2018 IL App (2d) 160500-U
No. 2-16-0500
Order filed September 19, 2018
Modified Upon Denial of Rehearing October 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-176
THOMAS J. GALLAGHER,	)	Honorable Timothy J. McCann,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of home invasion: although the occupant of the home had escaped by the time of defendant's entry, defendant's running, masked approach toward the home threatened the occupant with the imminent use of force; (2) defendant's convictions of home invasion and residential burglary did not violate the one-act, one-crime rule, as his threat of force arose out of acts separate from the entry of the residence.

¶ 2 Defendant, Thomas J. Gallagher, appeals from the judgment of the circuit of Kendall County, contending that there was insufficient evidence to prove that he committed home invasion (720 ILCS 5/19-6(a)(3) (West 2014)) and, alternatively, that his conviction of

residential burglary (720 ILCS 5/19-3(a) (West 2014)) must be vacated under the one-act, one-crime doctrine. Because there was sufficient evidence to prove that defendant committed home invasion and the convictions did not violate the one-act, one-crime doctrine, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of home invasion (720 ILCS 5/19-6(a)(3) (West 2014)), one count of residential burglary (720 ILCS 5/19-3(a) (West 2014)), and one count of the aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2014)). Defendant opted for a bench trial.

¶ 5 The following facts were established at trial. In 2015, defendant's friend, Zachary Barthel, told defendant that Marco Ortega had robbed him. Barthel proposed that they take drugs and money from Ortega. Defendant did not know Ortega.

¶ 6 At about 11 a.m. on June 12, 2015, Corey Gorges, another of defendant's friends, picked up defendant and defendant's girlfriend, Kathryn Fyfe, in a white Dodge Durango. While in the Durango, Gorges showed defendant two semi-automatic handguns. The threesome drove to Barthel's home, where defendant, Barthel, and Fyfe used heroin.

¶ 7 The foursome, which included Barthel, drove to Yorkville. Barthel directed Gorges to Ortega's house. While driving there, Gorges said that, if necessary, he would make Ortega give them drugs and money.

¶ 8 When they reached Ortega's house, Barthel said that, because Ortega's car was in the driveway, Ortega was home. Fyfe admitted on cross-examination that she never saw Ortega in the house and that none of her companions said that they saw him.

¶ 9 The four then drove around the block and stopped near Ortega's house. While still in the Durango, Gorges and defendant put on black and yellow gloves. Gorges covered his face from

the nose down with a yellow camouflage bandana. Fyfe gave defendant a black, sleeveless shirt, and defendant tied it around his face. Gorges carried a .380 semi-automatic handgun, and defendant carried a 9 millimeter, semi-automatic handgun. According to Fyfe, defendant's handgun was loaded, and he placed it in a waistband holster.

¶ 10 After defendant and Gorges exited the Durango, Barthel drove away. As the Durango drove off, Fyfe could see defendant and Gorges walking briskly up the driveway of Ortega's house and enter the side door of the attached garage.

¶ 11 According to Ortega, he was getting ready to take a shower when he heard his dog barking. He looked out a window in the front room of the house, expecting to see the mail lady or a UPS delivery person. Instead, he saw two people coming from a Durango that was driving away. The pair ran through his yard and up his driveway to the side door of his garage. Each person was wearing a "scarf or something covering their face." Ortega did not notice anything about their hands.

¶ 12 Ortega panicked, because he thought that the pair was going to come into the house to hurt or kill him. He went to a rear bedroom and tried to escape through a window. In attempting to do so, he stood on a table below the window, but one of the table legs broke. As a result, Ortega ran back into the hallway and "just listened for a minute," to determine if the pair was in the house.

¶ 13 As Ortega listened, the dog ran barking to the door between the house and the garage. Ortega then heard a distinctive "swoosh of the door open[ing]." Ortega believed that someone had opened the door and was entering the house from the garage.

¶ 14 According to Ortega, he did not wait around for something worse to happen. Rather, he ran out the front door, wearing only boxer shorts and an undershirt and no shoes. He ran across

the street to a neighbor's house. Ortega told the neighbor that someone had run into Ortega's house.

¶ 15 As Ortega and the neighbor looked across the street at Ortega's house, Ortega saw someone in the house looking around. Ortega guessed that the person was looking for him, as he did not believe that the intruders knew that he had exited the house.

¶ 16 A few seconds later, the pair ran out of Ortega's front door. One of them was carrying a black metal safe from Oretga's bedroom. Ortega yelled at them. One of the two turned and pointed a handgun at Ortega.

