2018 IL App (1st) 150490-U

No. 1-15-0490

Order filed June 14, 2018

Fourth 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. 12 CR 5226
	)	
JAMES MITCHELL,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for vehicular hijacking, robbery and aggravated battery are affirmed over his contention that the robbery and aggravated battery convictions violated the one-act, one-crime principle because they were based on the same physical act as his conviction for vehicular hijacking. Defendant's 10-year extended-term sentence for aggravated battery is vacated, defendant is resentenced to five years' imprisonment to run consecutively to his vehicular hijacking and robbery sentence, and the mittimus is amended accordingly. Fines, fees and costs order modified.

¶ 2 Following a joint bench trial with co-defendant Arredeus Green[1], defendant James Mitchell was found guilty of vehicular hijacking (720 ILCS 5/18-3(a) (West 2012)), robbery (720 ILCS 5/18-1(a) (West 2012)), and aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)). He was sentenced, as a Class X offender, to a total of 40 years' imprisonment: a 30-year term for vehicular hijacking, a concurrent 25-year term for robbery, and a consecutive 10-year, extended-term for aggravated battery.

¶ 3 On appeal, defendant contends that: (1) his convictions for robbery and aggravated battery violate the one-act, one-crime principle because they were based on the same physical act as his conviction for vehicular hijacking; (2) the trial court erred in imposing an extended-term sentence for his aggravated battery conviction because that offense was not the most serious offense of which he was convicted; and (3) the trial court erroneously assessed certain fines and fees. We affirm defendant's convictions; vacate his 10-year sentence for aggravated battery, resentence him to five years' imprisonment for that offense, and amend the mittimus accordingly; and modify the fines, fees and costs order.

¶ 4 Defendant was charged by indictment with one count of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(4) (West 2012)); one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2012)); and one count of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)). The aggravated vehicular hijacking count alleged that defendant, knowingly took a motor vehicle from the person or immediate presence of Arnulfo Brizuela, by the use of force or by threatening the imminent use of force and while otherwise armed with a firearm. The armed robbery count, as amended, alleged that defendant knowingly took property to wit: keys from the person or presence of Brizuela by the use of force or by threatening the imminent use of force and they

[1] Green is not a party to this appeal.

carried on or about their person or were otherwise armed with a bludgeon. The aggravated battery count alleged that defendant in committing a battery, knowingly caused bodily harm to Brizuela to wit: struck Brizuela about the head and body while they were on a public way to wit; 60th Street.

¶ 5 The facts adduced at trial showed that, on January 11, 2012, about 4:25 p.m., the victim, Arnulfo Brizuela, accompanied his cousin, Jose Gutierrez, to a currency exchange to retrieve a license plate for Gutierrez's 2000 Honda Accord. Gutierrez drove Brizuela to the corner of West 60th Street where Brizuela was to pick up the car while Gutierrez went to the currency exchange. When Brizuela approached the vehicle he opened the passenger side door because "the driver's side door would not open." As he was leaning into the car to open the driver's side door, he felt something hit him on the back of his head. Brizuela described the object that hit him as being "somewhat hard" and testified that he was hurt by the blow. Brizuela was unable to see who hit him. As Brizuela tried to stand up, co-defendant Green grabbed him and held him in a choke hold. Brizuela testified that he was unsure if the car keys were "snatched" out of his hand or if he dropped them after he was hit. Brizuela saw defendant enter the driver's side of the Accord and drive away. Green released Brizuela from the choke hold and ran for the car. Brizuela was about two feet away from Green when he saw Green reach into his coat pocket. Brizuela acknowledged that he was unsure as to what Green was trying to retrieve from his pocket. Brizuela phoned the police.

¶ 6 Later that afternoon, Brizuela saw the car near the intersection of 57th Street and California Avenue, and called the police. The car was towed to a yard near his home. On

February 13, 2012, Brizuela viewed a lineup at the 8th District police station and identified defendant as one of the offenders.

