

No. 1-15-1351

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 11091
)	
WILBUR DRIVER,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant’s convictions affirmed where he forfeited review of his claims of error on appeal and failed to invoke plain-error review and, if defendant had invoked plain-error review, his claims of error would have been meritless.

¶ 2 Following a bench trial, defendant Wilbur Driver was convicted of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4)(i) (West 2012)), aggravated fleeing or attempting to elude a peace officer (625 ILCS 5/11-204.1(a)(2) (West 2012)), resisting or obstructing a peace officer (720 ILCS 5/31-1(a), (a-7) (West 2012)), and possession of a controlled substance (720 ILCS 570/402(c) (West 2012)), and was sentenced to eight years’ imprisonment for aggravated battery of a peace officer and three years’ imprisonment for each of the remaining convictions, to

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be served concurrently. On appeal, defendant contends that his convictions for aggravated fleeing or attempting to elude a peace officer and resisting or obstructing a peace officer must be vacated as lesser-included offenses of aggravated battery of a peace officer. We affirm.

¶ 3 At trial, the evidence showed that, on the evening of May 7, 2013, Chicago police officer Sirmaty Chatys was on patrol with his partner Officer Wasielewski. The officers were in uniform and driving south on South Burley Avenue in a marked police vehicle when they pulled over defendant, who was driving a motorcycle and not wearing eye protection in violation of section 11-1404 of the Illinois Vehicle Code (625 ILCS 5/11-1404 (West 2010)). Officer Chatys exited their vehicle, approached defendant, told him to turn off his motorcycle, and asked for his driver's license and proof of insurance. Defendant turned off the motorcycle, but could not produce his driver's license or proof of insurance. As a result, Officer Chatys ordered defendant off the motorcycle and handcuffed him. Officer Chatys guided defendant to the rear of their police vehicle while Officer Wasielewski verified defendant's information for proof of a driver's license or any outstanding warrants.

¶ 4 At that point, a van driven by codefendant Romell Burgess (who is not a party to this appeal) (hereinafter referred to as codefendant) pulled alongside the police vehicle. Defendant ran toward the van and yelled at codefendant to open the door. While Officer Chatys pursued defendant, he observed the front door of the van had opened, and then defendant jumped into codefendant's lap. Defendant yelled at codefendant to "go, go, go," but Officer Chatys grabbed defendant's handcuffs with one hand and attempted to pull him out of the van. Several times, Officer Chatys announced his office to codefendant and that he should not drive away, but the van began to move. Officer Chatys, while still holding onto defendant, began running alongside the van. As the van began to accelerate, Officer Chatys reached through the steering wheel with

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his other hand and tried to stop the van shutting off the ignition or by placing it into park or neutral. Codefendant grabbed Officer Chatys' arm preventing him from stopping the van and the van continued to accelerate. As Officer Chatys struggled to keep up with the van, he released defendant with one hand, but could not pull the other hand away because codefendant was still holding on. Officer Chatys continued yelling to stop the van and pull over.

¶ 5 As the van accelerated to approximately 45 miles per hour, Officer Chatys, who was unable to release himself from codefendant, jumped into the van, falling on top of defendant who was still sitting on codefendant. Officer Chatys attempted to reach for his own weapon, but defendant and codefendant began to push him out of the van and the officer had to grab the door frame of the van to prevent his fall from it. Eventually, the van crashed into the front porch of a house approximately two blocks from where Officer Chatys had initially stopped defendant. After the crash, Officer Chatys attempted to pull defendant out of the van, but defendant resisted and yelled at codefendant to "throw [the van] in reverse and keep going." Officer Chatys heard the van's engine race, but the van did not move. Officer Chatys pulled the keys out of the van's ignition and attempted to detain defendant. Defendant continued to resist and began to kick and move around. Eventually, Officer Chatys, with the help of a bystander, was able to detain defendant.

¶ 6 Officer Wasielewski, who had followed the van, arrived at the scene and took codefendant into custody. While defendant was in custody, Officer Wasielewski and another officer observed that defendant was "grabbing toward his leg area." Officer Wasielewski subsequently found in the front right pocket of defendant's cargo pants a white bag containing a powdery substance which later tested positive for 1.3 grams of heroin.

¶ 7 As a result of the incident, Officer Chatys sustained minor injuries and was treated at a local hospital.

¶ 8 The trial court found defendant guilty of aggravated battery to a peace officer, aggravated fleeing or attempting to elude a peace officer, resisting or obstructing a peace officer, and possession of a controlled substance. Following defendant's unsuccessful motion for a new trial, the court sentenced him to eight years' imprisonment for aggravated battery to a peace officer and three years' imprisonment on each of the remaining convictions, to be served concurrently. Defendant did not file a motion to reconsider sentence. This appeal followed.

¶ 9 On appeal defendant argues that his convictions for aggravated fleeing or attempting to elude a peace officer and resisting or obstructing a peace officer must be vacated as lesser-included offenses of his aggravated battery conviction.

