

2017 IL App (1st) 151783-U

No. 1-15-1783

Order filed October 6, 2017

Sixth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 14 CR 7630
)	
MARCUS McKAY,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* We affirm defendant's convictions for aggravated robbery and aggravated battery. We vacate his convictions for robbery and unlawful restraint under the one-act, one-crime rule because they are based on the same conduct as his aggravated robbery conviction.
- ¶ 2 Following a bench trial, defendant Marcus McKay was convicted of aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2014)), robbery (720 ILCS 5/18-1(a) (West 2014)), aggravated battery (720 ILCS 5/12-3.05(a)(5) (West 2014)), and unlawful restraint (720 ILCS 5/10-3(a)

(West 2014)). He was sentenced to concurrent prison terms of 14 years for aggravated robbery, 14 years for robbery, 6 years for aggravated battery, and 6 years for unlawful restraint. On appeal, defendant does not challenge his aggravated robbery conviction. Rather, he contends that his convictions for robbery, aggravated battery, and unlawful restraint violate the one-act, one-crime rule because they are based on the same physical act as his aggravated robbery conviction. For the following reasons, we affirm defendant's convictions for aggravated robbery and aggravated battery, and vacate his convictions for robbery and unlawful restraint.

¶ 3 Defendant was charged by indictment with, in relevant part, one count of aggravated robbery, one count of robbery, one count of aggravated battery, and one count of unlawful restraint. The aggravated robbery charge alleged that defendant “knowingly took property *** from the person or presence of R.J., by the use of force, while indicating verbally, or by his actions to R.J., that he was presently armed with a firearm.” 720 ILCS 5/18-1(b)(1) (West 2014). The robbery charge alleged that he “knowingly took property *** from the person or presence of R.J., by the use of force or by threatening the imminent use of force.” 720 ILCS 5/18-1(a) (West 2014). The aggravated battery charge alleged that defendant “in committing a battery, strangled *** R.J.” 720 ILCS 5/13-3.05(a)(5) (West 2014). The unlawful restraint charge alleged that defendant “knowingly, without legal authority, detained” R.J. 720 ILCS 5/10-3(a) (West 2014).

¶ 4 Defendant waived his right to a jury trial. Because defendant does not challenge the sufficiency of the evidence to sustain his convictions, we recount the facts only to the extent necessary to resolve the issue raised on appeal.

¶ 5 At the bench trial, R.J. testified that, at 11:45 p.m., on March 9, 2014, she was walking toward a bus stop on 79th Street and Martin Luther King Drive in Chicago. As she did so, she

heard footsteps behind her and saw five men running toward her. One of the men grabbed her, turned her around, and placed his forearm around her neck in a “choke hold.” R.J. saw the man’s face just before he grabbed her and she identified him as defendant. R.J. could see clearly due to the illuminated parking lot of a nearby restaurant. R.J. testified that, as defendant held her in a chokehold, she saw that one of the other men had a gun. Defendant told the man in front of R.J. to search her pockets, her purse, and to take her phone. After the man took her phone, defendant reached inside R.J.’s jacket and patted her down. Defendant removed his hands from R.J.’s shirt, kissed her on the corner of the mouth, told her “thank you,” and then the group ran away. R.J. estimated that she was in the choke hold for about two minutes. R.J. did not give any of the men permission to touch her. After the robbery, R.J. walked home and her mother called the police.

¶ 6 Chicago police officers, using a mobile phone tracking application, ascertained that, shortly after the robbery, R.J.’s phone had been at 7156 South May Street. R.J. rode with officers to that location and saw two men sitting on the front porch. She recognized one of the men as one of the robbers. Defendant was not on the porch and R.J. did not see defendant while she was at that location. When R.J. returned to the police station, an officer showed her a photo array and she identified defendant as the man who put her in a choke hold. R.J. then identified defendant in a line-up.

¶ 7 During closing arguments, the State argued that “R.J. testified that the defendant was the person that placed her in a choke hold and that he held her during the course of this robbery ***.” After arguments concluded, the trial court found defendant guilty of aggravated robbery, aggravated battery based on strangulation, robbery, and unlawful restraint. The court denied defendant’s motion for a new trial. Defendant filed a timely notice of appeal.

