FIFTH DIVISION
SEPTEMBER 23, 2016

No. 1-14-1207



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 9198 |
| | ) | |
| DAVID GONZALES, | ) | Honorable |
| | ) | William O'Brien, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Two of defendant's three convictions for aggravated battery must be vacated pursuant to the one-act, one-crime rule when all three are based upon the same act, *i.e.*, defendant slashing the victim with a box cutter. Defendant's fines and fees order must be corrected to vacate improperly assessed fees and to reflect the offset of certain fines by defendant's presentence custody credit.

¶ 2 Following a jury trial, defendant David Gonzales was found guilty of burglary and three counts of aggravated battery. Defendant was sentenced, because of his criminal background, to a Class X sentence of 27 years for the burglary. He was also sentenced to three seven-year prison terms for the aggravated batteries. All sentences were to run concurrent to each other. On appeal, defendant contends that two of his three battery convictions must be vacated pursuant to the one-act, one-crime rule. He also contests the imposition of certain fines and fees. We affirm in part, vacate in part, and correct the fines and fees order.

¶ 3 At trial, the victim, Diego Lusero, testified that on May 28, 2011, he drove his van to work and could observe the parked vehicle through the windows of the room where he worked. At one point, he observed a man enter his van through the passenger side window. The window had been broken. The victim watched as this person, who was wearing a red jacket, removed a "GPS" that was affixed to the windshield. Lusero asked his coworkers for help and ran outside.

¶ 4 When the victim arrived outside the building, the man with the red jacket (the offender), was walking away from the building and the victim followed him. The offender began to run, so the victim ran after him. When the victim caught up to the offender, the victim grabbed him and told him to return the GPS. At trial, the victim was unable to identify defendant as the offender in court. The offender denied having the GPS. After about three minutes, the victim's coworkers, Adan Sanchez and Cesar Antonio, arrived. The victim asked them to hold the offender and to call the police because he was "stealing" the victim's "things." The offender reached into his jacket, pulled out a knife and began "cutting" the victim. The victim described the knife as "like a box cutter." Although the victim threw the offender to the "floor," he was cut "many times." At

one point, when the offender was on the floor, he told the victim to let him go and he would pay for the GPS. The victim refused.

¶ 5 The victim suffered two lacerations to the head; one required seven stitches and the other eight staples. A laceration to his right arm required seven stitches. His left arm at the bicep was cut "down to the bone," so that wound was "sewed [*sic*] twice more inside." A cut on his left forearm received eight stitches.

¶ 6 Adan Sanchez testified that after the victim screamed that someone was stealing, the victim ran outside. Sanchez followed and watched as the victim approached a man in a red jacket and grabbed him by the arm. Sanchez ran up and grabbed the man's other arm. At trial, he identified defendant as the man in the red jacket. Defendant told Sanchez and the victim to let him go because he was a gang member and if they did not, he would kill them. Defendant pulled a GPS out of his red jacket, said to let him go, and offered to give the victim money. Defendant threw the GPS to the ground. Antonio arrived, and Sanchez told him to grab defendant. Sanchez called another coworker and asked him to call the police. He looked away during the call. When he turned back, defendant had a knife, and the victim was "bleeding from all over."

¶ 7 Sergeant McLoughlin, who was "[f]lagged down" as he was driving by, testified that when he exited his vehicle, he observed defendant being detained by several men. One man pointed to defendant and stated that defendant had hurt his friend. McLoughlin took defendant into custody.

¶ 8 Detective Demosthenes Balodimas testified that during a conversation with defendant at a police station, defendant told him that he used a spark plug to "pop" a vehicle window, reached

inside and removed a GPS. He further stated that as he was running away, he was grabbed by the victim. Defendant finally stated that after he was pinned to the ground by unknown persons, he pulled out his "razor" and started swinging in order to break loose. Defendant also stated that when he was initially caught, he offered to pay for any damages and to return the GPS.

¶ 9 Defendant testified that he was walking down the street when a man wearing a red jacket ran past him and dropped something. Defendant, who was also wearing a red jacket, picked up the object the man dropped, a GPS, and put it in his pocket. He continued walking and was then grabbed and choked from behind. Defendant was scared and asked to be let go. However the man did not say anything and just kept "squeezing." After asking to be let go twice, defendant started to fight and "went down" with this man on top of him. Defendant then took out "a box cutter *** from work" and "sliced" the man. Ultimately, defendant was restrained on the ground. He denied telling police that he broke into a vehicle; rather, he told police that someone ran past him and dropped a GPS.

¶ 10 Detective Balodimas testified in rebuttal that defendant did not tell him that a man ran past him and dropped the GPS.

¶ 11 The jury found defendant guilty of burglary and three counts of aggravated battery. A presentence investigation report was prepared. After the court heard arguments in aggravation and mitigation, defendant was sentenced, because of his criminal background, to a Class X sentence of 27 years in prison for the burglary. He was also sentenced to three seven-year prison terms for the aggravated battery convictions. All sentences were to run concurrent to each other.

