aggravated vehicular hijacking is a Class X felony with ever increasing additional enhancements depending on how a firearm was used in the commission of the offense: 15 years if carried by the offender ((a)(4)), 20 years if personally discharged by the offender ((a)(5)), and

25 years up to natural life imprisonment if personally discharged by the offender and the discharge causes great bodily harm or death ((a)(6)). 720 ILCS 5/18-4(b) (West 2012).

¶ 45 It is clear from the plain language of the statute that the 7-year minimum sentence applies only when a weapon other than a firearm is involved in the aggravated vehicular hijacking ((a)(3)). The 7-year minimum therefore does not affect aggravated vehicular hijacking offenses committed under subsections (a)(4) through (a)(6), and the usual Class X sentencing range of 6 to 30 years' imprisonment applies to these convictions, with the addition of increasing firearm enhancements. Consequently, the minimum sentence for defendant's aggravated vehicular hijacking conviction under subsection (a)(4) is 21 years' imprisonment, 6 years plus a 15-year enhancement.

¶ 46 Although the trial court misstated the minimum sentence for defendant's conviction, a new sentencing hearing is not automatic. *People v. Eddington*, 77 Ill. 2d 41, 48 (1979); see also *People v. Quinones*, 362 Ill. App. 3d 385, 398 (2005). "A misstatement of the understanding of the minimum sentence by the trial judge necessitates a new sentencing hearing only when it appears that the mistaken belief of the judge arguably influenced the sentencing decision." *Eddington*, 77 Ill. 2d at 48; see also *People v. O'Malley*, 356 Ill. App. 3d 1038, 1047 (2005). In determining whether the court's mistaken belief arguably influenced its sentencing decision, we look at " 'whether the trial court's comments show that the court relied on the mistaken belief or used the mistaken belief as a reference point in fashioning the sentence.' " *Quinones*, 362 Ill. App. 3d at 398 (quoting *People v. Hill*, 294 Ill. App. 3d 962, 970 (1998)).

¶ 47 During the sentencing hearing, and before imposing its sentence, the trial court told defendant "[t]here are minimums that I have to sentence you to in this matter." It further recognized defendant's youth, but stated "[m]y hands are tied. The minimum on the aggravated vehicular hijacking is 22 years because there was a firearm involved. So it's going to be 22 years' [imprisonment]." The court then explicitly told defendant it was sentencing him to the minimum for armed robbery and possession of a stolen motor vehicle. Further, when informing defendant of his appeal rights, the court stated "what I sentenced you to is the minimum that I could possibly give you." Therefore, the court's comments demonstrate that its mistaken belief as to the minimum sentence arguably influenced its sentencing decision, as it appears the court intended to sentence defendant to the minimum for his aggravated vehicular hijacking conviction. Pursuant to *People v. Eddington*, 77 Ill. 2d 41, 48 (1979), the proper remedy here is to vacate defendant's sentence and remand the matter for a new sentencing hearing.

¶ 48 Despite *Eddington*, defendant argues that a new sentencing hearing is unnecessary given the trial court's steadfast desire to sentence him to the minimum for aggravated vehicular hijacking. He argues that this court should simply reduce his sentence to 21 years' imprisonment. The only authority he cites for this proposition is Illinois Supreme Court Rule 615(b)(4), which generally states the reviewing court may "reduce the punishment imposed by the trial court."

¶ 49 This case, however, is indistinguishable from *People v. Hausman*, 287 Ill. App. 3d 1069 (1997), in which the appellate court remanded for a new sentencing hearing. In *Hausman*, the trial court sentenced the defendant to three years' imprisonment for aggravated battery, stating "I am going to impose the *minimum sentence of three (3) years* in the Illinois Department of

Corrections." (Emphasis in original.) *Id.* at 1070-71. The minimum sentence for aggravated battery, however, was two years' imprisonment. *Id.* at 1072. Finding the mistaken belief as to the minimum sentence for aggravated battery arguably influenced the trial court's sentencing decision, the appellate court vacated the sentence and remanded for a new sentencing hearing. *Id.* We find the same result warranted here. Accordingly, we vacate defendant's sentence for aggravated vehicular hijacking and remand the matter to the trial court for a new sentencing hearing.

