2019 IL App (1st) 170503-U

No. 1-17-0503

Order filed May 30, 2019

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. 15 CR 13259
	)	
TYRONE ROBINSON,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for aggravated robbery and retail theft did not violate the one-act, one-crime rule where they were based on separate physical acts.

¶ 2 Following a bench trial, defendant Tyrone Robinson was convicted of aggravated robbery and retail theft, and sentenced to concurrent terms of 10 and 3 years' imprisonment, respectively. On appeal, he argues that his convictions violated the one-act, one-crime rule because they were

based on the same continuous taking of property. As such, he contends that his conviction for retail theft, the less serious offense, should be vacated. We affirm.

¶ 3 Defendant was charged by indictment with one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2014)), one count of aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2014)), and one count of retail theft (720 ILCS 5/16-25(a)(1) (West 2014)). The armed robbery count alleged that he took "miscellaneous items" from the person or presence of Anthony Nutall by threatening the imminent use of force and while armed with a dangerous weapon, a box cutter. The aggravated robbery count alleged that defendant took "miscellaneous merchandise" from Nutall by indicating that he was armed with a dangerous weapon, the boxcutter, and threatening the imminent use of force. The retail theft count alleged that defendant knowingly took possession of or carried away "miscellaneous merchandise" valued at less than $300 from a Target store with the intent to permanently deprive Target of the merchandise.

¶ 4 The case proceeded to a bench trial. In its opening statement, the State detailed defendant's "rather elaborate plan" to steal liquor from the Target. The State described how defendant:

> "went in earlier, he selected a cooler from the shelf; and took that cooler, filled it with liquor, and put it back on the shelf; and then he returned a couple of hours later to take the cooler full of liquor in a cart, which he wheeled past the front door of the Target without paying for the liquor."

¶ 5 The State then explained that Nutall, a manager, stopped defendant in the parking lot and asked to see a receipt because he noticed that the cooler was not in a bag. Defendant did not show a receipt for the cooler, but instead pulled out a box cutter and threatened Nutall. When

Nutall backed away, defendant "grabbed the cooler, and ran away and ditched the cooler at the side of the building."

¶ 6 In response, defense counsel argued that the evidence would show only that defendant exited the store with a cooler in his shopping cart and encountered Nutall, who walked away from their conversation in frustration.

¶ 7 Nutall testified that he was working as the store manager of a Target in Matteson, Illinois on July 8, 2015. He was dressed in khakis and a red shirt with his name badge displayed. At approximately 4:30 p.m., Nutall went to the parking lot to help a customer carry an item to her vehicle. As he walked back toward the store, he observed defendant exiting the front entrance, pushing a shopping cart with a cooler inside. Nutall approached defendant and asked to see his receipt for the cooler. Defendant responded by handing him a crumpled receipt that was several days old and not for the cooler. Nutall "lifted up" the cooler and felt that there were items inside. He suggested that they go inside the store to resolve the discrepancy with the receipt. Defendant became "hostile," put his hands on the cooler, and told Nutall that "he wasn't going to let it go back into the store." Nutall explained at trial that he and defendant "both had our hands on the cart," and that defendant also had a hand on the cooler. When Nutall threatened to call the police, defendant pulled out a closed, black and yellow box cutter. Nutall "backed off" and told defendant to "[g]et out of here." Defendant took the cooler and ran toward the side of the building.

¶ 8 Nutall returned to the store and called the police. He then went into his office and collected surveillance video of defendant. When Matteson police officer Chuck Evans and detective Shawn White arrived, he showed them a still image of defendant from the footage.

Then, another officer, later identified as Justin Ramel, arrived with the cooler defendant had taken. In the cooler, Nutall found eight bottles of liquor. He scanned the items and discovered that they were all Target merchandise. Nutall generated a receipt for the cooler and liquor, and determined that their pretax retail value was $245.21. Afterwards, he accompanied the officers to a nearby Pep Boys, where he identified defendant.

¶ 9 The State entered a DVD containing time-stamped surveillance footage from cameras inside and outside the store, which is in the record on appeal. The videos, which do not have audio, show defendant loading several bottles of liquor into the cooler around 2 p.m. before placing it back on the shelf. Shortly before 4:30 p.m., defendant loads the cooler into a shopping cart and leaves with it. Defendant is then stopped outside the front entrance by Nutall. The two men engage in a conversation, during which Nutall puts his hands on the cooler and shopping cart to prevent defendant from taking it away. After about six minutes, Nutall lets go of the cart and walks into the store. Defendant runs away with the cooler and falls down in the parking lot. He then leaves the cooler by the side of the store and walks away.