¶ 8 On appeal, defendant does not challenge his aggravated robbery conviction. Rather, he contends that his convictions for robbery, aggravated battery, and unlawful restraint violate the one-act, one-crime rule because they are based on the exact same physical act as his conviction for aggravated robbery.

¶ 9 As a threshold matter, defendant acknowledges that he failed to raise this issue in the trial court and thus failed to preserve the matter for appeal. The parties agree, however, that our supreme court has repeatedly found that a one-act, one-crime violation is reviewable under the second prong of the plain-error doctrine because it affects the integrity of the judicial process. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010); *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009).

¶ 10 The one-act, one-crime rule prohibits multiple convictions carved from the same physical act. See *People v. Almond*, 2015 IL 113817, ¶ 47; *People v. King*, 66 Ill. 2d 551, 566 (1977). To determine whether simultaneous convictions violate the one-act, one-crime rule, this court performs a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we must determine if the offenses stem from multiple acts or a single act. *Id.* “Multiple convictions are improper if they are based on precisely the same physical act.” *Id.* An “act” is defined as any overt or outward manifestation which will support a different offense. *King*, 66 Ill. 2d at 566. If we determine that the offenses stem from separate acts, we move on to the second step of the analysis and determine whether any of the offenses are lesser-included offenses. *Miller*, 238 Ill. 2d at 165. “If an offense is a lesser-included offense, multiple convictions are improper.” *Id.* Whether a conviction should be vacated under the one-act, one-crime principle is a question of law, which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 11 The State concedes, and we agree, that defendant's convictions for unlawful restraint and robbery should be vacated because they violate the one-act, one-crime rule. Specifically, the State acknowledges that defendant's conviction for unlawful restraint should be vacated because his restraint of R.J. was an inherent part of the aggravated robbery. *People v. Daniel*, 2014 IL App (1st) 121171, ¶¶ 54-55 (holding that the unlawful restraint of the victim was inherent in the armed robbery and therefore should be vacated). The State further concedes that defendant's act of unlawfully taking R.J.'s property was the basis for both the aggravated robbery and robbery convictions. See *People v. Dressler*, 317 Ill. App. 3d 379, 388 (2000) (vacating defendant's conviction for the lesser-included offense of robbery where it was predicated on the same taking as his armed robbery conviction). Under the one-act, one-crime rule, a sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Defendant's aggravated robbery conviction is a Class 1 offense (720 ILCS 5/18-1(c) (West 2014)); his robbery conviction, a Class 2 offense (720 ILCS 5/18-1(c) (West 2014)); and his unlawful restraint conviction, a Class 4 offense (720 ILCS 5/10-3(b) (West 2014)). Accordingly, we vacate defendant's convictions for unlawful restraint and robbery.

¶ 12 Defendant's remaining argument is that his conviction for aggravated battery should be vacated because it was based on the exact same physical act as his conviction for aggravated robbery. Defendant does not claim that his aggravated battery conviction is a lesser-included offense of his aggravated robbery conviction. Rather, he solely contends that his convictions for aggravated battery and aggravated robbery stem from a single act. As such, we review only whether these two convictions stem from a single act or separate acts.

¶ 13 For multiple convictions to stand, a charging instrument must indicate that the State intended to treat defendant's conduct as multiple acts. *People v. Crespo*, 203 Ill. 2d 335, 342-45 (2001) (emphasizing that each stab wound made by defendant could have supported multiple convictions, but the indictment showed that the State intended to treat defendant's conduct as a single attack because the State did not apportion the crimes among the stab wounds). Here, the State charged defendant with aggravated battery and aggravated robbery based on different physical acts. The aggravated battery charge alleged that defendant "in committing a battery, strangled *** R.J." 720 ILCS 5/13-3.05(a)(5) (West 2014). The aggravated robbery charge alleged that defendant "knowingly took property *** from the person or presence of R.J., by the use of force, while indicating verbally, or by his actions to R.J., that he was presently armed with a firearm." 720 ILCS 5/12-3.05(a)(5) (West 2014). We therefore will consider the evidence presented at trial to determine whether defendant's convictions were based on the same physical act.