¶ 17 Another neighbor, Samuel King, was working in his garage when he heard a loud vehicle exhaust. Curious, he stepped out of the garage to see who it was. As he did so, he saw two people running from a white vehicle toward Ortega's house. One was wearing a red hoodie and the other a tan, Carhartt-type jacket. Both had bandanas covering their faces. The person wearing the jacket appeared to have a weapon in his hand. The pair entered Ortega's garage through the side door.

¶ 18 King then called 911. As he watched from inside his garage, he saw Ortega run across the street to a neighbor's house. He then saw the person wearing the jacket run from Ortega's house. That person pointed a black, semi-automatic handgun at King. King identified a handgun found nearby as resembling the one that was pointed at him. Shortly thereafter, King saw the person wearing the red hoodie running from Ortega's house carrying a black metal box. That person ran through a yard and out of King's sight. Because both persons had their faces covered, King was unable to describe them.

¶ 19 A police search of the area revealed in some tall weeds a Carhartt-type jacket, a .380 semi-automatic handgun and a 9 millimeter semi-automatic handgun, and a pair of yellow and

black gloves. Defendant could not be excluded as contributing the DNA found on one of the gloves. The police also found a red hoodie, a black metal safe, and a black sleeveless shirt, all of which had been discarded near Ortega's neighborhood.

¶ 20 Shortly after the incident, the police arrested Gorges, who had discarded the safe near a bridge and attempted to hide the red hoodie in a tree. Gorges could not be excluded as contributing the DNA found on the red hoodie.

¶ 21 Later that day, the police investigated a report of a man going door to door near Ortega's neighborhood asking to use a telephone. The police arrested the man, who turned out to be defendant.

¶ 22 Defendant moved for a directed finding, contending, among other things, that the evidence did not show that defendant used force or threatened the imminent use of force while Ortega was in the home. The trial court denied the motion.

¶ 23 The trial court found defendant guilty of home invasion and residential burglary.[1] In doing so, the court commented that the issue of whether defendant threatened the imminent use of force against Ortega was the "most problematic." Noting that the purpose of the home-invasion statute is to protect people in their homes, the court commented that it would defeat that purpose to allow a defendant to avoid criminal liability simply because the occupant of the home escaped to avoid injury before the defendant entered. Pointing to Ortega's response to having seen defendant and Gorges running up the driveway wearing masks, the court found that Ortega's fear was reasonable under the circumstances. Thus, the court found that defendant had threatened the imminent use of force while Ortega was still in his home.

[1] During trial, the State nol-prossed the charge of aggravated unlawful use of a weapon.

¶ 24 Defendant filed a motion for a new trial, in which he contended, among other things, that the State had failed to prove that he had threatened the imminent use of force against Ortega. The trial court denied the motion for a new trial and sentenced defendant to concurrent terms of imprisonment of 25 years for home invasion and 10 years for residential burglary. Defendant filed a timely notice of appeal.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant contends that (1) the State failed to prove beyond a reasonable doubt that he threatened the imminent use of force against Ortega and (2) his residential burglary conviction must be vacated under the one-act, one-crime doctrine.

¶ 27 A. Sufficiency of the Evidence (Home Invasion)

¶ 28 Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt all essential elements of the offense. *People v. Brown*, 2013 IL 114196, ¶ 48. That standard of review recognizes the responsibility of the trier of fact to resolve any conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the evidence. *Brown*, 2013 IL 114196, ¶ 48. Accordingly, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *Brown*, 2013 IL 114196, ¶ 48. Although those determinations are entitled to deference, they are not conclusive. *Brown*, 2013 IL 114196, ¶ 48. Thus, a criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 29 The home-invasion statute provides, in pertinent part, that a person, who is not a police officer acting in the line of duty, commits home invasion when, without authority, he knowingly enters the dwelling place of another when he knows or has reason to know that one or more persons is present and, while armed with a firearm, uses force or threatens the imminent use of force upon any person within the dwelling, regardless of whether an injury occurs. 720 ILCS 5/19-6(a)(3) (West 2014).

¶ 30 Here, defendant contends only that the evidence was insufficient to prove that he threatened the imminent use of force against an occupant within the dwelling. We disagree.

