

No. 1-14-2181

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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. 12 CR 3917
	)	
DONALD ELLIS,	)	Honorable
	)	Noreen Valeria Love,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Lavin and Pucinski concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Statutory amendments that took effect on January 1, 2016, requiring sentencing court to consider enumerated mitigating factors, allowing the court discretion to not impose a firearm enhancement and expanding the jurisdiction of juvenile court to offenses committed before a juvenile's 18th birthday do not apply retroactively to defendant.

¶ 2 Following a bench trial, defendant Donald Ellis was convicted of armed robbery with a firearm, aggravated unlawful restraint, possession of a defaced firearm, and unlawful possession of a weapon by a felon. Defendant was sentenced to a term of 30 years in prison, which included a 15-year enhancement for his use of a firearm when committing the armed robbery. Defendant,

who was 17 years old when he committed these offenses, was tried and sentenced as an adult in accordance with the "automatic transfer" provision in section 5-130 of the Illinois Juvenile Court Act of 1987 (the Juvenile Court Act) (705 ILCS 405/5-130 (West 2010)). On appeal, defendant contends this case should be remanded for resentencing or for a reduction of his 30-year term under new sentencing provisions in Public Act 99-69, section 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105) and Public Act 99-258, section 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805 (West 2014)). Defendant also asserts that his conviction for aggravated unlawful restraint should be vacated because that conduct arose from his commission of the armed robbery and that the mittimus should be corrected to indicate the number of days he spent in custody prior to sentencing. For the reasons set forth below, we affirm in part, vacate in part and order correction of the mittimus.

¶ 3 Defendant was tried in a simultaneous bench trial with co-defendant Marcus Jones. At trial, Maria Martinez testified that on December 12, 2011, she was working as a cashier at a small grocery store at 5830 West 16th Street in Cicero. At about 2 p.m., defendant and Jones entered the store together. Martinez testified she was standing at the cash register and that defendant "tried to squeeze into where I was."

¶ 4 When defendant was not able to fit into the area where Martinez was standing, he and Jones took items from shelves and placed them in front of Martinez, who began to ring up the purchase. After Martinez opened the register, defendant "barged" into her and placed his arm around her. Defendant pointed a firearm at her right temple and took money from the cash register. Martinez testified that when a customer entered the store, Jones ran outside, followed by defendant, who left the firearm and money on the store counter.

¶ 5 Surveillance video introduced into evidence was consistent with Martinez's testimony. Martinez identified defendant in a photo array several hours after the incident. Jones was apprehended in the backyard of a nearby house, and defendant was charged in this case when he was located in custody for another offense. Berwyn Police Detective Robert Arnony, who assisted Cicero police with the investigation, recovered the weapon from the store counter and testified that its serial number was defaced. The State introduced into evidence a certified copy of defendant's 2011 felony conviction of possession of a controlled substance in case No. 11 CR 09299. The trial court found defendant guilty of armed robbery, aggravated unlawful restraint, possession of a defaced firearm and the unlawful possession of a weapon by a felon.

¶ 6 Following a sentencing hearing, the trial court imposed a sentence of 30 years for the armed robbery, which included a mandatory 15-year sentencing enhancement for his use of a firearm pursuant to section 18-2(b) of the Criminal Code of 1961 (720 ILCS 5/18-2(b) (West 2010)). The court also sentenced defendant to concurrent prison terms of five years for aggravated unlawful restraint, five years for possession of a firearm with a defaced serial number and three years for unlawful possession of a weapon by a felon. Additional facts regarding defendant's sentencing hearing will be set out later in this order as they relate to the issues raised.

¶ 7 On appeal, defendant contends his case must be remanded for resentencing under the new sentencing provisions in Public Act 99-69, section 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105) and the amendments contained in Public Act 99-258, section 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805 (West 2014)). Both of those statutory amendments took effect on January 1, 2016, while defendant's case was pending on direct appeal. Defendant asserts that both of these amendments should be applied retroactively to his case.

¶ 8 We first address Public Act 99-69, which added section 5-4.5-105 to the Unified Code of Corrections (the Code) requiring the trial court to consider various enumerated factors in mitigation of a sentence when sentencing a defendant who was younger than age 18 when the offense took place.