¶ 7 The State called several Chicago police officers to testify. Officer Lule testified that he arrested co-defendant Green and obtained defendant's address. Lule tendered this information to the detectives and tactical officers. Lule also acted as a translator for Brizuela during the line-ups. Officer Julian Morgan testified that on January 11, 2012, he recovered the Honda Accord approximately a block from where it was taken. Officer Donna Walsh testified that on February 13, 2012, she observed defendant standing on the sidewalk on South California and talking on his cell phone. Walsh recognized defendant as being a wanted offender. Walsh placed defendant under arrest and, pursuant to a signed consent to search form, searched defendant's apartment. Walsh testified that, in addition to several letters with defendant's name and address, she recovered, from a dresser in one of the bedrooms, a white sock with a lock inside of it. The State rested.

¶ 8 Defendant filed a motion for directed finding. The court heard arguments and denied the motion as to the armed robbery and aggravated battery counts, but found that the State had not proven that a gun was used during the course of the aggravated vehicular hijacking. The court found that the State met their burden of proving the lesser-included offense of vehicular hijacking. Defendant rested after the ruling on the motion for directed finding.

¶ 9 The court found defendant guilty of vehicular hijacking and aggravated battery. The court found that the State failed to prove defendant guilty of armed robbery, but found that the State met their burden of proving the lesser-included offense of robbery. At sentencing, the State presented testimony from two Chicago police officers. Detective Otero testified to the arrest and

conviction of defendant for an October 19, 2005, aggravated vehicular hijacking and aggravated discharge of a firearm. Detective Rempas testified to the positive lineup identification of defendant for a vehicular hijacking that occurred on November 7, 2011, and a vehicular hijacking, robbery and aggravated battery that occurred on January 16, 2012. After listening to factors in both aggravation and mitigation the court sentenced defendant, as a Class X offender, to a total of 40 years' imprisonment: a 30-year term for vehicular hijacking, a concurrent 25-year term for robbery, and a consecutive 10-year, extended-term for aggravated battery.

¶ 10 On appeal, defendant first contends that his convictions for robbery and aggravated battery should be vacated because they violate the one-act, one-crime principle where these convictions are based on the exact same physical act as his vehicular hijacking conviction. In setting forth this argument, defendant acknowledges that he failed to preserve the issue for appeal, but argues that it is reviewable under the second prong of the plain error doctrine because the error affects his substantial rights.

¶ 11 The State concedes, and we agree, that the alleged violation of the one-act, one-crime principle affects the integrity of the judicial process and thus it is reviewable under the second prong of the plain error doctrine. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010) (citing *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009)). However, before considering whether the plain-error exception to the rule of forfeiture applies, we must first determine whether any error occurred. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Here, we find that it did not.

¶ 12 The one-act, one-crime principle prohibits a defendant from being convicted of multiple offenses based on the same physical act. *People v. Coats*, 2018 IL 121926, ¶ (citing *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. *Coats*, 2018 IL 121926, ¶ 12. First, we determine whether the defendant's conduct in committing the robbery and aggravated battery consisted of multiple physical acts or a single physical act. *Id.* "Multiple convictions are improper if they are based on precisely the same physical act." *Id*. An "act" has been defined as "any overt or outward manifestation that will support a separate conviction." *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. *Coats*, 2018 IL 121926, ¶ 12. Whether a conviction should be vacated under the one-act, one-crime principle is a question of law that is reviewed *de novo*. *Id.*

¶ 13 In this case, defendant does not argue that his robbery and aggravated battery convictions are lesser-included offenses of his vehicular hijacking conviction. Rather he contends that his robbery and aggravated battery convictions are based on the same physical act—the blow to the back of Brizuela's head—as his vehicular hijacking conviction. Therefore, we review only whether the convictions are based on the same physical act.

