2017 IL App (1st) 150899-U

No. 1-15-0899

September 27, 2017

Third 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. 13 CR 13706
	)	
MARCUS NIXON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the trial court's imposition of consecutive prison sentences and remand with instructions to determine whether defendant inflicted severe bodily injury as necessary to impose mandatory consecutive sentences, to vacate one of defendant's convictions for aggravated assault of a peace officer, and to correct the mittimus.

¶ 2 Following a bench trial, defendant Marcus Nixon was convicted of aggravated battery by discharging a firearm (720 ILCS 5/12-3.05(e)(1) (West 2010)) and two counts of aggravated assault of a peace officer (720 ILCS 5/12-2(c)(8) (West 2010)) and sentenced to an eight-year

prison term consecutive to two concurrent two-year prison terms. On appeal, defendant argues the trial court improperly imposed consecutive prison terms and one conviction must be vacated under the one-act, one-crime doctrine. We vacate the imposition of consecutive sentences and remand with instructions to determine whether defendant inflicted severe bodily injury as required to impose consecutive sentences and to vacate one of defendant's convictions for aggravated assault of a peace officer.

¶ 3 Defendant was charged with six counts of attempted first degree murder, one count of aggravated battery by discharging a firearm, and two counts of aggravated assault of a peace officer stemming from acts on November 9, 2011, in Chicago. We briefly state the facts presented at trial as defendant does not challenge the sufficiency of the evidence supporting his conviction.

¶ 4 Chicago police officer Patrick McGrath testified that he was off-duty, dressed in civilian clothes, and equipped with a Chicago police radio in the area of 506 North Lavergne. Around 9:45 a.m., McGrath witnessed a group of six men fighting at a nearby grocery store. Approximately 45 minutes later, a blue Buick pulled up and parked in the space in front of McGrath. A man, identified in court as defendant, exited the Buick and walked towards another man on the street. Defendant produced a chrome semiautomatic pistol from his waistband and fired one shot at the man on the street. The man ran a little bit but collapsed to the ground very quickly after being shot. McGrath radioed in for assistance and provided a description of defendant and the vehicle. McGrath then rendered aid to the man, later identified as Deandrea McMichaels, and called an ambulance. McMichaels was laying on a speed bump in the street and was shot in the lower back portion of his body.

¶ 5 McGrath was directed to the area of 5035 West Erie, where he met with other officers. The officers had detained a man, later identified as Austin Williams, who was a passenger in the Buick with defendant and not involved in the shooting. McGrath testified that Williams stayed inside the Buick and did not discharge any weapons.

¶ 6 Following McGrath's testimony, defendant requested a Supreme Court Rule 402 (eff. July 1, 2012) conference. The following exchange occurred:

"THE COURT: What is the Government willing to conference?

MR. HODAL [assistant State's Attorney]: Judge it will be an agg bat firearm consecutive to the agg assault.

THE COURT: Is that mandatory consecutive? I just need to admonish him.

MR. HODAL: It would be because of the great bodily harm.

THE COURT: So it's mandatory consecutive?

MR. HODAL: Yes.

THE COURT: And the aggravated assault?

MR. HODAL: Class 4.

THE COURT: The Government is willing to conference this case, [defendant], and your lawyer tells me you want to do this on two charges; aggravated battery with a firearm, that's to Mr. McMichaels, and aggravated assault to a police officer.

***

Aggravated assault, if you were to plead guilty to both of these, they would be running consecutive, one after the other. That's a Class 4 felony and it carries 1 to 3 years in the penitentiary, a fine of up to $25,000, or probation up to 30 months. If you go to the

penitentiary on that, you'd have to serve a year of mandatory supervised release which is like parole. If you go to the penitentiary the sentences would run consecutive, one after the other. Do you understand that?

THE DEFENDANT: Yes, sir."

¶ 7 A Rule 402 conference was held off the record but it did not resolve the case. The trial then continued.

¶ 8 Chicago police officer Jermaine Harris testified that he was in uniform and working as a patrol officer in his marked squad car when he heard a radio dispatch that a blue Buick was involved in a shooting in the area of Lavergne and Ferdinand. He observed the Buick and activated his emergency lights and sirens. Harris pulled the Buick over and stopped his car perpendicular to it. He approached the vehicle and told the driver, identified in court as defendant, to exit the vehicle.

¶ 9 Harris was in front of the vehicle when defendant put the vehicle in reverse, and then back into drive. He heard the engine revving before defendant accelerated towards him. Harris was afraid of being hit by the vehicle and, had he not jumped out of the way, would have been struck by it.