The court ordered that defendant was to receive credit for the 1,025 days he had already spent in custody.

¶ 12 On appeal, defendant first contends that two of his three convictions for aggravated battery must be vacated pursuant to the one-act, one-crime rule because all three convictions are based upon the same conduct, *i.e.*, "slashing" the victim with a box cutter. He further contends that this cause must be remanded to the trial court for resentencing so that the court can determine which aggravated battery conviction is "more serious." He also argues that resentencing is required because the trial court's "sketchy sentencing rationale" may have been influenced by the "improvidently entered convictions."

¶ 13 Defendant concedes that he waived this issue by failing to raise it before the trial court, however, he requests that we review this issue pursuant to the plain error doctrine. The plain error doctrine permits "a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). This court reviews one-act, one-crime issues pursuant to the second prong of the plain error doctrine because the potential for an unwarranted conviction and sentence threatens the integrity of the judicial process. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 14 To determine whether a violation of the one-act, one-crime rule has occurred, a reviewing court must determine whether the defendant's conduct involved multiple acts or a single act, and, if the conduct involved multiple acts, whether any of the offenses are lesser-included offenses. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). Multiple convictions are improper if they are based on precisely the same physical act. *Miller*, 238 Ill. 2d at 165. We review *de novo* whether a defendant's convictions violate the one-act, one-crime rule. *People v. Csaszar*, 375 Ill. App. 3d 929, 943 (2007). *De novo* review means that this court performs the same analysis that a trial judge would perform. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 12.

¶ 15 The State concedes that two of defendant's convictions for aggravated battery must be vacated pursuant to the one-act, one-crime rule because the three convictions are based upon defendant's acts of slashing the victim multiple times with a box cutter. The State contends, however, that this cause does not need to be remanded for resentencing because none of the convictions for aggravated battery is "more serious" than the other. The State argues that because each conviction for aggravated battery requires the same mental state and is subject to the same sentencing range, this court may simply vacate defendant's convictions for aggravated battery under counts III and IV rather than remanding the cause to the trial court.

¶ 16 Here, defendant was convicted of three counts of aggravated battery. Count II charged that defendant intentionally or knowingly caused great bodily harm to the victim by slashing the victim with a knife about the body. Count III charged that defendant intentionally or knowingly caused permanent disfigurement to the victim by slashing the victim with a knife about the body. Count IV charged that defendant knowingly caused bodily harm to the victim while using a

deadly weapon other than by the discharge of a firearm by slashing the victim with a knife about the body.

¶ 17 Based on the above charges, we agree with the parties that the indictment failed to treat defendant's conduct as multiple acts. Accordingly, three convictions for aggravated battery are unwarranted and two must be vacated pursuant to the one-act, one-crime rule because they are all based upon the same "act" of slashing the victim with a box cutter. See *Miller*, 238 Ill. 2d at 165.

¶ 18 Here, each of defendant's convictions for aggravated battery is a Class 3 felony (see 720 ILCS 5/12-4(e)(1) (West 2010)), subject to the same sentencing range. The trial court determined that each count stood on equal footing when it imposed the same prison term of seven years on each count and provided that the terms would be served concurrently. Although defendant concedes that each aggravated battery conviction is "punished equally" and has the "same mental state," he argues that cause must be remanded so that the trial court can determine which conviction is more serious.

¶ 19 Generally, when multiple convictions are obtained for offenses arising out of a single course of conduct, as in this case, the conviction for the less serious offense must be vacated. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). When a reviewing court is unable to determine the more serious offense, a remand to the trial court is required so that the trial court can make this determination. *People v. Artis*, 232 Ill. 2d 156, 177 (2009). However, our supreme court has, under similar circumstances, found remand unnecessary when all three of the defendant's convictions at issue were for the same offense, and he received identical concurrent sentences for each conviction. See *People v. Price*, 221 Ill. 2d 182, 194-95 (2006) (finding remand was

unnecessary where one-act, one-crime principles required the vacation of multiple theft convictions because both the statutory penalty and the concurrent sentences imposed were identical). Under the circumstances of this case, and to conserve judicial resources, we therefore vacate defendant's aggravated battery convictions under counts III and IV.

¶ 20 Defendant also argues that this cause must be remanded for resentencing because the improper convictions may have influenced the trial court at sentencing. Although defendant concedes that it is "uncertain" from the record whether the trial court was influenced by the two "wrongly-entered" convictions, he argues that remand is warranted because "it cannot be determined with certainty" that the trial court was not influenced. However, when there is no indication in the record that a vacated conviction had any bearing on the remaining sentences, a remand for resentencing is not necessary. See *People v. Lee*, 376 Ill. App. 3d 951, 957 (2007). We do not find defendant's argument persuasive.

¶ 21 Defendant next contests the imposition of certain fines and fees. Although defendant has forfeited review of this claim because he did not challenge the fines and fees order in a postsentencing motion (see, *e.g.*, *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), on appeal a reviewing court may modify the fines and fees order without remanding the case back to the circuit court. See Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008). We review the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). As stated above, *de novo* review means that this court performs the same analysis that a trial judge would perform. *Schlosser*, 2012 IL App (1st) 092523, ¶ 12.