¶ 31 When Ortega heard his dog barking, he looked out a window to see what was going on. To his surprise, he saw two people wearing masks and gloves running[2] up his driveway toward the side door of the attached garage. He also saw the Durango, from which the two had apparently exited, driving off. According to Ortega, he was afraid that the pair was going to hurt or kill him. Indeed, he was so afraid that he panicked and tried to escape through a bedroom window. When that failed, he entered a hallway and carefully listened to determine whether the two had entered his home. In doing so, he saw the dog run barking to the door between the garage and the house. He then heard the distinctive swooshing sound of the interior garage door being opened. Because he continued to fear for his safety, Ortega ran out of the house, even though he was not wearing shoes and had on only boxer shorts and an undershirt. Ortega's reaction to defendant's conduct supports the finding that the conduct was threatening.

[2] Both Ortega and King testified that the two were running. Although Fyfe testified that they were walking briskly, the trial court was free to accept Ortega's and King's description. Even if the two were walking briskly, our conclusion would be the same.

¶ 32 More importantly, Ortega's perception of the threat of the imminent use of force was reasonable. Indeed, two masked people wearing gloves, who exit a vehicle, rapidly approach a side entrance to a home, and enter without permission, constitute an obvious threat of the imminent use of force to an occupant of the home. That is so whether or not the two people displayed any weapons.

¶ 33 Our conclusion is supported by *People v. Kovacs*, 135 Ill. App. 3d 448 (1985). The issue in *Kovacs* was whether the evidence was sufficient to prove that the defendant had threatened an occupant of a dwelling within the meaning of the home-invasion statute. *Kovacs*, 135 Ill. App. 3d at 450. The defendant maintained that, because the occupant exited the dwelling before he entered, he did not threaten the imminent use of force against an occupant in the dwelling. *Kovacs*, 135 Ill. App. 3d at 450. In rejecting that contention, this court stated that the offense of home invasion could be comprised of a defendant's conduct both within and without the dwelling and did not require the "fine distinction" urged by the defendant. *Kovacs*, 135 Ill. App. 3d at 451. This court found no support in the home-invasion statute for the proposition that the threat of force against a person in the dwelling must occur only after the unlawful entry. *Kovacs*, 135 Ill. App. 3d at 451. Further, this court interpreted the home-invasion statute as intended to apply to a home invader who, while outside the dwelling, threatens a person inside the dwelling. *Kovacs*, 135 Ill. App. 3d at 451; see also *People v. Troutt*, 172 Ill. App. 3d 668, 672-73 (1988) (rejecting the defendant's argument that force must be threatened only after an unlawful entry). Clearly, *Kovacs* stands for the proposition that the threat of the imminent use of force directed at the occupant of a dwelling need not occur only after entry into the dwelling.

¶ 34 We add that Ortega was not required to first allow defendant and his companion to enter the home before further ascertaining their intentions or reacting to the threat. See *People v.*

Kolls, 179 Ill. App. 3d 652, 655 (1989) (to allow a defendant to evade the home-invasion statute where the victim flees or is forced from his dwelling before any entry would defeat the purpose of the statute); see also *People v. Mata*, 316 Ill. App. 3d 849, 853-54 (2000) (there can be a home invasion even though the occupant flees the dwelling before the defendant enters). To hold otherwise would contradict the purpose of the home-invasion statute. See *Kolls*, 179 Ill. App. 3d at 655 (purpose of the home-invasion statute is to protect people in their homes). Thus, defendant's conduct here, which caused Ortega to exit the dwelling, satisfied the element of the threatened imminent use of force.

¶ 35 We reject defendant's argument that he never conveyed a threat of imminent force because he and Ortega had no direct interaction. Defendant conveyed a threat through his conduct as he approached and entered Ortega's house. Ortega observed that conduct and quickly determined that it threatened his safety. Contrary to defendant's assertion, a close-up personal exchange between defendant and Ortega was not required under the circumstances. Nor, as noted, did the law require Ortega to remain in his home to further ascertain defendant's intentions. See *Kolls*, 179 Ill. App. 3d at 655. Thus, defendant, through his conduct upon approaching and entering the home, conveyed a threat to Ortega.

¶ 36 Finally, defendant argues that, in those cases where a court held that a threat of an imminent use of force occurred before the unlawful entry, there was more evidence of a threat than occurred here. We reject that argument, as we are called upon to assess the evidence in this case. The quality or quantity of evidence in other cases does not establish a threshold of proof for this case.

¶ 37 When the evidence is viewed in the light most favorable to the State, it was sufficient to prove beyond a reasonable doubt that defendant threatened Ortega with the imminent use of force. Thus, defendant was properly found guilty of home invasion.

¶ 38 B. One-act, One-crime Doctrine (Residential Burglary)

¶ 39 Under the one-act, one-crime doctrine, multiple convictions may not be based on the same physical act. *People v. King*, 2017 IL App (1st) 142297, ¶ 22 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). An act is defined as any overt or outward manifestation that will support a different offense. *King*, 2017 IL App (1st) 142297, ¶ 22.