¶ 10 Defendant drove away and Harris followed. While in an alley, defendant crashed into a garbage can and fled with Williams from the scene. Harris was unable to capture defendant but Williams was apprehended by another officer.

¶ 11 Chicago police officer Michael Key testified consistently with Harris' testimony. Specifically, Key testified that he was responding to the same radio dispatch when he observed

defendant's Buick nearly strike Officer Harris. Key followed the Buick and observed it crash in an alley. The occupants fled but he was able to apprehend Williams.

¶ 12 Detective Kevin Carney testified that, on November 9, 2011, after inspecting the scene of the shooting and the alley, he went to Loyola Hospital and met with McMichaels. Carney learned McMichaels was being treated for a gunshot wound to his back. McMichaels identified defendant in a photo array, and Carney later issued an investigative alert for defendant.

¶ 13 The parties stipulated, *inter alia*, that Dr. Andrew Banos would testify that he was working at Loyola Medical Center on November 9 and 10, 2011, and treated McMichaels. He further conducted a urine drug screen on McMichaels, which came back positive for phencyclidine, also known as PCP.

¶ 14 The trial court found defendant guilty of one count of aggravated battery by discharging a firearm and two counts of aggravated assault of a peace officer. It found defendant not guilty of attempted first degree murder.

¶ 15 In aggravation at sentencing, the State highlighted defendant's criminal history, which, according to the presentence investigation report, included three felony drug convictions, for which he received terms of three, three, and six years' imprisonment. Further, defendant had two other drug convictions for which he received probation and one simple assault conviction for which he received two days in jail. The State asked for a "substantial Illinois Department of Corrections sentence on the aggravated battery with a firearm, to run consecutive with a minimum of one year on the aggravated assault."

¶ 16 The trial court noted that the complainant, McMichaels, was shot but never appeared in court. The State agreed that McMichaels did not testify, but stated, *inter alia*, that McGrath witnessed the entire incident and "tried to render aid to the victim."

¶ 17 In mitigation, defense counsel argued, *inter alia*, that McMichaels "never came to court; he never testified" and "basically thumbed his nose at the justice system." Counsel concluded that defendant "still – even though the Court did find him guilty of this offense, he still maintains his innocence. And because of all those factors, we'd ask that you sentence [defendant] accordingly on the lower end of the sentence."

¶ 18 The trial court sentenced defendant to eight years' imprisonment on the aggravated battery by discharge of a firearm conviction consecutive to two years' imprisonment for aggravated assault to a peace officer. The court told defendant, "[y]ou've got a criminal record. A police officer saw you shooting somebody, I'm not sure exactly what the context of that was, but that person never wanted to come to court and wouldn't cooperate with the prosecution, and then tried to run the police over on the way out." The court stated it would sentence defendant to consecutive terms "because the incidents happened not together but separate times." Defendant filed a written motion to reconsider his sentence, which the trial court denied. Defendant filed a timely notice of appeal. However, the trial court did not make a finding that defendant inflicted severe bodily injury.

¶ 19 On appeal, defendant does not challenge the evidence supporting his convictions or the length of any sentence imposed. Rather, defendant argues the trial court improperly sentenced him to consecutive prison terms where the evidence did not support a finding that, in committing aggravated battery by discharging a firearm, defendant inflicted severe bodily injury. He further

argues one of his two convictions for aggravated assault of a peace officer must be vacated in light of the one-act, one-crime doctrine.

¶ 20 Defendant concedes he failed to raise the issue regarding the imposition of improper consecutive sentencing in the trial court and, thus, it is forfeited on appeal. However, he argues we should review the issue under the plain-error doctrine or, alternatively, as an ineffective assistance of counsel claim.

¶ 21 To preserve an issue for review, the defendant must raise the issue at trial and in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, improperly imposing consecutive sentences may violate the defendant's fundamental rights and we therefore may review it for plain error. *People v. Murray*, 312 Ill. App. 3d 685, 692 (2000). The first step of plain-error review is to determine whether a clear or obvious error occurred. *In re M.W.*, 232 Ill. 2d 408, 431 (2009). "This requires a 'substantive look' at the issue raised." *People v. Banks*, 2016 IL App (1st) 131009, ¶ 71.

