2017 IL App (1st) 142936-U

No. 1-14-2936

Order filed June 1, 2017

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 5999
	)	
BENNY GALLEGOS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's judgment over defendant's claims that the court erred in denying his motion to suppress; that the court erred in permitting the State to publish Barragan's written statement and in considering it as substantive evidence; that the trial court erred in imposing consecutive sentences for his convictions for aggravated battery and unlawful vehicular invasion; and that his conviction for aggravated unlawful restraint violated the one-act, one crime rule.

¶ 2 Following a bench trial, defendant Benny Gallegos was found guilty of aggravated battery with a firearm, unlawful vehicular invasion, and aggravated unlawful restraint in

connection with the March 27, 2011, shooting of Roberto San Gabriel Cortes in Chicago, Illinois. The trial court subsequently sentenced defendant to concurrent terms of 10 years imprisonment for aggravated battery with a firearm and 5 years imprisonment for aggravated unlawful restraint, and a consecutive term of 3 years imprisonment for unlawful vehicular invasion. On appeal, defendant contends that the court erred in denying his motion to suppress his written statement, the court erred in permitting the assistant State's Attorney to publish Irvin Barragan's written statement, the court erred in imposing consecutive sentences for his convictions for aggravated battery with a firearm and vehicular invasion, and that we should vacate his conviction for aggravated unlawful restraint. For the reasons that follow, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Motion to Suppress

¶ 5 Prior to trial, defendant filed a motion to suppress statement. In his motion, defendant contended that on March 30, 2011, he was arrested by officers of the Chicago Police Department. Defendant contended that none of the officers informed him of his *Miranda* rights and he later gave a statement to an assistant State's Attorney (ASA), who also did not inform him of his *Miranda* rights, regarding his involvement in a shooting that took place on March 27, 2011. At the hearing on defendant's motion, Samantha Medina testified that she was defendant's fiancée and was with him when he was arrested on March 30, 2011. She testified that she subsequently contacted First Defense Legal Aid (First Defense) and left a message with their answering service. Later that evening, she received a call from Jared Smith, a volunteer for First Defense, and she asked him to represent defendant.

¶ 6 Smith testified that after speaking with Medina and agreeing to represent defendant, he called his supervisor, Caitlin Patterson, and arranged to meet her at the Area 4 Police Headquarters where defendant was being held. Smith testified that he arrived at Area 4 around 12:30 a.m. and Patterson arrived 15 minutes later. They went inside and spoke with Sergeant Daniel Gallagher at the front desk who asked for their identification. They told Sergeant Gallagher that they were there to see defendant, their client. At the time, defendant was in the roll call room at Area 4 giving a statement to an ASA, while another officer, Detective Thomas Crain, was present.

¶ 7 Sergeant Gallagher went to the roll call room where defendant was giving his statement and asked Detective Crain to step out of the room. Sergeant Gallagher then told Detective Crain that there were two attorneys at the station asking to see their client. Detective Crain testified that he walked back into the roll call room and told defendant "exactly what Sergeant Gallagher said to" him, that "there were two people here and they claim to be your attorneys and they would like to speak to you." Defendant told Detective Crain that he "just want[ed] to finish his statement," and Detective Crain relayed that information to Sergeant Gallagher. Sergeant Gallagher returned the front desk and told Smith and Patterson that defendant did not want to speak with them. Patterson asked Sergeant Gallagher if she could ask defendant that herself, but Sergeant Gallagher told her that she could not. Patterson testified that she was able to meet with defendant later that morning.

¶ 8 ASA Bob Groebner testified that he arrived at the Area 4 police station and met with defendant shortly after midnight on March 31, 2011. He testified that he told defendant that he was a lawyer, but not defendant's lawyer and read him his *Miranda* rights. Groebner further testified that defendant waived his rights and agreed to speak with him about the incident with

Detective Crain present. After speaking with defendant, Groebner asked him if he would like to memorialize his statement in writing, and defendant agreed to do so. As Groebner was taking defendant's written statement, they were interrupted by another police officer who asked to speak with Detective Crain. Detective Crain briefly left the room, then returned and told defendant there was a lawyer there who wished to speak with him. Groebner testified that defendant told Detective Crain that he did not want to meet with anyone and that he wanted to finish giving his statement.

¶ 9 While Detective Crain was out of the room, Groebner asked defendant if he was being treated fairly by the police and defendant told him that he had "no issues with the police that evening." Groebner further testified that he never heard any of the police officers threaten defendant and specifically never heard any of the officers threaten to "rip off the defendant's f***ing head off." Groebner testified that he never heard any of the officers promise that defendant could go home after giving a statement. After finishing defendant's written statement, Groebner asked defendant to read the first page and then read the remainder of the statement to him and asked him to make corrections where necessary. Defendant made one correction, and he, Groebner, and Detective Crain signed each page.

¶ 10 Detective Crain testified that upon admitting defendant to the police station, his partner, Officer Gomez, read defendant his *Miranda* rights and defendant indicated that he understood his rights. Detective Crain further testified that he never threatened defendant and never told him that he was not in trouble or that he would get to go home if he gave a statement. Detective Crain testified that ASA Groebner arrived between 10:30 and 11 p.m. and also read defendant his *Miranda* rights before speaking with him and memorializing his statement in writing.

¶ 11 Detective Crain published a portion of defendant's written statement to the court. In his statement, defendant stated that while Groebner was taking his statement, "[defendant] was informed that a lawyer was at Area 4 who wished to speak to him, and [defendant] informed Detective Crain in the presence of ASA Groebner that he did not wish to speak with the lawyer and wanted to continue to give a statement to ASA Groebner." Detective Crain also published a portion of defendant's written statement in which defendant stated that "he ha[d] been treated well by police and by Assistant State's Attorney Bob Groebner" and that no one threatened him or made him any promises to induce him into giving this statement. On cross-examination, Detective Crain acknowledged that the written statement indicated that he told defendant there was "a lawyer" there to see him rather than "two lawyers," but Detective Crain stated that this was a mistake that he failed to correct when he reviewed defendant's statement and he would have informed defendant that there were two lawyers present.

¶ 12 Defendant testified that he was sitting on the porch of his home when he was arrested and none of the officers advised him of his *Miranda* rights. He further testified that the officers told him that he could go home if he provided a statement and that Detective Crain told him that he was not in trouble and did not need to talk to a lawyer. He further testified that Detective Crain told him there was a 100-110% chance of him going home. Defendant testified that Groebner did not advise him of his *Miranda* rights and he only gave the statement to Groebner because he believed that he would get to go home if he did so. Defendant further testified that while he was giving his statement, Detective Crain slammed his hands on the table and told him he should "rip [his] f***ing head off." Defendant testified that he was never informed that there was a lawyer who came to see him at the police station and he only learned about it after the fact.