¶ 10 Initially, we note and the State agrees, that defendant forfeited review of his claims of error by failing to raise them first in the trial court. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Consequently, we may only review these claims if defendant has established plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The plain-error doctrine allows review of a forfeited claim of error when the error is clear or obvious, and either: (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error;" or (2) "the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. McDonald*, 2016 IL 118882, ¶ 48. Defendant has the burden of persuasion to establish plain error. *Id.* If he fails to meet this burden, his forfeiture will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 11 In defendant's opening brief, he did not address forfeiture and, thus, has failed to invoke plain-error review. Defendant has not filed a reply brief. "A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion." *Id.* Consequently, because defendant has not attempted to meet his burden of persuasion to establish plain error, we will honor his forfeiture. See *id.* at 545-47.

¶ 12 However, even if defendant had argued for plain-error review, he would not be entitled to relief. Although defendant does not refer to his claims of error as such, he asserts violations of the one-act, one-crime doctrine. Violations of this doctrine are properly reviewable under the second prong of the plain-error doctrine "because they implicate the integrity of the judicial process." *Nunez*, 236 Ill. 2d at 493. The first step in a plain-error analysis is to determine whether an error actually occurred. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008).

¶ 13 Under the one-act, one-crime doctrine, a defendant may not be convicted of multiple offenses based on the same act, and he may not be convicted of multiple offenses based on multiple acts if some of the offenses are lesser-included ones. *People v. Miller*, 238 Ill. 2d 161, 165 (2010) (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). In order to determine whether a defendant's convictions may stand, we employ a two-step analysis. *Id.* First, we must determine whether the defendant's conduct constituted a single act or multiple acts. *Id.* If his conduct involved only one act, multiple convictions are improper. *Id.* Second, if his conduct involved multiple acts, we must determine whether any of the convictions were lesser-included offenses. *Id.* If the defendant was convicted of lesser-included offenses, those convictions are improper. *Id.* Defendant's claims of error involve the second step.

¶ 14 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

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commission of the offense charged.” 720 ILCS 5/2-9(a) (West 2012). When determining whether a charged offense is a lesser-included offense of another charged offense, the proper framework to use is the abstract-elements approach. *Miller*, 238 Ill. 2d at 175. Under this approach, we must compare the statutory elements of the offenses at issue. *Id.* at 166. “If 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.* “In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense.” *Id.*

¶ 15 Defendant was convicted of aggravated battery of a peace officer under subsection 12-3.05(d)(4)(i) of the Criminal Code of 2012 (Code) (720 ILCS 5/12-3.05(d)(4)(i) (West 2012)), which occurs when, while committing a battery, the defendant knew “the individual battered to be *** [a] peace officer *** performing his or her official duties.” *Id.* In turn, a battery occurs when the defendant “knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.” 720 ILCS 5/12-3(a) (West 2012).

¶ 16 In comparison, defendant was convicted of aggravated fleeing or attempting to elude a peace officer under subsection 11-204.1(a)(2) of the Illinois Vehicle Code (625 ILCS 5/11-204.1(a)(2) (West 2013)), which occurs when “any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer *** and such flight or attempt to elude *** causes bodily injury to any individual.” *Id.*

¶ 17 Upon comparison of the statutory elements of the offenses, it is possible to commit aggravated battery of a peace officer without committing aggravated fleeing or attempting to elude a peace officer, as the latter offense has a motor vehicle component, an element not

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included in the aggravated battery statute. Consequently, aggravated fleeing or attempting to elude a peace officer is not a lesser-included offense of aggravated battery of a peace officer. See *Miller*, 238 Ill. 2d at 166.

¶ 18 Defendant was also convicted of resisting or obstructing a peace officer under subsection 31-1(a) of the Code (720 ILCS 5/31-1(a) (West 2012)), which occurs when the defendant “knowingly resists or obstructs the performance by one known to the person to be a peace officer.” The offense is enhanced to a felony when the defendant’s conduct is “the proximate cause of an injury to a peace officer.” 720 ILCS 5/31-1(a-7) (West 2012). Resisting and obstructing do not require physical acts. *People v. Kotlinski*, 2011 IL App (2d) 101251, ¶ 47. Instead, “[p]assive acts that impede an officer’s ability to perform his duties, such as repeatedly refusing an order to exit a vehicle, can be a violation of section 31-1(a).” *Id.* A battery, on the other hand, requires the defendant to directly cause a bodily harm or make a physical contact of an insulating or provoking nature. 720 ILCS 5/12-3(a) (West 2012). The statutory elements of the offenses are different (see *City of Chicago v. Brown*, 61 Ill. App. 3d 266, 277 (1978)), and it is therefore possible to commit aggravated battery of a peace officer without committing resisting or obstructing a peace officer. Consequently, resisting or obstructing a peace officer is not a lesser-included offense of aggravated battery. See *Miller*, 238 Ill. 2d at 166.

¶ 19 As neither aggravated fleeing or attempting to elude a peace officer, nor resisting or obstructing a peace officer, are lesser-included offenses of aggravated battery of a peace officer, no error occurred when defendant was convicted of all three offenses. Where there is no error, there can be no plain error. See *Bannister*, 232 Ill. 2d at 71. Consequently, even if defendant had argued for plain-error review, his claims of error would have no merit. Accordingly, we affirm defendant’s convictions.

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¶ 20 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 21 Affirmed.