¶ 14 Initially, we note that, contrary to defendant's argument that the State did not attempt to distinguish separate acts necessary to sustain a conviction for each offense, the record shows that the State charged defendant with vehicular hijacking, robbery and aggravated battery based on different physical acts. Specifically, the aggravated vehicular hijacking count alleged that defendant, knowingly took a motor vehicle from the person or immediate presence of Brizuela, by the use of force or by threatening the imminent use of force and while otherwise armed with a firearm. The armed robbery count, as amended, alleged that defendant knowingly took property to wit: keys from the person or presence of Brizuela "by the use of force or by threatening the

imminent use of force" and [he] carried about [his] person or were otherwise armed with a bludgeon. The aggravated battery count alleged that defendant "in committing a battery, ***, knowingly caused bodily harm to Arnulfo Brizuela, to wit: *** [defendant] struck Arnulfo Brizuela about the head and body, while they were on or about a public way, to wit: West 60th Street, Chicago[.]"

¶ 15 Therefore, the charging instrument sufficiently differentiated between the types of acts for each crime: the taking of the motor vehicle by the use of force for the vehicular hijacking, the taking of the keys by the use of force for the robbery, and the striking on a public way for aggravated battery. See *People v. Crespo*, 203 Ill. 2d 335, 343-45 (2001) (To sustain multiple convictions, the charging instrument must indicate that the State intends to treat the defendant's conduct as separate and multiple acts). As such, we decline defendant's invitation to deem that his convictions arose from the same physical act. Rather, we consider the evidence presented at trial to determine whether defendant's convictions were based on the same physical act.

¶ 16 Here, we find that the trial court did not err in convicting defendant of vehicular hijacking, robbery and aggravated battery where the evidence presented at trial demonstrated that defendant committed three separate acts. Brizuela testified that, as he was getting into the car on 60th and California Avenue, he was hit in the head with an unknown object. Brizuela tried to stand up, but co-defendant Green grabbed Brizuela from behind and put him in a choke hold. Brizuela could not recall if the car keys were knocked out of his hand by the blow to the head or if the keys were "snatched" from his hand. After being placed in a choke hold, Brizuela saw defendant enter the car and begin to drive away. Brizuela also saw co-defendant reach into his coat pocket.

¶ 17 The act of striking Brizuela in the head while on the public way satisfied the elements of the aggravated battery charge. Separate and apart from the act of hitting Brizuela in the head, co-defendant placed Brizuela in a choke hold. During the course of the attack, Brizuela's car keys either fell out of his hand and were picked up by defendant or were snatched out of his hand by defendant, thus satisfying the elements of the robbery charge. *People v. Pearson,* 331 Ill. App. 3d 312, 321-22 (2002) (upholding defendant's robbery and aggravated battery convictions where the defendant's conduct of grabbing the victim's purse and knocking her to the ground constituted two separate acts); see also *People v. Dixon,* 91 Ill. 2d 346, 355 (1982) (multiple acts may be found even where the acts are interrelated).

¶ 18 Separate and apart from the aggravated battery and robbery was the vehicular hijacking. Defendant entered Brizuela's car and drove away, while co-defendant stuck his hand in his coat pocket and ran towards the car. See 720 ILCS 5/18-3(a)(West 2014) (the offense of vehicular hijacking is established when a defendant knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or threatening the imminent use of force.); *People v. Lovings,* 275 Ill. App. 3d 19, 22, (1995) (the threat of imminent force is satisfied if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will).

¶ 19 Thus, these separate and distinct acts were sufficient to support defendant's convictions for aggravated battery, robbery and vehicular hijacking. *People v. Rodriguez,* 169 Ill. 2d 183, 188-89 (1996) (even where two offenses share an act in common, multiple convictions are permissible if the defendant commits a second overt manifestation which supports a second

offense). Accordingly the trial court did not err in convicting defendant of aggravated battery and robbery.