¶ 22 Section 5-8-4(d)(1) of the Unified Code of Corrections requires the imposition of mandatory consecutive sentences where "[o]ne of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(d)(1) (West 2010). Here, defendant does not contest that aggravated battery by discharging a firearm is a Class X offense. See 720 ILCS 5/12-3.05(e)(1), (h) (West 2010). Rather, defendant argues the trial court did not find, and the record does not support a finding, that he inflicted severe bodily harm on McMichaels as required for the imposition of mandatory consecutive sentences.

¶ 23 A trial court's factual finding of severe bodily injury in the context of mandatory sentencing will only be reversed 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." *Id.*

¶ 24 We have previously noted that not all gunshot wounds are severe simply because they are gunshot wounds. *People v. Austin*, 328 Ill. App. 3d 798, 808 (2002). Rather, "[w]e have to look at the extent of the harm done by the gunshot in the particular case." *People v. Williams*, 335 Ill. App. 3d 596, 599 (2002).

¶ 25 The State argues defendant acceded to the prosecutor's characterization of the severity of McMichaels' injury wherein the prosecutor told the trial court the sentences would be consecutive "because of the great bodily harm" and defendant did not object. We first note that we have previously found that "great bodily harm" and "severe bodily injury" to be distinct concepts. See generally *Williams*, 335 Ill. App. 3d at 599-600; People v. *Alvarez*, 2016 IL App (2d) 140364, ¶¶ 23-24. Further, this comment by the prosecutor occurred right before the Rule 402 conference that occurred in the middle of trial. There is no indication the trial court itself made this finding, despite its admonishments to defendant that the sentences would be consecutive. Indeed, any finding would be premature, as defendant rejected the offer at the Rule 402 conference, and the trial court continued on with the trial to hear more evidence. We will not take the failure to object during an off-the-record conference and elevate it an affirmative acquiescence to consecutive sentencing. Therefore, we reject the State's argument that defendant acquiesced to the severity of McMichaels' injury.

¶ 26 The State points out that defendant fails to cite a single case decided after *Deleon,* which it believes controls the analysis in this case. While our supreme court in *Deleon* defined the standard of review as manifest weight of the evidence when evaluating a trial court's factual determination of severe bodily injury, we nevertheless find *People v Williams*, 335 Ill. App. 3d 596 (2002), and other cases to be instructive as factual scenarios analyzing severe bodily injury. See *People v. Alvarez,* 2016 IL App (2d) 140364, ¶¶ 19, 26-28 (relying on *Deleon* and *Williams*). *Alvarez* is persuasive as it recognizes the standard of review for evaluating a trial court's factual finding of severe bodily injury as set forth in *Deleon,* but still looks to *Williams* for support when there is no factual finding by the trial court. Here, like in *Williams* and *Alvarez,* there was no factual finding of severe bodily injury such that we can review it under the standard set forth in *Deleon.*

¶ 27 In *Williams*, the defendant was convicted of first degree murder and three counts of aggravated battery with a firearm. *Williams*, 335 Ill. App. 3d at 597. At sentencing, the trial court imposed consecutive sentences on the aggravated battery with a firearm counts, but did not make any findings or observations about the victims' gunshot wounds. *Id.* On appeal, the *Williams* court found that one victim certainly suffered severe bodily injury where her gunshot wound required emergency surgery and a hospital stay of 19 days. *Id.* at 601. However, the court found the evidence concerning gunshot wounds with respect to the other two victims to be "problematic." *Id.* Specifically, one victim was shot in the leg, with the bullet exiting the back of the thigh, and was hospitalized for five or six hours. *Id.* The other victim was also shot in the leg with the bullet exiting, and was released immediately after doctors cleaned the gunshot wound. *Id.* Noting that the trial court is in the best position to determine the severity of the injury of these

two victims and it did not make any factual findings, the reviewing court vacated the consecutive sentences and remanded for the determination of whether the defendant inflicted severe bodily injury on these two victims. *Id.* at 601-02.

¶ 28 *Alvarez*, which relied on *Williams*, provides further support when analyzing whether there was a factual finding of severe bodily injury. In *Alvarez*, the trial court found the defendant guilty beyond a reasonable doubt that he had caused "great bodily harm and permanent disfigurement." *Alvarez*, 2016 IL App (2d) 140364, ¶ 12. The court sentenced the defendant to mandatory consecutive prison terms following its statement that "as previously found" the defendant had discharged a firearm and the resulting injuries constituted "severe bodily injury." *Id.* ¶ 14. On appeal, the reviewing court noted that "great bodily harm" and "severe bodily injury" are different concepts, such that the trial court could not have relied on its earlier determination of "great bodily harm" in finding "severe bodily injury" for purposes of consecutive sentencing. *Id.* ¶ 24. Further, the trial court never made a finding of "severe bodily injury" to support the imposition of mandatory consecutive sentences. *Id.* ¶ 20. Relying on *Williams*, the reviewing court found that, because the trial court never made any findings or observations regarding the victim's wounds, there was no factual determination to review and thus, the case must be remanded to determine whether the defendant inflicted "severe bodily injury." *Id.* ¶¶ 26-29.