¶ 14 The trial court did not err in convicting defendant of both aggravated battery and aggravated robbery, because the convictions arose out of separate physical acts. Defendant's conduct of strangling R.J. was separate from his act of taking property from R.J. by the use of force, while indicating verbally, or by his actions that he was presently armed with a firearm. R.J. testified to multiple overt acts by defendant. She testified that defendant rushed up behind her, grabbed her, turned her around, and put her in a "choke hold." While he held her, defendant ordered another man to take R.J.'s belongings. Defendant also reached into R.J.'s jacket to search her. R.J. was able to see that a third man to her right was holding a gun. R.J. testified that defendant had her in this hold for two minutes. R.J.'s testimony described the battery, the

strangulation, the taking, and the gun. Each of these acts was separate and distinct. The State presented them as such in its charging instrument, at trial, and during closing arguments.

¶ 15 Defendant committed aggravated battery by grabbing R.J., turning her around, choking her, and holding her in place. Defendant committed aggravated robbery when he, while using a weapon, held her in place and took her belongings. While there is some overlap, each offense has overt manifestations that are not present in the other and would support a separate offense. See *People v. Martson*, 353 Ill. App. 3d 513, 519 (2004) (holding that a defendant can be guilty of two offenses even though they share an act in common if there is a separate act that will support a second offense). Defendant's convictions were based on separate acts and, thus, the trial court did not err in convicting defendant of both offenses. *People v. Dixon*, 91 Ill. 2d 346, 355 (1982) ("As long as there are multiple acts, their interrelationship does not preclude multiple convictions and the imposition of concurrent sentences for separate offenses none of which are by definition lesser included offenses.").

¶ 16 Defendant nevertheless argues that the State improperly used his strangulation of R.J. as the basis for both the aggravated battery offense and the force element for the aggravated robbery offense. He therefore maintains that the aggravated battery charge must be vacated because there is no evidence that the battery had "any independent purpose" other than to accomplish the robbery.

¶ 17 Defendant's reliance on the lack of an "independent purpose," as the basis for vacating the aggravated battery conviction, is misplaced. The "independent purpose" test has not been the law for four decades. *King*, 66 Ill. 2d at 565-66 ("We, therefore, reject the 'independent motivation' test as the standard for determining whether multiple convictions and concurrent

sentences are permissible.”) Instead, the appropriate analysis is the *King* two-part review. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996) (“We *** decline *** the suggestion that this court abandon the *King* doctrine and return to its predecessor.”). Under the *King* rule, defendant committed multiple acts.

¶ 18 We are likewise not persuaded by defendant’s reading of case law that it is a violation of the one-act, one-crime principle for the State to use his strangulation of R.J. to satisfy both the “use of force” element of the aggravated robbery and the aggravated battery. See *People v. Pearson*, 331 Ill. App. 3d 312, 322 (2002) (holding that defendant’s convictions for robbery and battery did not violate the one-act, one-crime rule where he grabbed a woman’s purse, a struggle ensued, and he shoved her to the ground while making off with the purse); see also *Marston*, 353 Ill. App. 3d at 519 (finding no one act, one crime violation where, although defendant’s convictions for home invasion and aggravated battery both relied on the same striking of the victim, his home invasion conviction also required the separate act of entering the home). As these cases illustrate, the same act can support multiple offenses where, as here, there is an additional overt act that would support a second offense. See *Rodriguez*, 169 Ill. 2d at 188-89 (1996) (holding that defendant’s convictions for home invasion and aggravated criminal sexual assault did not violate the one-act, one-crime rule, despite sharing the element of threatening the victim with a gun, because the home invasion charge also required the overt manifestation of defendant entering the victim’s bedroom).

¶ 19 In sum, we conclude that defendant’s convictions for aggravated robbery and aggravated battery were based on separate acts, and his convictions for those two offenses are affirmed. We vacate defendant’s convictions for robbery and unlawful restraint.

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¶ 20 Affirmed in part and vacated in part.