Defendant further testified that he was never given an opportunity to read the statement written by Groebner.

¶ 13 In ruling on defendant's motion, the court found that:

> "It's suggested that that if [Detective Crain] told [defendant] that somebody was there, that he didn't let them know it was a lawyer for you, that there is some kind of ambiguity, that really it's the state's attorney. The fact of the matter is that person was there before the state's attorney did come. Mr. Groebner came later and talked to [defendant] and reduced things to writing and typed them out and went through it with [defendant]. [Groebner] also mentioned the fact that a lawyer had appeared and he had a chance to talk with [defendant] outside the presence of the detectives."

The court further found that Groebner was credible and that there were some mitigating factors in the statement where defendant attempted to mitigate his involvement in the shooting. The court found that there were therefore no 5th or 6th Amendment violations that would warrant suppression of defendant's statement and denied defendant's motion.

¶ 14 Defendant filed a motion to reconsider that ruling contending that Detective Crain never told defendant that the lawyers present at the police station were hired by his family to be his lawyers. In denying defendant's motion to reconsider, the court recited the facts presented at the hearing on the motion and found that the "crux of the issue" is what happened after Smith and Patterson arrived at the police station and asked to speak with defendant. The court found that it did not "believe that there [was] anything that indicate[d] that [there] was some kind of confusion or subterfuge" that would have led defendant to believe that there was another state's attorney present like Groebner. The court noted that defendant was advised that there was a lawyer there to see him. The court found that based on the evidence presented that defendant had

been adequately advised that lawyers were present on his behalf. The court observed that defendant declined to meet with the attorneys and instead chose to speak with law enforcement and give a statement mitigating his involvement in the incident by indicating that he was not the shooter. The court noted that this was defendant's choice to make and that "[n]obody lied to him or told him anything different." The court found that neither the police nor Groebner had violated any of defendant's rights and therefore denied the motion for reconsideration.

¶ 15 B. Trial

¶ 16 At trial, Lydia Salazar testified that she was the wife of the victim, Roberto San Gabriel Cortes. She testified that on March 27, 2011, Cortes received a phone call and left the house. Later that day, a Chicago police detective told Salazar that her husband was in the hospital, and police transported her to Mt. Sinai Hospital. She testified that Cortes could not move or speak and was in the hospital for seven months before Mt. Sinai transferred him to a hospital in Mexico. Salazar further testified that he was eventually released from the hospital and is now in the care of his parents in Mexico. Salazar testified that she receives updates about his condition from his parents and that he is still unable to move or communicate and receives all of his nutrition from a feeding tube.

¶ 17 The ASA then asked Salazar whether Cortes had to undergo any surgeries while at Mt. Sinai, but the court interrupted and stated that it did not believe great bodily harm was in dispute. The court then asked defense counsel if he was disputing great bodily harm and defense counsel responded "No, Judge." The court then directed the ASA to stop the line of questioning regarding Cortes' injuries.

¶ 18 Jose Balderrama testified that he lives near the 2400 block of South Millard Avenue in Chicago and was playing video games with his nephew on March 27, 2011, when he looked out

of his window and saw three Latino men, all wearing red, pulling a person out of the driver's seat of a truck parked near the corner of the street. Balderrama also saw a black vehicle double parked in the street and saw a fourth male wearing black take a handgun out of the vehicle's trunk. Balderrama ran to get his phone to dial 911, but before he could do so, he heard a gunshot. Balderrama ran out onto the street and saw the four Latino males and the black vehicle were gone. Balderrama observed the driver of the truck laying face down and motionless in the road and called police. He testified that the driver moved slightly when the police arrived and blood started coming out of his head.

¶ 19 Detective John Jurek testified that on March 27, 2011, he was assigned to a shooting that took place near 25th Street and South Millard Avenue. After speaking to witnesses at the scene, Detective Jurek was looking for an individual with the letter "A" tattooed under his left eye. Two days later, Detective Jurek learned that Irvin Barragan was in custody on an unrelated matter and he matched the description provided by the witnesses at the scene. After speaking with Barragan, Detective Jurek began looking for defendant in connection with the incident. Detective Jurek testified that he did not find Barragan to be impaired by drugs or alcohol when he spoke to him. Defendant was arrested later that day.

¶ 20 Barragan testified that he was currently in custody for an unrelated drug conviction. He testified that he and defendant were members of the Two Sixers gang in March 2011, and that the Two Sixers and Latin Kings were rivals. When counsel questioned Barragan about the events of March 27, 2011, he initially responded that he did not recall being with defendant or speaking with police. The court then admonished Barragan that he was under oath and that if the court believed he was not answering questions accurately, he would be held in contempt of court.

¶ 21 Following this admonishment, Barragan acknowledged that he met with an ASA on March 31, 2011, and gave a written statement. Barragan testified that he told the ASA that on March 27, 2011, he was in a vehicle with defendant and Julio Jimenez and they decided to go "beat up some Kings." Julio, who was driving, drove them to 25th Street and South Millard Avenue where they saw another vehicle with two or three individuals in it. Barragan testified that he "false flagged" the Latin Kings hand sign at the men in the vehicle and they made the same hand signal back at him. Barragan testified that at that point he jumped out of the vehicle and he and defendant chased one of the passengers of the other vehicle down the street. He then heard three or four gunshots and he, defendant, and Julio ran back to the vehicle and drove away.

¶ 22 Over defense counsel's objections, the State then questioned Barragan regarding discrepancies between his testimony at trial and his written statement to the ASA.

"Q. You told the state's attorney that [defendant] went up to the driver's door of the SUV, opened it, and started to beat the driver of the SUV with his fists.

A. No. I had told him that me and [defendant] were in the car and we seen [*sic*] Julio open the door. That's what I said. I don't know why the state's attorney put that.

Q. You told the State's attorney that [defendant] grabbed the driver of the car out and was hitting him on the ground next to the car.

A. No, I told them Julio—me and [defendant] were already in the car. How can [defendant] open the door if he's already in the car with me[?]

Q. You told the state's attorney that you chased the passenger down.

A. I told him me and [defendant] chased him.

***

Q. Irvin, you told the state's attorney that you then saw Julio walk towards the male Hispanic driver that [defendant] was beating up and pointed a handgun next to his head and fired one shot into the driver's head.

Do you remember telling the state's attorney that?

A. All I said was I heard a gunshot, I don't know if Julio did it or not. I was already in the car. Me and [defendant] were already in the car.

Q. You told the state's attorney that [defendant] was standing right next to Julio when Julio shot the driver in the head.

A. I told him me and [defendant] were in the car, that's what I told the state's attorney that I was under the influence of cocaine, and he kept harassing me and all that, the state's attorney.