¶ 29 Similarly here, the trial court did not make any factual findings regarding the severity of McMichaels' wound. In fact, the trial court's only comment was "[a] police officer saw you shooting somebody, I'm not sure exactly what the context of that was, but that person never wanted to come to court and wouldn't cooperate with the prosecution." It then noted that it was

imposing consecutive sentences "because the incidents happened not together but separate times," presumably in reference to an outdated version of the mandatory consecutive sentencing statute. Compare 730 ILCS 5/5-8-4(a) (West 2000) ("[t]he court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless ***") with 730 ILCS 5/5-8-4(d)(1) (West 2010) (omitting the quoted phrase). There was no factual finding by the trial court regarding severe bodily injury. "Without findings to review, we must not engage in our own assessment of the facts and the evidence to determine whether consecutive sentences were required under section 5-8-4(d)(1) of the Code." *Alvarez*, 2016 IL App (2d) 140364, ¶ 28 (relying on *Deleon* for the proposition that great deference should be given to the trial court as finder of fact and the reviewing will not substitute its judgment for the trial court's on issues regarding witness credibility, the weight given to evidence, or the inferences to be drawn). Because the trial court did not make a factual finding regarding severe bodily injury, we will not provide our own determination.

¶ 30 Moreover, the trial facts and record regarding the shooting are inconclusive in determining whether or not there was severe bodily injury, as the reviewing court found in *Williams*. See *Williams*, 335 Ill. App. 3d at 601 (finding there was "no question" one victim suffered severe bodily injury based on the facts at trial, but also finding the evidence regarding severe bodily injury to the other to victims to be "problematic"). McGrath testified that defendant shot McMichaels in the lower back. He then rendered aid to McMichaels before an ambulance arrived and transported him to a hospital. Carney testified that he went to the hospital and learned McMichaels was being treated for a gunshot wound. Finally, the parties stipulated

that Dr. Banos treated McMichaels on November 9 and 10, 2011. Given this record, we are unable to determine why the trial court found consecutive sentences were required and, therefore, unable to determine whether it erred in imposing them. See *Williams*, 335 Ill. App. 3d at 601.

¶ 31 The State relies on our supreme court decision in *Deleon* for the proposition that evidence of postshooting behavior or treatment is not required to sustain a finding of severe bodily injury. The State highlights the supreme court's finding in *Deleon* that "[i]rrespective of the victim's postshooting behavior, we would have no difficulty affirming that a wound of that nature constitutes 'severe bodily injury.' " However, here, we are not relying on any postshooting behavior. Instead, we conclude the trial court never made any finding of severe bodily injury and there is inconclusive evidence of severity in the record. Further, the trial court in *Deleon* did make a finding of severe bodily injury and recounted testimony regarding the shooting, including the victim's testimony that he felt " 'burning in his chest.' " See *Deleon*, 227 Ill. 2d at 332.

¶ 32 The State relies on *People v. Johnson*, 149 Ill. 2d 118 (2002), to argue that a penetrating gunshot wound can meet the definition of severe bodily harm, without the need to analyze the duration of hospitalization or evidence of treatment. However, subsequent cases have not interpreted *Johnson* so broadly, and many have held that a "nick or cut" which does not require medical attention does not constitute severe bodily harm even if inflicted by a gunshot. See, *e.g.*, *People v. Durham*, 312 Ill. App. 3d 413, 421 (2000). Here, although the wound was never described as a nick or cut, we note that it was never described by any witness. The evidence suggests that the wound was more severe than a nick or cut. However, we cannot substitute

suggestion or speculation for evidence of wound severity. Therefore, we decline the State's invitation to affirm based on the holding in *Johnson*.