¶ 10 Evans testified that he met with Nutall and White at approximately 4:45 p.m. on July 8, 2015. They went into the Target security office, where they viewed the surveillance footage. Subsequently, Ramel arrived with a cooler and liquor bottles, which Nutall identified as Target merchandise. White left in search of defendant, and soon thereafter informed Evans that he had arrested defendant at Pep Boys. Evans drove Nutall to Pep Boys, where he identified defendant.

¶ 11 Ramel and White testified consistently with Evans. Ramel added that he found the cooler and liquor bottles on the side of the building. White added that he recovered a box cutter from defendant’s pocket when he detained him.

¶ 12 The State rested, and defense counsel moved for a directed finding on all three counts. The court examined the box cutter and, because it did not contain a blade, granted defendant's motion with respect to armed robbery. The court denied the motion as to the other counts, and the defense rested without presenting evidence.

¶ 13 At closing, defense counsel argued in part that the State failed to prove that defendant "took anything from Mr. Nutall *** in order for there to be a robbery" because Nutall "just picked up the cooler" rather than engaging in a "tug-of-war" over it with defendant. Defense counsel also argued that, because Nutall was outside the store when defendant exited, there was no testimony that defendant did not pay for the merchandise. The State declined to make a closing argument or rebuttal.

¶ 14 The court found defendant guilty of aggravated robbery and retail theft. Following a hearing, the court imposed concurrent sentences of 10 years for aggravated robbery and 3 years for retail theft, and assessed various fines, fees, and costs.

¶ 15 Defendant now appeals, arguing that his convictions violated the one-act, one-crime rule because both were based on the same taking of property. In response, the State argues that defendant committed two separate takings—one by removing the merchandise from the store and one by threatening Nutall in the parking lot.

¶ 16 As a preliminary matter, defendant acknowledges that he did not raise a one-act, one-crime challenge in the trial court, and has therefore forfeited the issue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("both a trial objection and a written post-trial motion raising the issue are necessary to preserve an issue for review."). However, as the State rightly concedes, we may review the issue for plain error because a one-act, one-crime violation implicates fundamental

fairness and the integrity of the judicial process. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Consequently, we will address defendant's claim on the merits.

¶ 17 The one-act, one-crime rule is violated where multiple offenses are "carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566 (1977). However, multiple convictions are permissible where a defendant committed multiple acts, even though such acts may be "incidental or closely related." *Id.* Whether the one-act, one-crime rule was violated is a question of law, which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 18 A one-act, one-crime analysis involves a two-step process. First, a reviewing court must determine whether the defendant's conduct constituted multiple acts or a single act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). If the court finds that the defendant committed multiple acts, it must then "determine whether any of the offenses are lesser-included offenses." *Id.* Multiple convictions are proper so long as the defendant's conduct involved multiple acts and each offense is not a lesser-included offense of any other. *Id.*

¶ 19 Here, defendant only contends that his conduct did not involve multiples acts. In this context, the term "act" means "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566. In keeping with this definition, courts have consistently found that discrete physical movements are separate acts, even where they are closely connected. See, *e.g.*, *People v. Dixon*, 91 Ill. 2d 346, 355-56 (1982) (finding that the defendant committed multiple acts where he struck the victim with a club multiple times in succession). Moreover, two convictions are not carved from the same conduct where one involves an additional physical act not required for the other. *People v. McLaurin*, 184 Ill. 2d 58, 105 (1998); see also *People v. King*, 2017 IL App (1st) 142297, ¶ 27 (finding that convictions for residential burglary and home

invasion comprised multiple acts because only the home invasion required the additional act of injuring the resident); *People v. Price*, 2011 IL App (4th) 100311, ¶ 30 (same).

¶ 20 Applying these principles to the present case, it is clear that defendant's convictions for aggravated robbery and retail theft did not arise from precisely the same physical conduct. As charged here, a person commits retail theft when, without paying, he carries away or takes possession of merchandise offered for sale in a retail establishment with the intent to permanently deprive the establishment of the merchandise. 720 ILCS 5/16-25(a)(1) (West 2014). In contrast, a person commits aggravated robbery when he takes property from the person or presence of another by threatening the imminent use of force and while indicating that he is armed with a dangerous weapon. 720 ILCS 5/18-1(b)(1) (West 2014).

¶ 21 Thus, defendant's convictions involved different elements that were satisfied by distinct sets of acts. Defendant committed his first series of acts when he placed the cooler and liquor bottles in a shopping cart and passed the final point of sale without paying. By then, he had taken the property with the requisite intent, and had thus completed the crime of retail theft. See *People v. Steele*, 156 Ill. App. 3d 508, 512 (1987) (retail theft is complete once a defendant carries unpurchased merchandise past the last point of sale); see also *People v. DePaolo*, 317 Ill. App. 3d 301, 307 (2000) (retail theft was complete where the defendant placed unpurchased merchandise outside the store, even though he was immediately apprehended before he could escape). Notably, Nutall was not present during the retail theft and it did not involve any threat of force toward him.