Q. You didn't tell the state's attorney you were already in the car when that happened, you said you were watching from about ten feet away when the shooting occurred, is that right?

A. No, because how did I do that if I chased two [*sic*] and me and [defendant] were already in the car so how was I ten feet away from him if we didn't see nothing[?]"

Barragan further testified that defendant had nothing to do with the shooting and that the only thing he and defendant did was "chase somebody and beat him up." When counsel showed Barragan his handwritten statement, Barragan testified that he was high on cocaine at the time he gave the statement and was forced by the ASA into giving the statement.

¶ 23 Groebner testified that at the time he took Barragan's statement, Barragan did not appear to be impaired by drugs or alcohol. Groebner then published Barragan's statement to the court.

In the statement, Barragan stated that he was standing on the street corner when defendant and Julio drove up in a black vehicle. Barragan got into the vehicle and Julio suggested that they go "f*** with the Latin Kings." Julio then drove the vehicle to 25th Street and South Millard Avenue where they observed some men sitting an SUV. The three of them "false flagged" the Latin Kings gang sign to the men sitting in the SUV and the men made a similar signal back to them.

¶ 24 Barragan stated that he and defendant then exited the vehicle and he chased down one of the passengers while defendant went to the SUV's driver side door, opened it, and started hitting the driver with his fists. Defendant then dragged the driver out of the vehicle and started hitting him on the ground next to the SUV. After Barragan chased the passenger down, he returned to the SUV and saw Julio open the trunk of the black vehicle and retrieve a handgun. While Barragan watched from about 10 feet away, Julio walked over to the driver of the SUV and fired one shot into driver's head while defendant was standing right next to him. The three of them then got back into the black vehicle and Julio quickly drove away.

¶ 25 Groebner also published defendant's written statement to the court in which defendant repeated the version of events contained in Barragan's statement with a few distinctions. Defendant stated that he did not see the men in the SUV make the Latin Kings hand signal after Barragan and Julio "false flagged"[1] them. Defendant stated that he was "within a few inches" of Julio when Julio fired the handgun at the driver's head. Defendant also stated that before the

[1] Defendant stated that "false flag" means to flash a gang sign of a gang of which you are not a member.

shooting, he was not aware that Julio had a gun and thought they were only going to fight the men in the SUV.[2]

¶ 26 The parties stipulated that an evidence technician took multiple photographs of the crime scene and recovered an expended shell casing. The defense did not call any witnesses, but presented the stipulated testimony of Medina who would testify that she spoke to a First Defense attorney around midnight on March 31, 2011, and asked him to represent defendant. The defense further presented the stipulated testimony of Smith who would testify that after speaking with Medina, he agreed to represent defendant, but that when he and Patterson went to the police station, they were not able to speak with him.

¶ 27 Following closing argument, the court recounted the evidence finding that defendant's statement was "credible and compelling as to what he was doing and what his mental state was." The court stated that defendant's "performance" on the witness stand was a classic example of why the legislature permits certain exceptions to the rule against hearsay in section 115-10 of the Illinois Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)). The court found that Groebner was "no kind of cowboy" in the sense that he tried to be tough or circumvent any rules; he merely wrote down what defendant told him.

¶ 28 The court found that defendant saw Julio coming with the gun and was still beating the driver of the SUV when Julio used the gun. The court found that Julio, Barragan, and defendant were "all in this together" and that defendant did not leave the scene until after the gun was fired. The court determined that defendant was therefore proven guilty of aggravated battery with a firearm, unlawful vehicular invasion, and aggravated unlawful restraint, but not guilty of

[2] On cross-examination, Groebner acknowledged that he arrived at the Area 4 police station on March 30, 2011, around 10 p.m. and that he mistakenly testified at the hearing on the motion to suppress that he did not arrive at the police station until around midnight.

attempted first degree murder because there was insufficient evidence of defendant's specific intent to kill. The court subsequently denied defendant's motion for reconsideration in which defendant argued that the court erred in denying his motion to suppress his statement and in admitting Barragan's out-of-court statement without proper foundation.

¶ 29 C. Sentencing

¶ 30 At sentencing, the State informed the court that because defendant was found to cause great bodily harm, his sentences for aggravated battery with a firearm and unlawful vehicular invasion should run consecutively. The court stated that it "tend[ed] to agree with that" and asked defense counsel if he had any comments. Defense counsel stated that the proper determination in the statute was whether defendant caused "severe bodily injury," but that he "would leave to this court to determine whether or not the defendant caused severe bodily injury." The court determined that based on the evidence presented in this case, the sentences should run consecutively.

¶ 31 Following the arguments in aggravation and mitigation, and defendant's statement in allocution, the court found that although defendant was not the person who actually shot the gun, he was part of the group of people who dragged Cortes out of the vehicle and caused the injuries he suffered. The court stated that Cortes "is more like a vegetable or a plant that his parents have to maintain than a person. He cannot communicate anymore." The court further stated that Cortes "is one of those people that you wonder what might be going on in his head. How much of a prisoner in his own body he realizes that he is. That life was taken and it was taken in a criminal manner."

¶ 32 After considering defendant's prior convictions, the court sentenced defendant to consecutive terms of 10 years imprisonment for aggravated battery with a firearm and 5 years

imprisonment for unlawful vehicular hijacking. The court also sentenced defendant to a concurrent term of three years imprisonment for aggravated unlawful restraint. The court subsequently denied defendant's motion to reconsider his sentence. This appeal follows.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant raises four contentions. Defendant first contends that the trial court erred in denying his motion to suppress his statement where it was obtained in violation of his right to counsel and his right to due process. Defendant further contends that the trial court erred in permitting Groebner to publish Barragan's written statement where his trial testimony was not inconsistent with his statement and in considering it as substantive evidence because his testimony did not affirmatively damage the State's case. Defendant also contends that the trial court erred in imposing consecutive sentences for his convictions for aggravated battery with a firearm and unlawful vehicular invasion because the evidence presented failed to establish that the victim suffered severe bodily injury. Finally, defendant contends that this court should vacate his conviction for aggravated unlawful restraint where there was no evidence of restraint and the conviction violates the one-act, one-rule.

¶ 35 A. Motion to Suppress

¶ 36 Defendant first contends that the trial court erred in denying his motion to suppress his statement. Defendant asserts that his purported waiver of his right to counsel was not knowing or voluntary where the police officers failed to identify the attorneys who were present at the police station or to advise him that the attorneys were hired on his behalf.

¶ 37 1. *Standard of Review*

¶ 38 In reviewing a trial court's ruling on a motion to suppress evidence, this court reviews the court's findings of historical fact for clear error, giving due weight to any inferences drawn

from those facts by the court. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Where, as here, the relevant facts are not in dispute, we review *de novo* the trial court's application of the law to these uncontested facts. *People v. Woods*, 338 Ill. App. 3d 78, 84 (2003).