¶ 9 Section 5-4.5-105 begins:

"(a) On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under [730 ILCS 5/5-4-1], shall consider the following additional factors in mitigation in determining the appropriate sentence[.]" Pub. Act 99-69, § 10 (eff. Jan. 1, 2016).

¶ 10 Section 5-4.5-105 then sets forth nine categories of information that the court is required to consider in mitigation, including the defendant's "age, impetuosity, and level of maturity at the time of the offense, including the ability to consider the risks and consequences of behavior," the "circumstances of the offense," the defendant's "degree of participation and specific role in the offense," and the person's prior juvenile or criminal history." 730 ILCS 5/5-4.5-105(a)(1), (5), (6), (8) (West 2016). Section 5-4.5-105 further provides that the trial court, in certain circumstances, may "in its discretion, decline to impose any otherwise applicable sentencing enhancement based on firearm possession \*\*\*[.]" 730 ILCS 5/5-4.5-105(b) (West 2016); see also 730 ILCS 5/5-4.5-105(c) (West 2016).

¶ 11 When construing a statute, the primary objective is to ascertain and give effect to the legislature's intent. *In re A.A.*, 2015 IL 118605, ¶ 21. The most reliable indicator of the legislature's intent is the plain language of the statute, and where such language is clear and

unambiguous, this court will enforce that language as written and will refrain from reading into the statute exceptions, conditions or limitations that are not expressed. *Id.* Statutory construction presents a question of law, which is reviewed *de novo*. *Id.*

¶ 12 Defendant contends that even though section 5-4.5-105 includes an effective date for when those sentencing procedures must be followed, the statute does not indicate when the offense at issue must have occurred. He asserts the statute therefore could apply to offenses, such as his, that took place before the January 1, 2016 effective date. Defendant further notes that section 5-4.5-105 does not include a savings clause indicating that it should apply only to offenses occurring after January 1, 2016, which would indicate that the statute should apply only prospectively.

¶ 13 This court has addressed and rejected the same arguments that defendant now raises as to the retroactivity of Public Act 99-69 in *People v. Hunter*, 2016 IL App (1st) 141904, ¶¶ 41-48, *appeal allowed*, No. 121306 (Nov. 23, 2016) (consolidated appeal with *People v. Wilson*, 2016 IL App (1st) 141500, *appeal allowed*, No. 121345 (Nov. 23, 2016)). To determine whether the amendment applied retroactively or only prospectively, the *Hunter* court used the analysis set out in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the first step of which is to determine and give effect to whether the legislature "has clearly indicated the temporal reach of the amended statute." *Id.* ¶ 36; see also *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29.

¶ 14 Applying that test, the court stated in *Hunter*:

"We find that, read plainly, section 5-4.5-105 does state its temporal reach by clearly indicating that a court is required to apply its provisions only at sentencing

hearings held "[o]n or after the effective date" of Public Act 99-69, *i.e.*, January 1, 2016. Nothing in the statute suggests that section 5-4.5-105 applies retroactively to cases where, as here, sentencing occurred prior to January 1, 2016, and we may not subvert the plain language by reading into the statute conditions not expressed by the legislature [Citation]." *Hunter*, 2016 IL App (1st) 141904, ¶ 43.

¶ 15 The *Hunter* court further noted that in light of that clear expression of the temporal reach of the statute, the defendant's additional arguments as to its retroactivity were not relevant. *Id.* ¶¶ 44-48; see also *Wilson*, 2016 IL App (1st) 141500, ¶ 17. Based on the reasoning set out in *Hunter* and *Wilson*, we conclude that section 5-4.5-105 applies only prospectively and does not apply retroactively to defendant's case.

¶ 16 Defendant next contends that if this court finds that section 5-4.5-105 applies only prospectively, the mandatory firearm enhancement is unconstitutional as applied to him because the trial court was not able to consider his youth and rehabilitative potential in accordance with the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). He asserts that other defendants who committed offenses prior to January 1, 2016, as he did, may not have the firearm enhancement assessed against them if they are sentenced after January 1, 2016.

