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2017 IL App (3d) 140710-U

Order filed January 27, 2017
Modified upon denial of rehearing May 3, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
Plaintiff-Appellee,)	
)	Appeal No. 3-14-0710
v.)	Circuit No. 10-CF-403
)	
AUNTERRIO BARNEY,)	Honorable
)	Stephen Kouri,
Defendant-Appellant.)	Judge, Presiding.
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* A defendant's aggravated arson conviction was affirmed because there was no error in convicting of the defendant of both felony murder with arson as the predicate offense and aggravated arson when the victim of the aggravated arson was the building owner, not the tenants who died in the fire.

¶ 2 The defendant, Aunterrio Barney, was convicted of aggravated arson and four counts of first degree felony murder. He appealed his conviction and sentence for aggravated arson, arguing that it was the predicate offense for the felony murder convictions.

¶ 3 **FACTS**

¶ 4 The defendant was charged with four counts of first degree felony murder (720 ILCS 5/9-1(a)(3)(West 2010)) based upon the forcible felony of arson, one count of aggravated arson (720 ILCS 5/20-1.1(a)(1) (West 2010)), one count of residential arson (720 ILCS 5/20-1.2(a) (West 2010)), and one count of arson (720 ILCS 5/20-1(a)(West 2010)). At the defendant's jury trial, the evidence established that a man purchased \$1 in gasoline in a red gas can with a white spout, and 30 minutes later the fire department was dispatched to an apartment house fire about a mile from that gas station. The firefighters found three adults and a toddler on the second floor. All four died from carbon monoxide poisoning or smoke inhalation. In the landing in the stairwell to the second floor, fire investigators detected gasoline, and it was determined that the fire was intentionally set. About three doors down from the house, police found a red gas can with a white spout that contained the remnants of gasoline. A fingerprint found on the gas can matched the defendant's left index finger. The cashier at the gas station identified the defendant as the man who had purchased the \$1 in gasoline.

¶ 5 The jury found the defendant guilty of all counts. The defendant filed a motion for a new trial, which was denied. The trial court imposed a life sentence for the three counts of first degree murder pertaining to the adult victims. That life sentence was made consecutive to a life sentence imposed for the death of the toddler. The trial court also imposed a 30-year sentence for the aggravated arson conviction, to be served consecutively to the other sentences. The defendant's motion to reconsider sentence was denied, and the defendant appealed.

ANALYSIS

¶ 6

¶ 7 The defendant argues that his aggravated arson conviction was based on precisely the same physical act as the predicate felony for his felony murder convictions. He concedes that this issue was not raised in the trial court, but argues that it should be reviewed as plain error. The State argues that plain error does not apply because the defendant was sentenced to natural life, so the sentence for aggravated arson could not extend his time in prison and affect his "substantial rights." Even if reviewed as plain error, the State argues that the aggravated arson conviction does not violate the one-act, one-crime rule because the predicate felony for felony murder was arson.

¶ 8 Having not objected at sentencing to having been convicted and sentenced for aggravated arson on the basis that it was a lesser included offense of felony murder, the defendant waived the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). However, despite the waiver, we will review it on the basis that it affects the defendant's substantial rights. See *People v. Smith*, 183 Ill. 2d 425, 430 (1998) (citing *People v. Hicks*, 181 Ill. 2d 541, 545 (1998), which held that "[t]he imposition of an unauthorized sentence affects substantial rights."). The question of whether a conviction violates one-act, one-crime principles is a question of law that we review *de novo*. *People v. Boyd*, 307 Ill. App. 3d 991, 998 (1999).

¶ 9 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 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). For purposes of the rule, an "act" is defined as any overt or outward manifestation that will support a separate conviction. *Almond*, 2015 IL 113817, ¶ 47. The one-act, one-crime doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, the court determines whether the defendant's conduct involved a single act or

multiple acts. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. Multiple convictions based on the same physical act, or on both the offense and a lesser-included offense, are improper. *Id.* Multiple crimes, and convictions, however, can arise out of a single act where separate individuals are victims of that single physical act. *People v. Williams*, 131 Ill. App. 3d 597, 610 (1985); *People v. Mercado*, 119 Ill. App. 3d 461, 463 (1983).

¶ 10 The indictment charged first degree murder, alleging that the defendant caused the death of each of the deceased victims "while committing a forcible felony being arson." The charge of aggravated arson alleged that the defendant damaged a building owned by Desh Mehta while committing an arson, knowing or having reason to know that someone else was present. The State cites to the case of *People v. Smith*, 44 Ill. App. 3d 237, 243 (1976), for the proposition that a defendant can be convicted of both murder and arson, even when the single act of lighting a fire caused both the fire and the death. In that case, the victim of the arson was the owner of the building and the victim of the murder was a tenant, separate injuries to two distinct victims. *Id.*

¶ 11 Similarly, in the case of *People v. Kuntu*, 196 Ill. 2d 105 (2001), the defendant was convicted of both murder and aggravated arson, but the victims were different people. The Illinois Supreme Court found that separate victims required separate convictions. *Id.* at 131. The indictments in this case named the deceased victims in the first degree murder indictments, but named the building owner in the aggravated arson indictment. The act of damaging the building by arson victimized the building owner, whether he was present or not, whereas the resulting fire victimized the people present in the building. The arson count was elevated to aggravated arson because of the fact that the defendant knew that it was likely occupied by one or more persons. Since the indictments named different victims, the convictions for aggravated arson and felony

murder based upon arson can both stand under *Kuntu*. Finding no error, much less plain error, we affirm the defendant's aggravated arson conviction.

¶ 12

CONCLUSION

¶ 13

The judgment of the circuit court of Peoria County is affirmed.

¶ 14

Affirmed.