¶ 39 2. *Right to Counsel*

¶ 40 A defendant's right against self-incrimination is guaranteed by both the United States and Illinois constitutions. *People v. McCauley*, 163 Ill. 2d 414, 421 (1994). This includes the right to an attorney. *Id.* A defendant may waive these rights provided that the waiver is voluntary, knowing, and intelligent. *People v. Evans*, 125 Ill. 2d 50, 74 (1988). In determining whether a defendant knowingly and intelligently waived his right to an attorney, a court must consider the totality of the circumstances, including the characteristics of the defendant and the details of the interrogation, without one circumstance or factor controlling. *People v. Reid*, 136 Ill. 2d 27, 54-55 (1990). The State bears the burden of proving, by a preponderance of the evidence, that defendant waived his rights knowingly, intelligently, and voluntarily. *Id.* at 51.

¶ 41 3. *Defendant's Waiver was Made Knowingly, Voluntarily, and Intelligently*

¶ 42 The undisputed facts show that two attorneys from First Defense arrived at the police station after defendant's fiancée asked them to represent him. At the time the attorneys arrived, defendant was in the midst of giving a statement to Groebner. The attorneys gave their identification information to Sergeant Gallagher who relayed the information to Detective Crain. Detective Crain then told defendant that there was a lawyer there to see him, but defendant declined to meet with anyone, telling Detective Crain that he wanted to finish giving his statement to Groebner. Sergeant Gallagher told this information to Smith and Peterson and they left the police station.

¶ 43 Defendant asserts that his rights to counsel and due process were violated because he was denied access to his attorneys who were physically present at the police station. Defendant contends that his purported waiver of his right to counsel was not made knowingly or intelligently because Detective Crain did not identify the lawyers or tell him that they had been hired by Medina to represent him. In contending that this amounted to a violation of his right to counsel, defendant relies on *McCauley*, 163 Ill. 2d 414 and *Woods*, 338 Ill. App. 3d 78.

¶ 44 In *McCauley*, defendant was brought to the police station in connection with a shooting. *McCauley*, 163 Ill. 2d at 418. After being advised of his *Miranda* rights, defendant did not ask for a lawyer, but instead spoke to the detectives. *Id.* While defendant was in custody, members of his family contacted an attorney who agreed to represent defendant and went the police station where defendant was being held. *Id.* After arriving at the police station, officers told the attorney that he could not speak with defendant because he had not asked to speak with a lawyer. *Id.* at 419. The attorney asked the officers to tell defendant that he was present at the station, but the officers refused to do so. *Id.* The trial court granted defendant's motion to suppress statements and the supreme court affirmed. *Id.* at 420, 449.

¶ 45 On review, the supreme court found that:

> "Our State constitutional guarantees simply do not permit police to delude custodial suspects, exposed to interrogation, into falsely believing they are without immediately available legal counsel and to also prevent that counsel from accessing and assisting their clients during the interrogation. (See Ill. Const.1970, art. I, §§ 2, 10.) It is apparent that when police are allowed to withhold information from custodial suspects that their attorneys are present and immediately available to offer assistance, enormous pressure builds upon the police to secure statements from those suspects before they

> either exercise their right to an attorney or somehow learn of their attorneys' presence. Further, by preventing those attorneys from accessing and assisting their clients, police improperly interfere with the suspects' right to their attorneys' presence as well as the attorney-client relationship, itself." *Id.* at 423-24.

The court further found that "due process is violated when police interfere with a suspect's right to his attorney's assistance and presence by affirmatively preventing the suspect, exposed to interrogation, from receiving the immediately available assistance of an attorney hired or appointed to represent him." *Id.* at 444. The supreme court found that the trial court properly suppressed defendant's statements where the record showed that the police officers refused to allow defendant's retained attorney to access him and did not inform defendant that his attorney was present at the station, seeking to consult with him. *Id.* at 445. The supreme court found that the police failed to apprise defendant of communications from his attorney and was thus denied information that was necessary to a knowing and intelligent waiver of his right to counsel. *Id.* at 446.

¶ 46 Accordingly, in *McCauley*, the supreme court upheld the trial court's decision to suppress defendant's statement where his counsel was present at the police station, but police officers refused to allow his attorney access to him or to tell defendant that his attorney was present at the station. In this case, by contrast, the testimony of Detective Crain and Groebner showed that defendant was informed that an attorney was present at the police station, but defendant explicitly declined the opportunity to meet with anyone. This information was corroborated by defendant's typewritten statement and the testimony of Sergeant Gallagher. Thus, in contrast with *McCauley* where defendant was never informed that an attorney was present at the police

station, the undisputed evidence in this case shows that defendant was informed that there was an attorney present at the station, but defendant declined to meet with anyone.[3]

¶ 47 We likewise find *Woods* distinguishable from the case at bar. In *Woods*, officers brought defendant to the police station for questioning regarding the death of his infant son. *Woods*, 338 Ill. App. 3d at 80. Defendant was given his *Miranda* rights, signed a waiver form, and agreed to give a written statement. *Id.* Defendant gave varying accounts of what transpired, eventually telling officers that he caused the injuries to his son, but he refused to give a statement to an ASA and requested to speak with his girlfriend. *Id.* at 80-81.

¶ 48 While defendant was in custody, his girlfriend contacted an attorney. *Id.* at 81. The attorney went to the police station, but the desk officers would not allow him to meet with defendant because it was a "State police case and since the state investigators were not at the station, he could not see defendant," but the desk officers told the attorney that the state investigators would return to the station later that night. *Id.* The attorney then wrote a note to defendant telling him that he was a lawyer and advising defendant to not talk with anyone without an attorney present. *Id.* at 81-82. The attorney handed the note and his business card to the desk officer and the desk officer agreed to give the note to defendant and the state investigators. *Id.* at 82.

¶ 49 That evening, the state investigator read the note and told another officer to advise defendant that an attorney had been there to see him and that arrangements could be made for

[3] Defendant contends that the information provided to him by the officers regarding the presence of an attorney was the sort of "abstract offer" to speak to an attorney that the supreme court found insufficient in *McCauley*. We observe, however, that in determining that an "abstract offer" to contact an unknown lawyer was insufficient to satisfy defendant's constitutional rights where an attorney was present at the station and asking to see defendant, the court was referencing the right to contact an attorney contained in *Miranda* warnings (*McCauley*, 163 Ill. 2d at 445), rather than communication to defendant that a lawyer was present at the police station seeking to speak with him.

him to call the attorney. *Id.* The officer then threw the note away and could not remember if he told the ASA about the note. *Id.* Defendant was informed by another officer that an attorney had come to see him and that he could contact the attorney, but he was never told about the note. *Id.* at 83-84. Defendant eventually gave an inculpatory statement to the officers and an ASA. *Id.* at 83. The trial court found that defendant's constitutional rights were violated, but found those violations were cured when defendant made incriminating statements after being informed that an attorney had been at the police station to see him. *Id.* at 84.