¶ 17 Defendant raises an as-applied challenge to the constitutionality of the 15-year firearm enhancement, which requires a showing that the statute violated the constitution as it applies to the facts and circumstances of his case. See *People v. Thompson*, 2015 IL 118151, ¶ 36. A statute is presumed to be constitutional, and a defendant challenging the constitutionality of a statute

bears the burden of establishing its invalidity. *People v. Miller*, 202 Ill. 2d 328, 335 (2002). The constitutionality of a statute is a question of law that is reviewed by this court *de novo*. *People v. Williams*, 2015 IL 117470, ¶ 8.

¶ 18 The State asserts that defendant has forfeited his as-applied constitutional challenge by not raising the issue at an evidentiary hearing before the trial court. Defendant responds that the facts to support his claim are clear from the record, namely that he was 17 years old at the time of this offense. For the reasons set out below, even if the record was sufficient to preserve defendant's as-applied constitutional challenge, his sentence did not violate the eighth amendment or the proportionate penalties clause.

¶ 19 The eighth amendment, which is applicable to the states through the fourteenth amendment, bars cruel and unusual punishment. U.S. Const., amend. VIII; see also *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). That prohibition has been interpreted to prevent "inherently barbaric punishments" and those that are "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). The proportionate penalties clause of the Illinois Constitution requires that penalties must be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. Although our discussion of relevant precedent will encompass both constitutional provisions, we note that the proportionate penalties clause has been found to offer greater protection to defendants than the eighth amendment. See *People v. Clemons*, 2012 IL 107821, ¶ 40; *Wilson*, 2016 IL App (1st) 141500, ¶ 38.

¶ 20 Defendant's claim of cruel and unusual punishment is based on three recent United States Supreme Court cases, the most recent of which is *Miller v. Alabama*, 567 U.S. \_\_\_\_, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), which held that mandatory sentences of life in prison without the possibility of parole for juvenile offenders convicted of homicide violate the eighth amendment. The Court held that such a mandatory sentence precludes the trial court's consideration of mitigating factors including the juvenile's age and attendant characteristics and the nature of the individual crime. *Id.* at \_\_\_\_, 132 S.Ct. at 2468. The Court noted that juvenile offenders differ from adults in several respects, namely that "children have a lack of maturity and an underdeveloped sense of responsibility," are "more vulnerable to negative influences and outside pressures \*\*\* and lack the ability to extricate themselves from horrific, crime-producing settings" and possess a greater potential for rehabilitation because their "actions [are] less likely to be evidence of irretrievable depravity." *Id.* at \_\_\_\_, 132 S.Ct. at 2464. Defendant also relies on *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), which found unconstitutional under the eighth amendment the imposition of capital punishment for a crime committed when the offender was younger than 18 years of age, and *Graham*, which found the eighth amendment was violated by a sentence of life imprisonment without the possibility of parole for juvenile offenders convicted of offenses other than homicide. *Graham*, 560 U.S. 48, 75, 130 S.Ct. 2011, 176 L.Ed.2d 825.

¶ 21 Defendant argues that because he was 17 years old at the time of these crimes, he deserves punishment that is less severe than the sentence that would be imposed on an adult defendant. He points out that he did not graduate from high school and that the "haphazard nature of the robbery" reflects a lack of premeditation. Defendant also asserts he can be restored



to useful citizenship because he has only one additional adult conviction on his record and lacks a violent criminal history.

¶ 22 Here, defendant was convicted of committing four felonies, including the Class X felony of armed robbery. A Class X felony is punishable by a sentence of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2010). Because the trial court was required to impose a 15-year firearm enhancement due to defendant's use of a weapon during an armed robbery, defendant was subject to a sentencing range of 21 to 45 years in prison. 720 ILCS 5/18-2(b) (West 2010).

