

NOTICE
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2017 IL App (5th) 140213-U

NO. 5-14-0213

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 13-CF-113
)	
KELY ARBUCKLE,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Moore and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's convictions on the merits, but reverse the trial court's imposition of an enhanced sentence of 50 years for use of a firearm during commission of an offense and remand for resentencing on the enhancement.

¶ 2 After a jury trial in the circuit court of Jackson County, defendant, Kely Arbuckle, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2012)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), unlawful possession of over 5,000 grams of cannabis with intent to deliver (720 ILCS 55/5(g) (West 2012)), and unlawful conspiracy to deliver over 5,000 grams of cannabis (720 ILCS 5/8-2(a) (West 2012)). He was sentenced to 50 years in the Department of Corrections for first-degree

murder, 50 years under the firearm enhancement statute, 15 years for aggravated discharge of a firearm, 20 years for unlawful possession of cannabis with intent to deliver, and 15 years for conspiracy to deliver cannabis. The 50-year terms are to run consecutive to each other. The latter three terms are to run consecutive to the 50-year terms, but concurrent to each other. The issues raised by defendant in this direct appeal are: (1) whether the trial court's imposition of an enhanced sentence of 50 years for use of a firearm should be reversed and (2) whether the trial court violated the one-act, one-crime rule when it sentenced defendant for aggravated discharge of a firearm and first-degree murder. We affirm in part, reverse in part, and remand for resentencing.

¶ 3

BACKGROUND

¶ 4 In the early morning hours of March 9, 2012, defendant fired several gunshots at a vehicle stopped at the corner of Grand Avenue and Giant City Road in Carbondale. The vehicle was occupied by Kinard Portee, Brandon Smith, Terran Stanley, and Toren Stanley. A bullet struck Toren Stanley, who died as a result of the gunshot wound. Defendant was on probation for a previous offense at the time of the murder.

¶ 5 After a jury trial, defendant was found guilty on all charges. The jury made a special finding based on Illinois Pattern Jury Instruction, Criminal, No. 28.06, that during the commission of the murder defendant personally discharged a firearm that proximately caused the death of another. This finding was for the purpose of determining whether the defendant could be given an enhanced sentence based upon the use of a firearm during the commission of an offense. See 730 ILCS 5/5-8-1 (West 2012).

¶ 6 With regard to sentencing defendant, the State argued that based on the jury's special finding regarding discharge of a firearm, a consecutive term of 25 years to life must be added to defendant's sentence for first-degree murder. The State further asserted that defendant's conviction for aggravated discharge of a firearm should stand as it did not fall under the one-act, one-crime rule because he fired multiple rounds into Mr. Portee's vehicle in addition to the one that killed Toren Stanley. Ultimately, the trial court sentenced defendant to 50 years on the murder count, with a 50-year consecutive term added based on defendant's use of a firearm.

¶ 7 In sentencing defendant, the trial court specifically stated as follows:

"I'm giving [defendant] 50 years on his Murder count. That's to be served at 100 percent. On top of the 50 years, since this was a murder committed through the use of a firearm, there is a mandatory consecutive of 50 years I'm imposing on him. That will be served at 100 percent."

The trial court also sentenced defendant to 15 years for aggravated discharge of a firearm, 20 years for unlawful possession of cannabis with intent to deliver, and 15 years on conspiracy to unlawfully deliver cannabis. The firearm and cannabis related sentences are to run consecutive to the murder and enhancement sentences, but concurrent to each other. Defendant filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 I. SENTENCE

¶ 10 The first issue we are asked to consider is whether the trial court's imposition of an enhanced sentence of 50 years for use of a firearm during commission of a murder should

be reversed. Defendant contends his sentence must be vacated and the cause remanded for resentencing because the trial court mistakenly believed such a sentence was mandatory and this mistaken belief arguably influenced the trial court's imposition of a sentence. The State replies the trial court's enhanced sentence of 50 years for use of a firearm during commission of the murder is sound because there is nothing in the record that rebuts the trial court's presumed knowledge and proper application of the law. After careful consideration, we agree with defendant.

¶ 11 The parties agree that section 5-8-1 of the Unified Code of Corrections is applicable in the instant case. It states in pertinent part as follows:

"Natural life imprisonment; enhancements for use of a firearm; mandatory supervised release terms.

(a) Except as otherwise provided in the statute defining the offense or in Article 4.5 of Chapter V, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for first[-]degree murder,

* * *

[(d)] (iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012).

The plain language of the statute requires a 25-year-to-life enhancement to a sentence for first-degree murder when a defendant's personal use of a firearm caused the victim's death.

¶ 12 However, in the instant case, when sentencing defendant, the trial court specifically stated: "On top of the 50 years, since this was a murder committed through the use of a firearm, there is a mandatory consecutive of 50 years I'm imposing on him." Based upon this statement, it appears the trial court was under the incorrect impression that it was required to sentence defendant to a minimum of an additional 50 years in prison. A trial court's misapprehension of a minimum sentence requires a new sentencing hearing when it appears the trial court's mistaken belief arguably influenced the sentencing decision. *People v. Eddington*, 77 Ill. 2d 41, 48, 394 N.E.2d 1185, 1188 (1979).