¶ 50 On appeal, this court found, relying on *McCauley*, that "a defendant's constitutional rights are violated when officers fail to tell defendant that his attorney was present at the station and when officers deny defendant access to his attorney who is physically present at the police station and ready to counsel defendant." *Id.* at 87. The court further found that the violation was not cured when defendant was later informed about the attorney's presence because the police officers failed to apprise defendant of communications from his attorney bearing on his right to counsel. *Id.* at 88. Specifically, the court found that the officers' "actions were deceitful" where they never showed defendant the note and even disposed of it without telling defendant about its contents. *Id.* The court concluded that this type of "incommunicado interrogation" had been previously condemned by the both the United States and Illinois supreme courts. *Id.* at 89. The court held that defendant's constitutional rights are violated where "an attorney who is physically present at the place the custodial suspect is being held is denied access to the custodial suspect or where authorities prevent a custodial suspect from receiving written communications from an attorney that directly relate to the custodial suspect's right to counsel." *Id.*

¶ 51 We find *Woods* distinguishable from the case at bar in several respects. In *Woods*, the court repeatedly emphasized the officers' failure to notify defendant about the presence of the

attorney while the attorney was physically at the police station. See *Id.* at 87, 88, 89. By contrast, in this case, Sergeant Gallagher and Detective Crain immediately informed defendant that there was an attorney there to see him while the attorney was still present at the police station. Moreover, there was no "deceit[]" present in this case that the court found objectionable in *Woods*. *Id.* at 88. In the case at bar, Smith and Patterson told Sergeant Gallagher that they were there to see defendant and gave him their identification. Sergeant Gallagher relayed this information to Detective Crain who testified that he "indicated [to defendant] exactly what Sergeant Gallagher said to me, there were two people here and they claim to be your attorneys and they would like to speak to you." Despite receiving this information and having the opportunity to meet with the attorneys while they were physically present at the police station, defendant decided to continue giving his statement to Groebner. This evidence shows defendant made a knowing, voluntary, and intelligent waiver of his right to counsel.

¶ 52 Defendant contends, nevertheless, that his waiver was not made knowingly or intelligently because he was never told that the attorneys were hired by his fiancée or that they were there to represent him. As the State points out, however, there is nothing in the record to suggest that Sergeant Gallagher or Detective Crain knew the attorneys were hired by defendant's fiancée. Both Smith and Patterson testified that they told Sergeant Gallagher they were there to see defendant and gave him their identification, and there was no evidence presented that either of them communicated to the officers that they were hired by defendant's fiancée. Moreover, the trial court explicitly rejected defendant's contention that by not expressly informing defendant that the lawyer present was there to represent him, that defendant would believe that the attorney present was another ASA. The trial court found there was no "confusion or subterfuge" regarding whether the attorneys were there to represent defendant and we find nothing in the

record to disturb this finding. Defendant asserts that there was subterfuge when Detective Crain told defendant that he would be able to go home if he gave a statement, however, both Detective Crain and Groebner, whom the trial court found credible, denied that defendant was ever told that he did not need to speak with a lawyer because he was not in any trouble. In reviewing a circuit court's ruling on a motion to suppress, we defer to the circuit court's determination on the credibility of the witnesses. *People v. Pitman*, 211 Ill. 2d 502, 512-13 (2004).

¶ 53 Defendant further contends that the trial court's credibility determination and recollection of the witnesses' testimony was manifestly erroneous. Defendant specifically contends that the court incorrectly found that the First Defense attorneys, Smith and Patterson, arrived at the police station before Groebner began taking defendant's statement where the evidence showed that the attorneys arrived at the station while Groebner was taking the statement. Defendant fails to identify, however, how this mischaracterization of the evidence, which the court corrected in ruling on defendant's motion for reconsideration, merits a different result on his motion to suppress. Defendant suggests that the officers were intentionally vague regarding the identity of the First Defense lawyers because they were in the process of obtaining an incriminating written statement from him, but, as discussed, we find that defendant was properly apprised of the attorney's presence and there was no sort of misconduct that was found present in *McCauley* and *Woods*.

¶ 54 Furthermore, in ruling on defendant's motion for reconsideration, the court correctly recalled the timeline of the events and found that defendant was properly informed of his rights and the presence of the attorneys and intelligently and knowingly waived his right to speak with them and chose to continue giving his statement to Groebner. Accordingly, we find that the trial court did not err in denying defendant's motion to suppress his statement where he was

adequately advised of his rights and he knowingly, intelligently, and voluntarily waived them. Because we find no error, we need not address defendant's contention that the erroneous admission of defendant's confession was not harmless error. See *People v. Nash*, 2012 IL App (1st) 093233, ¶ 33.

¶ 55 B. Barragan's Written Statement

¶ 56 Defendant next contends that the trial court erred in permitting Groebner to publish Barragan's written statement under section 115-10.1 of the Code (725 ILCS 5/115-10.1 (West 2014)) and considering it as substantive evidence. Defendant asserts that Barragan's trial testimony was not entirely inconsistent with his written statement and that the court should have admitted only those portions of his written statement that were inconsistent. Defendant further asserts that the court should not have permitted the State use Barragan's prior inconsistent statements for impeachment purposes because Barragan's testimony did not affirmatively damage the State's case. We first address defendant's contention that the court erred in permitting Groebner to publish Barragan's written statement.

¶ 57 1. *Forfeiture*

¶ 58 Initially, we observe that defendant has forfeited this issue for review. In order to preserve an issue for appeal, defendant must specifically object at trial and raise the specific issue again in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). In this case, although defendant raised the issue in a posttrial motion, defendant failed to object when Groebner published Barragan's statement to the court. Defendant acknowledges the forfeiture, but contends that we should review this issue under plain error, or, in the alternative, because his trial counsel was ineffective in failing to preserve the issue.

¶ 59 2. *Plain Error*

¶ 60 The plain error rule allows a reviewing court to consider unpreserved claims of error regardless of forfeiture. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Plain error applies when there is a clear or obvious error and the evidence is so closely balanced that the error would change the outcome of the case, or when there is a clear or obvious error that is so serious that it affected the fairness of defendant's trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first consideration in addressing defendant's plain error argument is determining whether an error occurred, which requires a "substantive look" at the issue. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 61 3. *Prior Inconsistent Statements Under Section 115-10*

¶ 62 Under section 115-10.1(c)(2)(A) of the Code, a court may admit a prior inconsistent statement by a witness as an exception to the rule against hearsay where it is a statement that "narrates, describes, or explains an event or condition of which the witness has personal knowledge, and the statement is proved to have been written or signed by the witness." 725 ILCS 5/115-10.1(c)(2)(A) (West 2014). A prior statement need not directly contradict a witness's trial testimony to be inconsistent. *People v. Leonard*, 391 Ill. App. 3d 926, 934 (2009). A prior statement is also deemed inconsistent when it omits a significant matter that would reasonably be expected to be mentioned if true. *People v. Zurita*, 295 Ill. App. 3d 1072, 1077 (1998).