¶ 20 In reaching this decision, we are not persuaded by defendant's reliance on *People v. Daniel*, 2014 IL App (1st) 121171. In *Daniel*, the defendant was charged with armed robbery and aggravated unlawful restraint based on an armed robbery that occurred in a convenience store. While armed with a handgun, the defendant ordered the victim to lie on the ground while he took money from the cash register. The defendant then kicked and hit the victim and eventually placed the gun in the victim's mouth demanding more money. The defendant took the victim's wallet. When the defendant went into the back room, the victim ran out the front door. The court found that "defendant's aggravated unlawful restraint conviction was carved from the same physical act as his armed robbery conviction…the restraint was not a separate or independent physical act. Rather the armed robbery in this case was ongoing until [the victim] escaped through the front door." *Id.*, ¶ 54. The court found that Daniel's conviction for aggravated unlawful restraint violated the one-act, one-crime principle because "there was no separate act of restraint." *Id.*, ¶ 55.

¶ 21 Here, unlike in *Daniel*, the State sufficiently differentiated between defendant's actions and elicited testimony from Brizuela regarding being struck in the head, placed in a choke hold, followed by the taking of the car keys, co-defendant's threat of force and defendant driving away in the car.

¶ 22 Defendant next contends that the trial court erred in imposing an extended-term sentence for aggravated battery because this was not the most serious offense of which he was convicted. Defendant requests that this court vacate his sentence of ten years' imprisonment for aggravated

battery and resentence him to five years' imprisonment, the maximum non-extended term allowed for a class 3 offense.

¶ 23 In setting forth this argument, defendant acknowledges that he failed to preserve this issue for appeal by not raising it in a postsentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). However, because the State does not argue forfeiture on appeal, it has forfeited the claim that the issue raised by defendant is forfeited. *See People v. Reed*, 2016 IL App (1st) 140498, ¶ 13 ("By failing to timely argue that a defendant has forfeited an issue, the State waives the issue of forfeiture."). This issue raises a question of law which we review *de novo*. *People v. Hall*, 198 Ill. 2d 173, 177 (2001).

¶ 24 The State concedes, and we agree, that defendant's extended-term sentence for aggravated battery was improper under *People v. Jordan*, 103 Ill. 2d 192 (1984). Defendant was convicted of vehicular hijacking, a class 1 felony (720 ILCS 5/18-3(c) (West 2012)), robbery, a class 2 felony (720 ILCS 5/18-1(b) (West 2012)), and aggravated battery, a class 3 felony (720 ILCS 5/12-4(e)(1) (West 2012)). Defendant was sentenced as a Class X offender and received a 30-year sentence as to the vehicular hijacking and a 25-year sentence as to the robbery to run concurrently. The court also imposed an extended-term sentence of 10 years on the aggravated battery to run consecutively to the concurrent sentences.

¶ 25 Under section 5-8.2(a) of the Code of Corrections (730 ILCS 5/5-8.2(a) West 2012)), a defendant may be sentenced to an extended-term of the maximum sentence authorized by section 5-8-1 (730 ILCS 5/5-8-1 (West 2012)). However, in order for the court to impose such a

sentence it must: (1) find to be present the aggravating factors "set forth in paragraph (b) of [s]ection 5-5-3.2 or clause (a)(1)(b) of [s]ection 5-8-1" and (2) the extended term sentence must be "for the class of the most serious offense of which the offender was convicted." 730 ILCS 5/5-8-2(a) (West 2012); *People v. Jordan*, 103 Ill. 2d 192, 207 (1984) ("extended sentences may only be imposed for the offenses within the most serious class of offense of which the accused is convicted.").

¶ 26 An exception to this rule "applies when extended term sentences are imposed on 'separately charged differing class offenses that arise from unrelated courses of conduct.' " *People v. Reese*, 2017 IL 120011, ¶ 83 (quoting *People v. Coleman*, 166 Ill. 2d 247, 257 (1995)). The test for determining whether the convictions arose from unrelated courses of conduct is whether there was a substantial change in the nature of defendant's criminal objective. *People v. Bell*, 196 Ill. 2d 343, 354 (2001). Where a lesser and greater offense are not committed as part of a single course of conduct, an extended term may be imposed on the lesser offense. *People v. Collins*, 366 Ill. App. 3d 885, 902 (2006).