¶ 40 To determine whether convictions violate the one-act, one-crime doctrine, a court applies a two-step process. *King*, 2017 IL App (1st) 142297, ¶ 24 (citing *People v. Miller*, 238 Ill. 2d 161, 165 (2010)). First, a court must determine whether it took multiple acts to commit the two offenses. *King*, 2017 IL App (1st) 142297, ¶ 24. Second, even if the conduct involved multiple acts, a court must determine whether one offense is a lesser included offense of the other. *King*, 2017 IL App (1st) 142297, ¶ 25.

¶ 41 We initially decide whether defendant's conduct in committing the two offenses involved the same physical act. It did not.

¶ 42 To commit home invasion, as charged here, defendant had to perform several distinct physical acts: enter the dwelling place of another, carry a firearm, and use force or threaten the imminent use of force. See 720 ILCS 5/19-6(a)(3) (West 2014). On the other hand, to commit residential burglary, defendant had to perform only one physical act, enter the dwelling. See 720 ILCS 5/19-3(a) (West 2014).

¶ 43 Although both offenses involved the same physical act of entering Ortega's dwelling, defendant also carried a firearm, as well as engaged in conduct (wearing a mask and gloves and

running toward the house) that constituted the threat of imminent force against Ortega. Those additional physical acts were separate from the act of entering the dwelling. Defendant contends that his conduct of running toward the house and entering were part of a single continuous act. That might be, but defendant also armed himself and donned a mask and gloves. As discussed, those distinct physical acts were part of the evidence that defendant threatened the imminent use of force. Both acts clearly were separate from the acts of running toward and entering the home. Thus, the two convictions were not carved from the same physical act.

¶ 44 Although defendant relies on *People v. McLaurin*, 184 Ill. 2d 58 (1998), that reliance is misplaced. Under the facts of *McLaurin*, the supreme court held that the defendant's convictions of home invasion and residential burglary were carved from the same physical act of entry into the dwelling. *McLaurin*, 184 Ill. 2d at 106. It did so, however, because there was no additional act attributable to the home invasion, as the separate act of setting a fire in the dwelling was attributable to the defendant's conviction of murder. See *People v. Coats*, 2018 IL 121926, ¶ 20. Thus, *McLaurin* is distinguishable, as here defendant committed additional physical acts separate from the entry into the dwelling that were attributable only to the home invasion.[3]

¶ 45 Nevertheless, defendant insists that his conviction for residential burglary must be vacated under *People v. Crespo*, 203 Ill. 2d 335 (2001). We disagree that *Crespo* is applicable. In *Crespo*, the defendant stabbed the victim three times "in rapid succession." *Crespo*, 203 Ill. 2d at 338. As a result, the State charged the defendant with aggravated battery and armed violence

[3] We note that residential burglary is not a lesser included offense of home invasion, as it requires proof of the additional element of the intent to commit a felony or theft that home invasion does not. See *King*, 2017 IL App (1st) 142297, ¶ 30.

without differentiating between the separate stab wounds. *Crespo*, 203 Ill. 2d at 342. In other words, the State charged the attack as a single offense, although it could have charged a separate offense for each of the victim's wounds. *Crespo*, 203 Ill. 2d at 342. Then, the State argued to the jury that the defendant's conduct constituted a single attack. *Crespo*, 203 Ill. 2d at 343-44. On appeal, the defendant successfully argued that his aggravated battery conviction had to be reversed because it stemmed from the same physical act that formed the basis for the armed violence charge. *Crespo*, 203 Ill. 2d at 340. The appellate court rejected the State's argument that each stab wound represented a separate act and held that "to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair." *Crespo*, 203 Ill. 2d at 343.

¶ 46 Here, defendant contends that, under the State's theory, the armed threat to Ortega was "indistinguishable" from the entry into his home, making the entry part of the threat. Defendant, therefore, reasons that his residential burglary conviction was carved from the same physical act as his home invasion conviction. Defendant fails to recognize that the nature of the present crime is dissimilar to the nature of the crime committed in *Crespo*, making a *Crespo* analysis unavailing. In *Crespo*, the defendant stabbed one victim, allowing the State to portray the incident as a single event, whereas the act of entering a home and the act of arming oneself are perforce separate events. Accordingly, we hold that defendant was properly convicted of both offenses.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the judgment of the circuit court of Kendall County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 49 Affirmed.