¶ 63 "[A]lthough only the inconsistent portions of a prior inconsistent statement are admissible in evidence [citation] a trial court need not make a 'quantitative or mathematical analysis' of whether the entire statement of the witness is inconsistent for the entire statement to be admissible [citation]." *People v. Govea*, 299 Ill. App. 3d 76, 83-84 (1998). The determination of whether a witness's prior statement is inconsistent with his present testimony is left to the

sound discretion of the trial court. *People v. Flores*, 128 Ill. 2d 66, 87-88 (1989). We will not reverse the trial court's rulings on evidentiary matters absent a clear abuse of discretion. *People v. Stechly*, 225 Ill. 2d 246, 312 (2007).

¶ 64 In this case, there were stark contrasts between Barragan's trial testimony and his written statement. In his written statement, Barragan stated that after "false flagging" the men in the SUV, he got out of the vehicle and started chasing one of the passengers while defendant went up to the driver's side door of the SUV, opened it, and started beating the driver with his fists. Defendant then dragged the driver out of the SUV and hit him on the ground next to the vehicle. Barragan then saw Julio retrieve a handgun from the trunk of his car. Defendant continued to hit the man on the ground as Julio walked up, pointed a gun at the driver, and fired one shot into his head. Barraged stated that he was only 10 feet away when Julio fired the gun and defendant was standing right next to Julio. The three of them then fled the scene.

¶ 65 In contrast, at trial, Barragan initially stated that he did not remember the events that occurred on March 27, 2011, but after being admonished by the court, he acknowledged his involvement in the incident. In contrast with his statement, however, Barragan testified that defendant did not go up to the driver of the SUV and start hitting him with his fists, but instead chased down one of the passengers with Barragan. Barragan testified that he and defendant were back in the vehicle when Julio opened the driver's door and grabbed the driver out of the SUV. He further testified that he and defendant were in the vehicle when someone fired the gun.[4] Barragan testified that he could not say for sure whether Julio was the person who fired the gun because he was in the car with defendant when he heard the gunshot. In contrast with his written

[4] We observe that Barragan also testified that while he was outside of the vehicle, he heard "three or four" gunshots and then ran back to the vehicle with defendant.

statement, Barragan testified that defendant was not standing right next to Julio when the gun was fired because defendant was in the vehicle with him. Barragan testified that the only thing he and defendant did was "chase somebody and beat him up."

¶ 66 Defendant contends that "[t]he only portion of Barragan's trial testimony that was inconsistent with his written statement dealt with whether [defendant] pulled the driver out of the car and beat him, and whether Barragan and [defendant] were near Julio when he shot Cortes." As the State points out, however, this "portion" of Barragan's testimony is the outline for the State's entire case against defendant. The charges brought against defendant were based on the fact that he pulled Cortes out of the vehicle (unlawful vehicular invasion) and continued to beat him on the ground (aggravated unlawful restraint) while Julio walked up and shot him in the head with a handgun (aggravated battery with a firearm). Barragan's statement was crucial to these charges because he stated that he was only 10 feet away when Julio shot Cortes and that defendant was standing right next to Julio. At trial, however, Barragan recanted much of his statement and testified that defendant did not beat the driver and pull him out of his vehicle, did not continue to beat the driver on the ground while Julio walked over with a gun, and was not standing right next to Julio when he fired the gun. In fact, the only consistencies between Barragan's statement and his trial testimony were that he, defendant, and Julio drove to 25th Street and South Millard Avenue, "false flagged" some Latin Kings gang members, and drove away after hearing gunshots. None of these facts formed the basis for the underlying charges against defendant and merely set the stage for the course of criminal activity.

¶ 67 Accordingly, we find the trial court did not abuse its discretion in admitting Barragan's entire written statement and we find no error warranting plain error review and honor defendant's forfeiture of this issue. See *People v. Johnson*, 238 Ill. 2d 475, 491 (2010). In

apparent anticipation of this result, defendant contends that his trial counsel was ineffective for failing to preserve this issue for appeal. "[I]f the ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient." *People v. Evans*, 186 Ill. 2d 83, 94 (1999). Prejudice occurs where defendant demonstrates a reasonably probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). As discussed, we find that the trial court did not err in admitting Barragan's statement pursuant to section 115-10, and thus we find that defendant suffered no prejudice as a result of counsel's alleged deficient performance. Because we find that the court did not err in admitting Barragan's statement and in considering it as substantive evidence, we need not address defendant's contention that the court erred in admitting Barragn's statement for impeachment purposes.

¶ 68 C. Consecutive Sentences

¶ 69 Defendant next contends that the court erred in imposing consecutive sentences for his convictions for aggravated battery with a firearm and unlawful vehicular invasion where the evidence presented was insufficient to establish that defendant caused severe bodily injury. Defendant argues that the court erred in finding that he caused severe bodily injury where the State did not introduce photographs or present competent medical evidence of Cortes's injuries.

¶ 70 1. *Forfeiture*

¶ 71 Initially, we observe that defendant has forfeited this issue for review. In order to preserve an issue for appeal, defendant must specifically object at trial and raise the specific issue again in a posttrial motion. *Woods*, 214 Ill. 2d ay 470. In this case, defendant neither objected at trial, nor raised the issue in a posttrial motion. Defendant acknowledges the

forfeiture, but contends that we should review this issue under plain error, or, in the alternative, because his counsel was ineffective in failing to preserve the issue. As discussed, the first consideration in addressing defendant's plain error argument is determining whether an error occurred, which requires a "substantive look" at the issue.[5] *Hudson*, 228 Ill. 2d at 191.

¶ 72 2. *Section 5-8-4*

¶ 73 Section 5-8-4(d)(1) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(d)(1) (West 2012)) imposes mandatory consecutive sentences where "[o]ne of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflected severe bodily injury." Here, defendant does not contest that he was convicted of a Class X or Class 1 felony, but contends that the court erred in determining that he caused severe bodily injury. We will reverse the trial court's determination that a bodily injury is severe for purposes of consecutive sentencing only if it is against the manifest weight of the evidence. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Deleon*, 227 Ill. 2d at 332.