¶ 23 Although such a sentencing range is significant, defendant in this case, as in *Hunter*, was not "subject to a sentence comparable to the penalty that was rejected in *Miller*." See *Hunter*, 2016 IL App (1st) 141904, ¶ 55. Here, the trial court sentenced defendant to 30 years in prison. This court has held that a prison term in this range does not violate the eighth amendment or the proportionate penalties clause and has declined to extend the rules set out in *Miller* and *Graham* to mandatory minimum sentences applied to juveniles. See *People v. Banks*, 2015 IL App (1st) 130985, ¶¶ 21-23 (defendant's 45-year sentence affirmed); *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 58, *appeal allowed*, No. 116402 (Sept. 25, 2013) (defendant's 30-year sentence affirmed).

¶ 24 Defendant next contends that despite our rejection of his constitutionally based arguments, this court should reduce his sentence to the statutory minimum term or remand for a new sentencing hearing because his 30-year term represented an abuse of the trial court's discretion. Defendant reiterates his age and lack of a violent criminal history and points out that no one was injured in these offenses. Defendant argues his 30-year sentence is "10 years longer than the minimum sentence for first degree murder" and maintains his sentence should be

reduced because the trial court did not find his family background and lack of education to be mitigating factors in his sentence.

¶ 25 At defendant's sentencing hearing, the prosecutor argued in aggravation that defendant used a defaced firearm and restrained Martinez while he pointed a gun at her head. Defendant had an adult felony conviction for possession of a controlled substance, for which he served one year in prison. The prosecutor further noted that defendant had several prior juvenile cases involving burglary, stalking and robbery and was committed to the Illinois Department of Corrections as a juvenile in one case.

¶ 26 In mitigation, defense counsel argued defendant was a "young man" with "family ties" and only one felony conviction as an adult and thus should receive the minimum sentence. Counsel asked the court to not consider defendant's prior juvenile record. Defendant declined to address the court in allocution.

¶ 27 The court made the following remarks before imposing sentence:

"You know, I don't see anywhere in [the presentence investigation report] where you've had problems as far as with your family and growing up. And you know, you've started your criminal career as a juvenile committing burglaries, committing robberies, as an adult, drug cases. I'm not sure exactly where you're headed. You've done a year in the Illinois Department of Corrections as an adult. I note that you did not complete your education. I find that huge because I think that's what gets you to a better life, is education. You don't get to a better life by burglarizing people. You don't get to a better life by robbing people. You don't get to a better life by getting involved in drugs. Those are the things that hold you back and hold you down.

You have a three-year-old son. What have you been doing for your son since he was brought into this world?

DEFENDANT: Watching him. That's it.

THE COURT: Yeah, nothing, nothing. Watching him, nothing. You have parents who are in your life. You don't think it's important that somewhere you should have been in your son's life more significantly than watching him? Fathers go out. They earn a living so that they can take care of their children so that their children can have an opportunity to have a better life than they had. This has been going on since the beginning of time, generation after generation after generation. I mean, if you really care about your son, you would have found a way to do something different with your life.

I mean, I find – I mean, he has no remorse. I don't understand it. I don't know what this young man is trying to get out of his life, but apparently he is not working towards any type of goal.

This was a serious incident. This was an incident where sometimes something like this goes wrong. It goes from being an armed robbery to a murder just in one false step.

We live in a society where if you want to buy things, if you want to get a car, if you want to own a home, if you want to have clothes on your back, it's called go out, get a job, and someone will pay you so that you can get those things. You don't take it from other people. That's why we have penitentiaries. Because our society has to be protected from people like you.

You are a young man. However, I think that in looking at your background, somehow you're a very troubled young man. I don't know if you're ever going to turn your life around[.]"

¶ 28 A trial court's sentencing decision is entitled to great deference and will not be altered on appeal until it represents an abuse of discretion; moreover, a sentence within the applicable statutory range does not constitute an abuse of the trial court's discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Randall*, 2016 IL App (1st) 143371, ¶ 68.

¶ 29 Again, with the mandatory 15-year firearm enhancement due to defendant's use of a weapon, defendant was subject to a sentencing range of 21 to 45 years in prison. 720 ILCS 5/18-2(b) (West 2010). Defendant's 30-year term sits within the lower half of that range.