¶ 27 Here, defendant's objective was to take Brizuela's car. The aggravated battery committed against Brizuela was merely a step to achieving this objective. We find that defendant engaged in the same course of conduct when he committed the crimes of which he was convicted. Accordingly, we agree with the parties that he was improperly sentenced to an extended-term sentence for aggravated battery. *Jordan*, 103 Ill. 2d at 206. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999), we reduce defendant's sentence for aggravated battery to five years' imprisonment, the maximum non-extended term, to run consecutively to his vehicular hijacking and robbery sentence. See 720 ILCS 5/12-4 (e)(1) (West

2012); 725 ILCS 5/5-4.5-40(a) (West 2012); *People v. Lashley*, 2016 IL App (1st) 133401, ¶ 74 (reducing the defendant's sentences to the maximum non extended term). We also amend the mittimus accordingly.

¶ 28 Finally, defendant contends that certain fines and fees imposed against him were erroneous because several of the assessments were unauthorized and some were not properly reduced by his pretrial incarceration credit. Defendant is not contending that the trial court erred is assessing the fines and fees in question, rather he claims that the trial court imposed the unauthorized Electronic Citation Fee and failed to award him credit against his fines for time spent in presentence custody. Thus, defendant requests this court to reduce the fines and fees assessed against him by $79. The State agrees that defendant is entitled to some presentence incarceration credit, but not all the credit that defendant is requesting. The State maintains that defendant should only be credited $20, leaving him owing $384.

¶ 29 In setting forth his argument, defendant acknowledges that he did not object to the imposition of the fines and fees at the time of sentencing nor was the issue preserved in his motion to reconsider sentence. As such, defendant is raising the issue for the first time on direct appeal. In doing so, defendant acknowledges that the issue has been forfeited but suggests that we review the matter under the second prong of the plain error doctrine or under Illinois Supreme Court Rule 615(b).

¶ 30 The State does not argue that the issue has been forfeited, but instead argues the merits. The State has therefore, forfeited the claim that the issues raised by defendant are forfeited. See *People v. Whitfield*, 228 Ill.2d 502, 509 (2007) (the State may forfeit the claim that an issue

defendant raises is forfeited if the State does not argue forfeiture on appeal). We review this issue of law *de novo*. See *People v. Green*, 2016 IL. App (1st) 134011 ¶ 44.

¶ 31 The fines, fees and costs order shows that defendant was assessed a total of $917 with credit for 1037 days in custody. However, as the State correctly points out, there was an error in calculating the fees and fines and the actual total should be $404.

¶ 32 That said, defendant first argues that the $15 State Police Operations fee, the $2 Public Defender Records Automation fee, the $2 State's Attorney Records Automation fee, the $15 Clerk Automation fee, the $15 Document Storage fee, and the $25 Sheriff's Court Service fee are all fines and therefore, are subject to the $5-per-day presentence incarceration credit. Thus, defendant requests that we reduce the total of his unpaid fees by $79. The State agrees with defendant in so much as the $15 State Police Operations fee should be credited and the $5 Electronic Citation fee was erroneously assessed. The State asks that we reduce the $404 that defendant owes by $20 for a total of $384.

¶ 33 A defendant is entitled to credit of $5 for each day he is incarcerated, with that amount to be applied toward the fines levied against him as part of his conviction. 725 ILCS 5/110-14(a) (West 2014). Defendant received credit for 1037 days in custody prior to sentencing. Therefore, at $5-per-day, he was entitled to $5,185 of presentencing credit. A "fine" is punitive in nature and is imposed as part of a sentence on a person convicted of a criminal offense. *People v. Graves*, 235 Ill.2d 244, 250 (2009). A "fee" is a charge that seeks to recoup expenses incurred by the State in prosecuting the defendant. *Id*. The legislature's label for a charge is strong evidence of whether the charge is a fee or a fine, but the most important factor is whether the charge seeks to compensate the State for any cost incurred as a result of prosecuting the defendant. *Id*.