¶ 74 3. *Severe Bodily Injury*

¶ 75 Our review of the record reveals that the trial court's determination that defendant inflicted severe bodily injury was not against the manifest weight of the evidence. Defendant's and Barragan's statements both showed that Cortes was shot in the head after defendant had beat him with his fists and pulled him out of his vehicle. Balderrama testified that after being shot, Cortes was motionless on the ground until police arrived and that when Cortes moved, blood

[5] This court has also recognized that the improper imposition of consecutive sentences might violate defendant's fundamental rights, mandating plain error review. *People v. Durham*, 312 Ill. App. 3d 413, 420 (2000); see also *People v. Williams*, 335 Ill. App. 3d 596, 598 (2002).

came out of his head. Cortes' wife, Salazar, testified that Cortes was in the hospital for seven months after the incident before being moved to a hospital in Mexico. Since being released from the hospital in Mexico, Cortes has been in the care of his parents. Cortes cannot feed himself, communicate, or move. The trial court observed that Cortes "is more like a vegetable or a plant that his parents have to maintain than a person."

¶ 76 Defendant contends that the trial court's finding was against the manifest weight of the evidence because the State failed to present any competent medical testimony from physicians or photographs of Cortes's injuries. The supreme court has recognized, however, that a lack of evidence concerning the nature of the victim's treatment or the intensity of his pain does not preclude a court from finding that the victim's injury constituted severe bodily injury. *Deleon*, 227 Ill. 2d at 334. Moreover, Illinois law has established that evidence of a single gunshot wound, coupled with a hospital stay is sufficient to establish severe bodily injury. See, *e.g.*, *People v. Johnson*, 149 Ill. 2d 118, 171 (1992) (victim shot in the shoulder, in the hospital the next day); *People v. Primm*, 319 Ill. App. 3d 411, 253 (2001) (victim shot in the back of his left thigh, taken to the hospital). We are cognizant, however, that not all gunshot wounds are severe, and we must look to the "extent of harm done by the gunshot in the particular case." *People v. Williams*, 335 Ill. App. 3d 596, 599 (2002). Here, we find that the extent of harm done by the gunshot wound in this case was sufficient to support the trial court's finding that defendant inflicted severe bodily injury.

¶ 77 We find *Williams* instructive. In *Williams*, the court found that there was "no question" that one of the victims suffered severe bodily injury where "the gunshot wound to her left arm resulted in emergency surgery and a hospital stay of 19 days." *Williams*, 335 Ill. App. 3d at 601. However, the appellate court reversed and remanded for resentencing with respect to the two

other victims who suffered gunshot wounds to their legs, but did not receive immediate medical attention. *Id.* One of the victims spent five or six hours at the hospital, and the other was released immediately after being treated. *Id.* This court remanded for resentencing in part because the trial court pronounced its sentences without making any findings or observations about the severity of the wounds suffered by the victims. *Id.* at 599.

¶ 78 Here, the record shows that the factor of severe bodily injury was brought to the court's attention during sentencing and the court explicitly acknowledged that

> "Incorporating the facts of this case with the convictions entered by this court and the statutes about sentencing, I do believe that this is what the [legislature] contemplated about triggering offenses.
>
> I do believe that the aggravated battery with a firearm and vehicular hijacking [] counts must by law run consecutively and that's how I will approach the sentencing hearing."

After considering the arguments in aggravation and mitigation, the court found that defendant was "more like a vegetable or a plant" than a person. It was the trial court's responsibility to determine whether the evidence presented established that Cortes's injuries constituted severe bodily injury, and here, we find no basis to disturb the trial court's finding that Cortes suffered severe bodily injury.[6] See *People v. Witherspoon*, 379 Ill. App. 3d 298, 310 (2008) (the

[6] Defendant calls our attention to *People v. Steele*, 2014 IL App (1st) 121452. *Steele*, however, considered whether the defendant in that case caused "great bodily harm," which defendant acknowledges is a distinct consideration from whether defendant caused "severe bodily injury." See *Williams*, 335 Ill. App. 3d at 599-600. Moreover, the issue in that case was that the witness's testimony about his injuries did not match the hospital discharge report, which indicated less severe injuries that his testimony. *Id.* ¶ 30. The court determined that the State should have offered medical expert testimony where the witness testified that he suffered injuries more serious than those indicated on the medical records and the causation of these more severe injuries "would not be readily apparent based on common knowledge and experience." *Id.* ¶ 31. In this case, there are no such discrepancies.

reviewing court deferred to the trial court's finding that the bruising of the victim's legs, ankle, and upper arm constituted "severe bodily injury"); *People v. Townes*, 94 Ill. App. 3d 850, 855 (1981) (the reviewing court concluded there was no reason to disturb the trial court's discretion regarding the issue of whether severe bruising of the face and neck constituted severe bodily injury). We thus find no basis to relax the forfeiture rule where there is no error warranting plain error review (*Johnson*, 238 Ill. 2d at 491) and likewise find defendant's claim of ineffective assistance of counsel meritless where defendant suffered no prejudice as a result of counsel's alleged deficient performance (*Richardson*, 189 Ill. 2d at 411).

¶ 79 D. Aggravated Unlawful Restraint

¶ 80 Defendant next contends that this court should vacate his conviction for aggravated unlawful restraint where there was no evidence of restraint and because it violates the "one-act, one-crime" rule. Defendant maintains that there was no evidence that he "detained" Cortes as alleged in the indictment. In the alternative, defendant contends that his commission of aggravated unlawful restraint was inherent in the offense of aggravated battery with a firearm and that conviction should therefore be vacated under the one-act, one crime rule.

¶ 81 1. *Sufficient Evidence of Detention or Restraint*

¶ 82 Defendant first contends that the State presented insufficient evidence to show that he detained or restrained Cortes. Where defendant challenges the sufficiency of the evidence to sustain his conviction, the reviewing court must consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 270 (2006).

This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution, and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 83 Under section 10-3.1 of the Illinois Criminal Code of 2012, "[a] person commits the offense of aggravated unlawful restraint when he or she commits unlawful restraint while using a deadly weapon." 720 ILCS 5/10-3.1(a) (West 2012). A person commits unlawful restraint where he "knowingly without legal authority detains another." 720 ILCS 5/10-3 (West 2012). The State charged defendant with aggravated unlawful restraint under the theory that he "knowingly and without legal authority detained [Cortes] while using a deadly weapon***." A detention includes actions that delay, hinder, hold, or restrain an individual from proceeding. *People v. Satterthwaite*, 72 Ill. App. 3d 483, 485 (1979). When a person is acting without legal authority, the duration of the restraint, however short, is inconsequential. *People v. Sparks*, 314 Ill. App. 3d 268, 274 (2000).