¶ 22 Defendant then committed additional physical acts, including the display of the box cutter, to effectuate an aggravated robbery. Nutall's testimony and the surveillance videos

established that Nutall stopped defendant outside the store and exerted control over the stolen merchandise by placing his hands on the cooler and grabbing the shopping cart. Defendant then regained control by showing Nutall a box cutter. This was an act of taking distinct from the retail theft. As defendant's threat of force was unique to the aggravated robbery, defendant's convictions were not carved from precisely the same conduct and did not violate the one-act, one-crime rule.

¶ 23 Defendant's reliance on *People v. Palmer,* 111 Ill. App. 3d 800 (1982), and *People v. Hunter*, 42 Ill. App. 3d 947 (1976), is misplaced. In both cases, the defendants were convicted of two counts of armed robbery after pulling a gun on two store employees and forcing them to open a single cash register. *Palmer*, 111 Ill. App. 3d at 801; *Hunter,* 42 Ill. App. 3d 948-49. Both defendants received two concurrent sentences for armed robbery. *Palmer*, 111 Ill. App. 3d at 807; *Hunter,* 42 Ill. App. 3d at 948. This court vacated one of the sentences in each case, finding that each defendant committed a single taking despite the presence of two victims. *Palmer*, 111 Ill. App. 3d at 808; *Hunter,* 42 Ill. App. 3d at 951.

¶ 24 This is inapposite to the present case, where defendant was convicted of two different offenses with two different sets of elements. More importantly, defendant's takings here were neither simultaneous nor based on the same conduct. Instead, defendant's convictions arose from entirely separate sets of actions. Thus, none of defendant's actions were double counted, and *Palmer* and *Hunter* are not controlling.

¶ 25 We are also unpersuaded by defendant's argument, citing *People v. Crespo*, 203 Ill. 2d 335 (2001), that the State failed to treat his conduct as multiple actions in the indictment or at trial. In *Crespo*, the defendant was charged with armed violence and aggravated battery after he

stabbed the victim three times. *Id.* at 338. However, the State did not differentiate between the individual stabs in the indictment, but instead charged the stabbing as a whole under multiple theories of culpability. *Id.* at 339. The defendant was found guilty of armed violence and aggravated battery. *Id.* On appeal, he argued that both convictions stemmed from the same physical act, *i.e.*, the stabbing. *Id.* Our supreme court found that, although each stab could have been charged as a distinct physical act, the State chose not to do so. *Id.* at 342. Thus, the court held that it would be "profoundly unfair" to allow the State to change its theory on appeal because the defendant had a constitutional right to be informed of the nature of the accusations against him before trial. *Id.* at 343, 345.

¶ 26 Here, however, the indictment clearly apportioned defendant's distinct acts to the different charges. The retail theft count alleged that defendant "took possession of, carried away, [or] transferred" "miscellaneous merchandise" from Target without paying and with the intent to permanently deprive Target of the merchandise. This language clearly indicated that the charge was based on removing property from Target without paying. There is no mention of Nutall, the box cutter, or any threat of force. In contrast, the aggravated robbery count alleged that he "took property" in the form of "miscellaneous merchandise" from Nutall by threatening him with a box cutter. Thus, the charging instrument sufficiently notified defendant that the two charges were based on different conduct that occurred with respect to different victims.

¶ 27 We also find little support for defendant's contention that the State's opening statement articulated a trial theory that defendant committed "one single continuous act." In our view, the State merely placed defendant's various actions into a coherent narrative that provided context to the evidence it would present. The fact that the State noted that defendant's actions were toward

the common end of stealing the liquor does not mean that it characterized them as a single act. Instead, as we have explained, the indictment was clear that the State conceived of his conduct as multiple acts that warranted multiple convictions. Thus, unlike in *Crespo*, it is not "profoundly unfair" for the State to continue its multiple acts argument on appeal. For the reasons stated above, we find that defendant's convictions do not violate the one-act, one-crime rule.

¶ 28 As a final matter, we note that defendant argued in his initial brief on appeal that several of the assessments imposed against him, though designated as "fees," were actually fines that should be offset by his presentence incarceration credit. In making this argument, defendant acknowledged that he did not properly preserve the issue, but contended that we could review his fines and fees pursuant to the plain-error doctrine or Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967). In response, the State noted the forfeiture and argued that new Illinois Supreme Court Rule 472, which was adopted after defendant filed his initial brief, precluded him from raising the alleged errors for the first time on appeal. See Ill. S. Ct. R. 472(a)(2), (c) (eff. May 17, 2019) (providing that "[n]o appeal may be taken" based on the application of presentence credit against fines "unless such alleged error has first been raised in the circuit court"). In light of the rule, defendant has withdrawn his challenge. Accordingly, we will not address the issue.

¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.