¶ 30 Defendant contends he should have received a sentence close to or at the minimum term for these offenses. In sentencing defendant, the trial court noted his prior criminal history, observing that after his previous offenses, defendant had not taken steps to change his life. By December 2011, when he committed these four felonies at the age of 17, defendant had been convicted of a previous adult offense as well as three juvenile offenses. The court also noted the gravity of defendant's commission of armed robbery with a firearm.

¶ 31 The seriousness of an offense, and not the presence of mitigating evidence, is the most important factor in sentencing a defendant. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94. The trial court is not required to give greater weight to a defendant's rehabilitative potential than to the seriousness of the offense. *People v. Alexander*, 239 Ill. 2d 205, 210 (2010). Given those facts, the trial court was well within its discretion to impose a sentence above the minimum term. Moreover, the court's remarks about the defendant's lack of family problems and the defendant's

failure to complete his education were not improper, and although defendant asserts that the court did not consider defendant's family obligations in mitigation of his sentence, the trial court is not required to expressly indicate its consideration of all mitigating factors and the weight to be assigned each factor. See *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43. Defendant's 30-year sentence for these offenses did not constitute an abuse of the trial court's discretion.

¶ 32 Defendant's next contention on appeal is his cause should be remanded and reconsidered under a recent amendment to the "automatic transfer" provision in section 5-130 of the Juvenile Court Act. See Pub. Act 99-258, section 5, eff. Jan. 1, 2016 (amending 705 ILCS 405/5-130, 5-805 (West 2014)). The recent amendment increases the age and reduces the number of enumerated offenses that take a youthful offender out of the jurisdiction of the juvenile court and subject him to adult court procedures and sentencing.

¶ 33 The current version of section 5-130(1)(a) provides, in relevant part:

"The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 16 years of age and who is charged with: (1) first degree murder, (ii) aggravated criminal sexual assault, or (iii) aggravated battery with a firearm [as set out in certain statutory sections].

These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State." Pub. Act 99-258, § 5, (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-805 (West 2014)).

¶ 34 Under the previous version of section 5-130 in effect at the time of these crimes, armed robbery with a firearm was included in those offenses that were excluded from juvenile court proceedings. 705 ILCS 405/5-130(1)(a) (West 2010). Following Public Act 99-258, the

commission of armed robbery with a firearm no longer excludes a defendant from juvenile court. 705 ILCS 405/5-130(1)(a) (West 2016).

¶ 35 Defendant does not challenge that the effective date of that amendment is January 1, 2016. He contends that under the same retroactivity analysis that we set out earlier, as to the firearm enhancement, the amended version of section 5-130(1)(a) should be apply to his case, thus placing him in the jurisdiction of the juvenile court because the offense he is charged with is no longer a transferable offense.

¶ 36 This court has issued differing opinions as to the retroactivity of these amendments. See *Hunter*, 2016 IL App (1st) 141904, ¶¶ 72-73 (amendment does not apply retroactively). But see *People v. Patterson*, 2016 IL App (1st) 101573-B, ¶ 15, and *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 15. In *Patterson* and *Ortiz*, the amendments in section 5-130(a)(1) were applied retroactively to the defendants, who were 15 years old when they committed their offenses, and this court affirmed the defendants' convictions but vacated their sentences and remanded the cases to juvenile court to allow the State to file a petition for a transfer hearing and resentencing in adult court. See *Patterson*, 2016 IL App (1st) 101573-B, ¶ 21; *Ortiz*, 2016 IL App (1st) 133294, ¶ 36 (such resentencing would take into account the holdings of *Miller*, *Roper* and *Graham*).

¶ 37 Our supreme court recently applied the amendments to section 5-130(1)(a) to a case pending in criminal court at the time of the amendment. In *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶¶ 3-4, the juvenile defendant was initially subject to adult criminal court proceedings under the prior version of the statute because he was charged with committing first degree murder and other offenses when he was 15 years old. The supreme court upheld the trial

judge's transfer of the case to juvenile court prior to trial based on the amendment to the automatic transfer provision, which changed the transfer age from 15 to 16. *Id.* ¶ 7. Here, however, in contrast to *Howard*, defendant's case has been completed and is before us on direct appeal.