¶ 34 First, defendant argues and the State agrees that the $15 State Police operations fee is a fine subject to be offset. 55 ILCS 5/5-1101(c)(1) (West 2014); 705 ILCS 105/27.3a(1.5) (West 2014); *People v. Ackerman*, 2014 IL. App (3rd) 120585 ¶ 30 ("the court systems fee *** was actually a fine"); *People v. Millsap*, 2012 IL. App (4th) 110668 ¶ 31 ("the State Police operations assistance fee is also a fine"). Accordingly, this charge should be offset by defendant's presentence incarceration credit.

¶ 35 Defendant also argues and the State agrees that the Electronic Citation Fee was erroneously assessed against him. The purpose of the $5 Electronic Citation Fee is to offset the expense of establishing and maintaining electronic citations applying in "any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." See 705 ILCS 105/27.3e (West 2014). We agree that defendant was found guilty of vehicular hijacking, robbery and aggravated battery and as such, this fee does not apply.

¶ 36 Next, defendant argues that a portion of his presentence custody credit should be applied to the $2 State's Attorney records automation and $2 Public Defender records automation charges because these assessments are fines and not fees as they do not reimburse the State for costs incurred in prosecuting a particular defendant. 55 ILCS 5/4-2002.1(c) (West 2014); 55 ILCS 5/3-4012 (West 2014). Although defendant recognizes this court's holding in *People v. Bowen*, 2015 IL. App (1st) 132046, ¶ 63-65, he nevertheless argues that he is entitled to reimbursement. However, the $2 State's Attorney records automation fee and the $2 Public Defender automation fee are not fines. "[T]he bulk of legal authority has concluded that both assessments are fees rather than fines because they are designed to compensate those organizations for the expenses they incur in updating their automated record-keeping systems

while prosecuting and defending criminal defendants." *People v. Brown*, 2017 IL. App (1st) 150146 ¶ 38 (consolidating cases); see contra *People v. Camacho*, 2016 IL. App (1st) 140604 ¶¶ 47-56 (finding the assessments are fines, not fees). Accordingly, defendant is not entitled to presentence custody credit toward these assessments.

¶ 37 Lastly, defendant contends that the $15 automation fee (705 ILCS 105/27.3a(1),(1.5) (West 2014)), the $15 document storage fee (705 ILCS 105/27.3c(a) (West 2014)), and the $25 court services fee (55 ILCS 5/5-1103 (West 2014)) are all fines subject to presentence incarceration credit. This court has already considered challenges to these assessments and found that they are fees as they "are compensatory and a collateral consequence of defendant's conviction." *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006). These charges represent part of the costs incurred for prosecuting a defendant and are, therefore, not fines subject to offsetting presentence custody credit. See *People v. Graves*, 235 Ill.2d 244, 250 (2009); *Tolliver*, 363 Ill. App. 3d at 97.

¶ 38 For the reasons set forth above, we find that the $15 State Police operations fee and the $5 Electronic Citation fee were erroneously assessed and are offset by defendant's presentence credit. We direct the clerk of the circuit court to modify the fines, fees and costs accordingly.

¶ 39 In sum, we affirm defendant's convictions for vehicular hijacking, robbery, and aggravated battery; vacate his extended-term sentence for aggravated battery, reduce his sentence for that offense to five years' imprisonment to run consecutively to his vehicular hijacking and robbery sentence, and amend the mittimus accordingly; and modify the fines, fees and costs order.

¶ 40 Affirmed as modified; mittimus amended; fines, fees and costs order modified.