¶ 22 Defendant first contends, and the State concedes, that the trial court improperly imposed a $5 electronic citation fee (705 ILCS 105/27.3e (West 2010)), against him. The $5 electronic citation fee only applies to defendants "in any traffic, misdemeanor, municipal ordinance, or conservation case" (705 ILCS 105/27.3e (West 2010)), and defendant was not convicted of one of the triggering offenses. The parties also agree that the Violent Crimes Victims Assistance Fund (VCVA) assessment should be vacated because defendant was assessed $30 in fines. See 725 ILCS 240/10(b) (West 2010) (when other fines are assessed, section 10 imposes a VCVA assessment of $4 for each $40, or fraction thereof, of fines imposed). We therefore vacate the $5 electronic citation fee and the $20 VCVA assessment.

¶ 23 Defendant next contends, and the State agrees, that pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)), he is entitled to a $5,125 credit based on 1,025 days of presentence custody.

¶ 24 The parties agree that defendant was assessed certain fines that may be offset by the presentence custody credit: the $50 Court Systems Fee (55 ILCS 5/5-1101(c) (West 2010)); the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2010)); and the $15 State Police Operations Fee (705 ILCS 105/27.3a (1.5) (West 2010)). Therefore, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the $50 Court Systems Fee, the $30 Children's Advocacy Center fine and the $15 State Police Operations Fee be offset by defendant's presentence custody credit.

¶ 25 The parties, however, dispute whether the $2 State's Attorney records automation assessment (55 ILCS 5/4-2002.1(c) (West 2012)), the $2 Public Defender records automation

assessment (55 ILCS 5/3-4012 (West 2012)), and the $10 probation and court services operations fee (705 ILCS 105/27.3a (1.1) (West 2012)), are also fines.

¶ 26 In *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30, the Fourth District Appellate Court determined that the State's Attorney records automation assessment was compensatory in nature, and, therefore, a fee. The court found that the assessment was a fee because it was intended to reimburse the State's Attorneys for expenses related to automated record systems. *Rogers*, 2014 IL App (4th) 121088, ¶ 30. See also *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 65 ("because the statutory language of both the Public Defender and State's Attorney Records Automation fees is identical except for the name of the organization, we find no reason to distinguish between the two statutes, and conclude both charges constitute fees"); *People v. Green*, 2016 IL App (1st) 134011, ¶ 46 (relying on *Bowen*); *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17 (relying on *Bowen* and *Rogers*). However, *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56, recently held that these assessments are fines because they do not compensate the State for the costs associated with prosecuting a particular defendant. Rather, they "demonstrate a prospective purpose," that is, the establishment and maintenance of automated record keeping systems. *Camacho*, 2016 IL App (1st) 140604, ¶¶ 50, 56.

¶ 27 In *People v. Graves*, 235 Ill. 2d 244, 250 (2009), our supreme court stated that a fee is intended to compensate the State for the costs of prosecuting the defendant, while fines are punitive in nature. We believe that the Fourth District correctly interpreted our supreme court's holding in *Graves* when deciding *Rogers*. The statutory language of section 4-2002.1(c) of the Counties Code sets forth that the assessment is intended to compensate the State for the costs of

prosecuting a defendant by offsetting the State's costs in establishing and maintaining automated record keeping systems (55 ILCS 5/4-2002.1(c) (West 2012)), and, as such, is a fee, which may not be offset by presentence custody credit (*People v. Jones*, 397 Ill. App. 3d 651, 664 (2009)). Although the use of the word "establishing" in relation to an automated record keeping system suggests only future use of such a system, we believe that the language of the statute is broad enough to encompass the current use of such systems and we continue to follow *Rogers* and *Bowen*. It therefore follows that the $2 Public Defender records automation fee is intended as a fee to compensate the office of the public defender for costs incurred in defending defendant, and may not be offset by defendant's presentence custody credit.

¶ 28 Finally, in *Rogers*, 2014 IL App (4th) 121088, ¶¶ 37-39, this court discussed the compensatory nature of probationary charges and held that when a probation officer is involved in the defendant's prosecution, this assessment constitutes a fee. Here, the probation office was used to create a presentence investigation report which the trial court considered during sentencing. Thus, this assessment reimbursed the State for charges incurred in defendant's prosecution. We decline to depart from our holding in *Rogers* and conclude that the $10 Probation and Court Services Operations charge is a fee which may not be offset by presentence incarceration credit.

¶ 29 Accordingly, we vacate defendant's convictions under counts III and IV. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's fines and fees order by vacating the $5 electronic citation fee and $20 VCVA assessment, and to reflect that the $50 Court Systems Fee, the $30 Children's Advocacy

Center fine and the $15 State Police Operations Fee are offset by defendant's presentence custody credit, for a new total due of $339. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 30 Affirmed in part; vacated in part; fines and fees order corrected.