¶ 13 In *Eddington*, the trial court incorrectly believed the statute provided a minimum four-year sentence for solicitation to commit murder, and the defendant was sentenced to a term of 20 to 40 years. *Id.* at 47-48, 394 N.E.2d at 1188. The court in *Eddington*, after stating the general rule above, found there was no indication the trial court used the incorrect minimum term as a reference point in determining the sentence ultimately imposed, a minimum of 20 years. *Id.* at 48, 394 N.E.2d at 1189. In the instant case, however, it appears the trial court not only misapprehended the law, but also used its misapprehension as a reference point in sentencing defendant on the enhancement.

¶ 14 The trial court specifically used the word "mandatory" with regard to the 50-year enhancement. The only conclusion we can draw from the record is that the trial court

used the incorrect minimum sentence (50 years enhancement rather than 25) as a reference point in determining defendant's ultimate sentence. If the 50-year enhancement was merely an inartful proclamation of the trial court's considerable discretion in sentencing, the trial court should make that clear upon remand. However, under the circumstances presented here, we cannot hold the error harmless. Accordingly, we must reverse the enhancement portion of defendant's sentence and remand for resentencing.

¶ 15

II. ONE ACT, ONE CRIME

¶ 16 The other issue raised in this appeal is whether the trial court violated the one-act, one-crime rule when it sentenced defendant for aggravated discharge of a firearm and first-degree murder. Defendant argues that because the State failed to differentiate between the shot that struck and killed Toren Stanley and the other shots that were fired in rapid succession into the vehicle, the one-act, one-crime rule applies, and the firearm conviction cannot stand. The State replies that the trial court did not violate the one-act, one-crime rule when it sentenced defendant on aggravated discharge of a firearm and first-degree murder because there were multiple shots fired at multiple victims and aggravated discharge of a firearm is not a lesser-included offense of first-degree murder. We agree with the State.

¶ 17 The application of the one-act, one-crime rule is a question of law, which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97, 927 N.E.2d 1179, 1189 (2010). Under one-act, one-crime principles, a defendant cannot be convicted of multiple offenses "carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977). A *King* analysis requires two steps: (1) whether the defendant

committed multiple acts, and (2) if so, whether any of the charges are lesser-included offenses. *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306 (1996). Where two offenses share an act in common, multiple convictions are permissible where the defendant commits a second overt manifestation which supports a second offense. See *id.* at 188-89, 661 N.E.2d at 307-08.

¶ 18 Defendant concedes that each separate shot was an overt manifestation capable of supporting a different offense, but insists the State failed to apportion the shots in the indictment, making the one-act, one-crime rule applicable. Here, however, not only were multiple shots fired, but there were also multiple victims. While Toren Stanley was the only person who died as the result of a gunshot, there were three other passengers in the vehicle who were directly in the line of defendant's fire.

¶ 19 The parties have cited several cases in support of their respective positions. We find *People v. Leach*, 2011 IL App (1st) 090339, 952 N.E.2d 647, most instructive. In *Leach*, the defendant made an argument similar to defendant's argument herein. The defendant argued his action of firing his gun three times constituted a single act (or, at least, was presented as such by the State), such that he could not be convicted of both murder and aggravated discharge of a firearm. *Id.* ¶ 33. Our colleagues in the First District rejected the defendant's assertion that his action of firing the gun three times constituted a single act, referring to the action of firing the gun three times as "multiple," yet interrelated, acts. *Id.* ¶ 34. The *Leach* court reasoned the one-act, one-crime rule was inapplicable because the defendant committed multiple, yet interrelated, acts against separate victims. *Id.* ¶¶ 33-34 (citing *People v. Pryor*, 372 Ill. App. 3d 422, 434-35, 865

N.E.2d 279, 291 (2007)). The court noted that the name of a specific victim is not an element of the offense of aggravated discharge of a firearm. *Id.* ¶ 22; 720 ILCS 5/24-1.2(a)(2) (West 2008). The plain language of the statute sets forth only two elements for aggravated discharge of a firearm under subsection (a)(2): first, knowingly or intentionally discharging a firearm; and second, in the direction of another person. *Id.* Accordingly the jury was not required to find the defendant took aim at any specific individual, only that defendant fired "in the direction" of "another person." *Id.*

¶ 20 In the instant case, as in *Leach*, one shot hit and killed a specific individual forming the basis for the murder conviction. Other separate but interrelated shots missed the three other persons in the direction of those shots, thereby forming the basis of the aggravated discharge of a firearm conviction. Relying on *Leach*, we find that the trial court did not violate the one-act, one-crime rule when it convicted defendant of first-degree murder and aggravated discharge of a firearm.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm defendant's convictions on the merits, but reverse the 50-year enhancement and remand for resentencing with regard to the enhancement only.

¶ 23 Affirmed in part, reversed in part, and remanded with directions.