¶ 38 Furthermore, defendant's case was heard in adult court because he was 17 years old in 2011 when these three felony offenses occurred. At that time, section 5-120 of the Juvenile Court Act excluded from its jurisdiction 17-year-olds charged with committing felonies. 705 ILCS 405/5-120 (West 2010). Even if the amendments in section 5-130(a)(1) were applied to defendant's case, they would not confer juvenile court jurisdiction on this defendant.

In a case with facts that mirror those in the instant case, this court reasoned in *People v. Jackson*, 2016 IL App (1st) 141448, ¶ 25, that where the defendant was not subject to juvenile court jurisdiction at the outset, the exceptions to the general rule did not need to be considered.

¶ 39 As the court in *Jackson* acknowledged, section 5-120 has been amended to include minors who commit felonies before their 18th birthday. Pub. Act. 98-61, § 5 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120). However, as *Jackson* points out, the amendment applies only to offenders who commit the charged crimes on or after January 1, 2014, because the amendment contains a savings clause indicating that the changes from the amendment "apply to violations or attempted violations committed on or after the effective date of this amendatory Act." 705 ILCS 405/5-120 (West 2014). Therefore, the prior version of section 5-120 applies to defendant and excludes his case from juvenile court jurisdiction. 705 ILCS 405/5-120 (West 2010).

¶ 40 Defendant is entitled to relief on his two remaining contentions in this appeal. First, defendant asserts that his conviction for aggravated unlawful restraint should be vacated because the conduct on which that conviction arose from his commission of the armed robbery.

¶ 41 Under the one-act, one crime rule, a criminal defendant cannot receive multiple convictions that arise from a single act. *People v. King*, 66 Ill. 2d 551, 566 (1977). An offender commits armed robbery when he takes property from another by the use of force or by the threat of imminent force while armed with a dangerous weapon. 720 ILCS 5/18-2(a)(1) (West 2010). An offender commits aggravated unlawful restraint when he knowingly detains another without legal authority and while using a deadly weapon. 720 ILCS 5/10-3, 10-3.1 (West 2010).

¶ 42 Where, as here, the restraint and the armed robbery occur simultaneously, the restraint must extend beyond that inherent in the armed robbery to support separate convictions. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶¶ 51-55 (aggravated unlawful restraint conviction vacated where defendant's restraint of armed robbery victims was not separate from acts necessary to commit robbery). The State concedes, and our review of the record confirms, that defendant held Martinez only while he took money out of the cash register and that he left the gun on the counter while fleeing the store. The testimony did not establish that defendant restrained Martinez beyond what was necessary to complete the robbery. Therefore, the armed robbery and the restraint were based on the same physical act, and only one conviction should be imposed against defendant.

¶ 43 When multiple convictions based on the same act are improperly entered, the conviction for the less serious offense must be vacated so that the more serious offense remains. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Here, the more serious offense is armed robbery, which is a



Class X felony (720 ILCS 5/18-2(b) (West 2010)); compare 720 ILCS 5/10-3.1(b) (West 2010) (aggravated unlawful restraint is a Class 3 felony). Accordingly, defendant's conviction for aggravated unlawful restraint is vacated under the one-act, one-crime rule.

¶ 44 Finally, defendant contends the mittimus in this case should be corrected to reflect an additional 40 days spent in pre-trial custody. A defendant is entitled to receive credit toward his sentence for each day spent in custody. 730 ILCS 5/5-4.5-100(b) (West 2010). The record includes some discussion at defendant's sentencing hearing of the number of days to which defendant was entitled, and the mittimus indicates defendant was ultimately awarded credit for 857 days in custody. However, defendant now contends, and the State agrees, that he should receive credit for 897 days.

¶ 45 In conclusion, for the reasons set forth in this order, defendant's conviction for aggravated unlawful restraint is vacated pursuant to the one-act, one-crime rule. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the mittimus to award defendant credit for 897 days toward his sentence. The judgment of the circuit court of Cook County is affirmed in all other respects.

¶ 46 Affirmed in part and vacated in part; mittimus corrected.