¶ 50 Defendant next contends, and the State concedes, that he is entitled to an additional eight days of presentence incarceration credit. A defendant held in custody for any part of a day should be given credit against his sentence for that day (*People v. Williams*, 2013 IL App (2d) 120094, ¶ 37; see 730 ILCS 5/5-4.5-100(b) (West 2012)), excluding his day of sentencing. *People v. Harris*, 2012 IL App (1st) 092251, ¶ 37. Although defendant did not include this issue in a postsentencing motion, it cannot be forfeited, as the statutory language is mandatory. *People v. Woodard*, 175 Ill. 2d 435, 456-57 (1997); *People v. Purcell*, 2013 IL App (2d) 110810, ¶ 18.

¶ 51 Defendant was arrested on June 27, 2012, and sentenced on October 18, 2013, which totaled 478 days in custody prior to his date of sentencing. His mittimus reflects credit for only 470 days in custody prior to his date of sentencing. Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1), and our ability to correct a mittimus without remand (see *People v. Hill*, 408 Ill. App. 3d 23, 31 (2011)), we correct defendant's mittimus to reflect 478 days of presentence custody credit.

¶ 52 Lastly, defendant challenges the imposition of several monetary assessments by the trial court against him. We review the propriety of the trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 53 Defendant first argues, and the State concedes, that the trial court improperly imposed a $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)). The fee applies only to defendants "in any traffic, misdemeanor, municipal ordinance, or conservation case." *Id.*; *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (noting the electronic citation fee does not apply to felonies). Here, defendant's only remaining conviction was a felony. Therefore, the trial court improperly imposed the $5 electronic citation fee, and we vacate it.

¶ 54 Defendant next argues, and the State concedes, that $50 worth of fines imposed against him were not offset by his $5 per day of presentence incarceration credit. The specific fines at issue are: a $10 mental health court fine (55 ILCS 5/5-1101(d-5) (West 2012)), a $5 youth diversion program fine (55 ILCS 5/5-1101(e) (West 2012)), a $5 drug court fine (55 ILCS 5/5-1101(f) (West 2012)) and a $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2012)).

¶ 55 A defendant is entitled to $5 credit for each day incarcerated prior to sentencing toward the fines levied against him. 725 ILCS 5/110-14(a) (West 2012). Therefore, defendant is entitled to a $50 credit toward the foregoing fines due to his presentence incarceration.

¶ 56 Defendant lastly argues, and the State concedes, that the $15 State Police operations assessment (705 ILCS 105/27.3a(1.5) (West 2012)) is a fine despite its statutory label as a fee, and he is therefore entitled to $5 per day of presentence custody credit against it. We agree. See

People v. Millsap, 2012 IL App (4th) 110668, ¶ 31 ("Despite its statutory label, the State Police operations assistance fee is also a fine.") Therefore, defendant must receive $5 per day of presentence custody credit toward this fine.

¶ 57 In sum, and pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) and our ability to correct a fines and fees order without remand (see *Bowen*, 2015 IL App (1st) 132046, ¶ 68), we (1) vacate defendant's $5 electronic citation fee and (2) award him a total of $65 worth of presentence incarceration credit based on his 478 days in custody prior to sentencing. Defendant's fines and fees order should be amended from $689 to $619 owed.

¶ 58 For the foregoing reasons, we affirm defendant's conviction for aggravated vehicular hijacking, but remand the matter for a new sentencing hearing on that conviction. We vacate defendant's conviction for armed robbery and merge his conviction for possession of a stolen motor vehicle into his conviction for aggravated vehicular hijacking. We also award defendant an additional eight days of presentence incarceration credit, and correct his mittimus, and fines and fees order.

¶ 59 Affirmed as modified in part, remanded in part, vacated in part.