¶ 84 Here, the evidence presented at trial showed that defendant pulled Cortes out of his vehicle and began punching him. Defendant then took Cortes to the ground and continued beating him while Julio retrieved a handgun from the trunk of his vehicle, walked over to Cortes, and shot him in the head while defendant was standing mere inches away. Defendant's act of beating Cortes on the ground while Julio pointed a gun at him clearly "delay[ed], hinder[ed] [held], or restrain[ed]" Cortes from proceeding. *Satterthwaite*, 72 Ill. App. 3d at 485. Although

defendant contends that the record is clear that he never possessed a deadly weapon, it is apparent that defendant was tried and convicted under a theory of accountability.[7] A person may be held accountable for the conduct of another where "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate [such] commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). "Where one attaches himself to a group bent on illegal acts which are dangerous or homicidal in character, *** he becomes accountable for any wrongdoings committed by other members of the group in furtherance of the common purpose, or as a natural or probable consequence thereof even though he did not actively participate in the overt act itself." *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 23 (quoting *People v. Morgan*, 39 Ill. App. 3d 588, 597 (1976)). Here, although defendant did not possess a deadly weapon, there was sufficient evidence presented to find him guilty of aggravated unlawful restraint under an accountability theory where Julio possessed a gun.

¶ 85 Here, the trial court found that the evidence presented was sufficient to establish that defendant detained Cortes with a deadly weapon. It is not our function on review to reweigh the evidence and disturb the trial court's finding of a criminal conviction based on the sufficiency of the evidence unless the evidence presented is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330. We do not find this to be such a case. Although the restraint of Cortes with a deadly weapon was brief before Julio ultimately shot Cortes, we observe that the duration of the restraint, however short, is inconsequential. *Sparks*, 314 Ill. App. 3d at 274; see also *People v. Jones*, 93 Ill. App. 3d 475,

[7] This is apparent given the court's observation that Julio, Barragan, and defendant were "all in this together" and that defendant did not leave the scene until after the gun was fired.

476, 479 (1981) (restraint of three or four seconds). Accordingly, we find that a reasonable trier of fact could find that defendant was proved guilty of aggravated unlawful restraint beyond a reasonable doubt.

¶ 86 2. *One-Act, One-Crime Rule*

¶ 87 Finally, defendant contends that his conviction for aggravated unlawful restraint violated the one-act, one-crime rule. He maintains that the same facts were used to prove his convictions for aggravated unlawful restraint and aggravated battery with a firearm and the court erroneously entered convictions on two offenses arising from the same act. He contends that his detention of Cortes was not separate and distinct from the dominant charged offense—aggravated battery with a firearm.

¶ 88 Although we observe that defendant did not preserve this issue for appeal by raising it in the court below, we recognize that violations of the one-act, one-crime rule are subject to second-prong plain error review. *People v. Tolentino*, 409 Ill. App. 3d 598, 609-610 (2011) (citing *People v. Harvey*, 211 Ill. 2d 368, 377 (2004)). Under the one-act, one-crime rule, "a defendant may not be convicted of multiple offenses based on the same physical act." *People v. Almond*, 2015 IL 113817, ¶ 47. An "act" is " 'any overt or outward manifestation which will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996) (*quoting People v. King*, 66 Ill. 2d 551, 566 (1977)). "In determining whether a defendant committed a separate physical act of unlawful restraint, Illinois courts have looked at whether the restraint was 'independent' of the physical act underlying the other offense [citations]; went 'further than' the restraint inherent in the other offense [citations]; or occurred simultaneously [citations]." *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 51. This court has recognized that "[n]early every offense

against the person necessarily involves a degree of restraint***." *People v. Kuykendall*, 108 Ill. App. 3d 708, 710 (1982).

¶ 89 Similarly, in considering whether a defendant committed a separate act of battery, Illinois courts have examined whether the battery was predicated on the same physical act constituting the other crime. See, *e.g.*, *People v. Isunza*, 396 Ill. App. 3d 127, 133-34 (2009). If the defendant's conduct consisted of a single act, then multiple convictions based on that act are improper. *Rodriguez*, 169 Ill. 2d at 186. If the defendant engaged in separate discrete acts, however, the court then proceeds to the second step of the analysis, which requires that the court determine whether any of the separate offenses are lesser-included offenses. *Id.* If so, then the defendant cannot receive multiple convictions. *Id.*

¶ 90 Here, as discussed above, defendant committed aggravated unlawful restraint when he beat the defendant on the ground while Julio pointed a gun at him. This period of restraint, however short, was sufficient to prove him guilty of that offense. *Sparks*, 314 Ill. App. 3d at 274. To commit aggravated battery with a firearm, however, another overt act was required. A person commits aggravated battery when he knowingly discharges a firearm and causes injury to another person. 720 ILCS 5/12-3.05 (West 2014). Thus, in order to be found guilty of aggravated battery with a firearm, the firearm was required to be discharged; an act distinct from the charge of aggravated unlawful restraint. This distinction is borne out in defendant's indictments. His indictment for aggravated battery with a firearm alleges that he "shot [Cortes] about the body," while his indictment for aggravated unlawful restraint alleges that he "knowingly and without legal authority detained [Cortes] while using a deadly weapon***." Accordingly, we find that the act of discharging the firearm was a distinct overt act representing a separate offense.

¶ 91 The second step in our one-act, one-crime analysis requires us to determine whether defendant's conviction for aggravated unlawful restraint is a lesser-included offense of his conviction for aggravated battery with a firearm. A lesser-included offense "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2–9(a) (West 2012). Our supreme court has held that the proper framework in determining whether a charged offense is a lesser-included offense of another charged offense is the abstract-elements approach. *People v. Miller*, 238 Ill. 2d 161, 175 (2010) (determining that the abstract elements approach, rather than the charging instrument approach, is the proper analysis to employ in determining whether one offense is a lesser-included offense of another under a one-act, one-crime analysis). Under this approach "[i]f all the elements of one offense are included in a second offense and the first offense contains no element not included in the second offense, the first offense is a lesser included offense of the second." *Id.*

¶ 92 A person commits aggravated unlawful restraint when he knowingly and without legal authority, detains another while using a deadly weapon. 720 ILCS 5/10-3.1(a) (West 2012); 720 ILCS 5/10-3 (West 2012). A person commits aggravated battery when he knowingly discharges a firearm and causes injury to another person. 720 ILCS 5/12-3.05 (West 2014).

¶ 93 Upon comparison of the statutory elements of the offenses, we find that it is possible to commit aggravated battery with a firearm without committing aggravated unlawful restraint, as the latter offense includes a detention of an individual, an element not included in the aggravated battery statute. Accordingly, we find that aggravated unlawful restraint is not a lesser-included offense of aggravated battery with a firearm and that defendant's convictions for both of those offenses do not violate the one-act, one-crime rule.

¶ 94 III. Conclusion

¶ 95 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 96 Affirmed.