¶ 33 Finally, the State cites *People v. Primm,* 319 Ill. App. 3d 411, 414 (2001), *People v. Austin,* 328 Ill. App. 3d 798, 807 (2002), and *People v. Gonzalez,* 351 Ill. App. 3d 192, 208 (2004) where the appellate court has affirmed the finding of severe bodily injury. We do not dispute that reviewing courts have upheld this finding when supported by the evidence. See *Williams*, 355 Ill. App. 3d at 600-01 (collecting cases both where severe bodily injury was proven and where it was not proven). Rather, here, the trial court did not make a finding of severe bodily injury such that we can review that finding for error. To the extent that the State is arguing that, because the trial court imposed consecutive sentences it must have necessarily made a finding of severe bodily injury, we reject that argument for the reasons previously discussed. See *Alvarez,* 2016 IL App (2d) 140364, ¶ 28.

¶ 34 Because the trial court did not make a finding of severe bodily injury as required to impose mandatory consecutive sentences, we vacate the consecutive sentences imposed and remand for the determination of whether defendant inflicted severe bodily injury on McMichaels. See *Williams*, 355 Ill. App. 3d at 601-02; see also *Alvarez*, 2016 IL App (2d) 140364, ¶ 29. Accordingly, defendant has established plain error under the second prong. See *People v. Lashley,* 2016 IL App (1st) 133401, ¶¶ 68-69. In reaching this conclusion, we need not consider defendant's alternative argument that he received ineffective assistance of counsel. *Id.* ¶ 71.

¶ 35 Defendant next contends that one of his convictions for aggravated assault of a peace officer should be vacated because, in violation of the one-act, one-crime doctrine, both

convictions are predicated on the same physical act. Although defendant did not raise this claim in the trial court, "forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 36 Pursuant to the one-act, one-crime doctrine, "a defendant may not be convicted of multiple offenses that are based upon precisely the same physical act." *People v. Johnson*, 237 Ill. 2d 81, 97 (2010); accord *Nunez*, 236 Ill. 2d at 494. An act refers to " 'any outward or overt manifestation which will support a different offense.' " *Nunez*, 236 Ill. 2d at 494 (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). The court first determines whether the defendant's conduct consisted of a single physical act or separate acts. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). If only one physical act was undertaken, then multiple convictions are improper. *Id.*

¶ 37 The State concedes both convictions were predicated on the same physical act and thus, one conviction for aggravated assault of a peace officer must be vacated. We agree with the parties that one of these convictions must be vacated. When there is a violation of the one-act, one-crime doctrine, the court should impose sentence on the more serious offense and vacate the less serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). The State asserts that defendant's conviction under count 9, aggravated assault of a peace officer, which charged defendant with "prevent[ing]" the officer from performing his official duties, is the "more serious" offense. Count 8 then, which charged defendant with aggravated assault of a peace officer while the officer was engaged in the performance of his official duties, would be the "less serious" offense. Defendant contends that we should make the determination of what is the "less serious" offense and vacate it accordingly.

¶ 38 When evaluating what offense is more serious, "we are instructed to consider the plain language of the statutes, as common sense dictates that the legislature would prescribe greater punishment for the offense it deems the more serious." *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009). When the penalties are identical, we must consider which one has the more culpable mental state. *Id.* Here, both aggravated assault of a peace officer offenses are Class 3 felonies. Further, both offenses require the mental state of knowledge. Because we are unable to determine which of the two offenses is the most serious, we also direct the trial court to make that determination on remand. *Artis*, 232 Ill. 2d at 177 ("[w]e conclude that the better course is to continue to adhere to the principle that when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination"); *People v. Grant*, 2017 IL App (1st) 142956, ¶ 33.

¶ 39 Finally, defendant notes and the State agrees, the mittimus reflects the aggravated assault of a peace officer convictions as Class 4 felonies. However, these convictions are Class 3 felonies. See 720 ILCS 5/12-2(d) (West 2010). The State, not defendant, urges us to correct the mittimus to reflect the aggravated assault of a peace officer conviction as a Class 3 felony. We are able to order the mittimus corrected without remand pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999). *People v. McGee*, 2015 IL App (1st) 130367, ¶ 82. But, as we are already remanding the case, we simply direct the trial court to issue a corrected mittimus on resentencing. See *People v. Jackson*, 2016 IL App (1st) 133823, ¶ 77.

¶ 40 For the reasons set forth above, as defendant does not challenge the evidence supporting his convictions or the length of any prison sentence imposed, we affirm the convictions and

length of each sentence. We vacate the imposition of consecutive sentences and remand the case with instructions to determine whether defendant inflicted severe bodily injury as required to impose mandatory consecutive sentences. We further direct the trial court to determine which aggravated assault of a peace officer conviction is less serious, vacate that conviction, and issue a corrected mittimus on resentencing.

¶ 41 Affirmed in part; vacated in part; and remanded with directions.