2019 IL App (1st) 171892-U
No. 1-17-1892
Order filed July 9, 2019

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 CR 5977
	)	
JOSE MENA,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Lavin and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Under the one-act, one-crime rule, defendant's sentence for aggravated battery is vacated because it was based on the same physical act as his conviction for attempted murder. The mittimus is corrected accordingly.

¶ 2 Following a bench trial, defendant Jose Mena was convicted of attempted first degree murder and aggravated battery, and sentenced to concurrent, respective terms of 31 and 8 years' imprisonment. On appeal, Mena contends that his conviction for aggravated battery must be vacated under the one-act, one-crime doctrine as based on the same physical act as his conviction for attempted murder. The State agrees that his conviction for aggravated battery is based on the

same physical act as his conviction for attempted murder. We agree as well, and vacate Mena's sentence for aggravated battery and otherwise affirm his conviction for attempted murder.

¶ 3 Background

¶ 4 Mena was charged with a total of six counts of attempt murder (counts 5 and 6 were *nol-prossed* before trial) and one count of aggravated battery with a firearm for shooting the victim, Jose Soria. As relevant, count 4 of the information charged Mena with attempted murder, alleging that he, with intent to kill, shot Soria "while armed with a firearm, which constituted a substantial step towards the commission of first degree murder, and during the commission of the offense he personally discharged a firearm that proximately caused great bodily harm" to Soria. Count 7 charged Mena with aggravated battery, alleging that he, "in committing a battery, knowingly discharged a firearm *** and caused any injury to another person" by shooting Soria "about the body." Mena does not challenge the sufficiency of the evidence to sustain his convictions so we recount the facts only to the extent necessary to resolve the appeal.

¶ 5 At trial, Soria testified that on March 31, 2015, about 7 p.m., he was walking with his friends John and Kenny Jimenez near 39th Place and Kedzie Avenue. Mena approached Soria on a bicycle and flashed gang signs. Soria knew Mena by his last name. Mena got off his bicycle and said "[t]wo six" before punching Soria in the eye. The two men starting fighting. At some point, Mena told Soria to get off him. Soria complied. Mena told Soria that he was going to get his gun to shoot him. A car drove up and Mena told the people in the car that Soria was a "Flake," a term for a "King." After the encounter, Soria and his friends continued walking.

¶ 6 As they did so, the same car that had pulled up earlier drove out of an alley. Two men from the car approached Soria and "check[ed]" him to see whether he was a gang member or had

tattoos. Mena then walked out of the alley and stopped about six feet in front of Soria. Mena retrieved a gun that looked like a revolver and pointed it at Soria's chest. Soria placed his hand up as Mena shot him. The bullet went through Soria's arm and into his right lung. He heard "like five" gunshots. Soria ran toward Kedzie; Mena ran to 38th near an alley. When the police arrived, Soria identified Mena. Later that evening while in the hospital, Soria selected Mena as the shooter from a photographic array.

¶ 7 John and Kenny Jimenez corroborated Soria's version of events. The day after the shooting, each brother identified Mena as the shooter in physical lineups at the police station.

¶ 8 The court found Mena "guilty on all of the counts" and specifically found the totality of the evidence was sufficient to prove attempted murder.

¶ 9 At the sentencing hearing, the parties clarified Mena was found guilty of counts 1 (attempt murder), 2 (attempt murder), 3 (attempt murder), 4 (attempt murder), and 7 (aggravated battery). Both defense counsel and the State agreed that all of the counts should merge into count 4, the most serious offense. The court imposed a sentence of 31 years' imprisonment for attempted murder on count 4, which included a 25-year firearm enhancement. The court then stated, "On the aggravated battery, which is Count 7, that's a Class X felony, it's going to merge with the attempt murder, but I'm going to sentence you to eight years on that." The court later ordered the sentences to be served concurrently.

¶ 10 Analysis

¶ 11 On appeal, Mena contends, and the State agrees, that his conviction for aggravated battery violates the one-act, one-crime rule because it is based on the same physical act as his conviction for attempted murder.

¶ 12 The parties agree that Mena failed to preserve this issue by objecting before the trial court and raising it in a posttrial motion, but Mena correctly argues that one-act, one-crime violations may be reviewed under the second prong of the plain error doctrine because they implicate the integrity of the judicial process. *People v. Coats*, 2018 IL 121926, ¶ 10; *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 13 Under the one-act, one-crime rule, a defendant cannot be convicted of multiple offenses arising out of the same physical act. *People v. Almond*, 2015 IL 113817, ¶ 47 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). This court performs a two-step analysis to determine whether simultaneous convictions violate the one-act, one-crime rule. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we determine whether the offenses stem from multiple acts or a single act. *Id.* Convictions based on the same physical act are improper. *Id.* An "act" is defined as any overt or outward manifestation that will support a different offense. *King*, 66 Ill. 2d at 566. If we determine that the offenses stem from separate acts, then we proceed to the second step of the analysis and determine whether any of the offenses are lesser-included offenses. *Miller*, 238 Ill. 2d at 165. "If an offense is a lesser-included offense, multiple convictions are improper." *Id.* Whether a conviction should be vacated under the one-act, one-crime principle presents a question of law reviewed *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 14 The record supports the parties' contentions that Mena's convictions arise out of his single physical act of shooting Soria, which resulted in Soria's injuries to his arm and chest. Both counts 4 and 7 charged Mena generally with shooting Soria and causing his injury. Although the testimonial evidence showed Mena fired the gun multiple times, Soria was shot once and the charging instrument did not apportion the individual shots. For multiple convictions to stand, the

charging document must indicate that the State intended to treat Mena's conduct as multiple acts. See *People v. Crespo*, 203 Ill. 2d 335, 342-45 (2001) (noting that each of several stab wounds by defendant could have supported multiple convictions, but indictment showed State did not apportion crimes among stab wounds and therefore demonstrated State did intended to treat defendant's conduct as single attack). Because the convictions arose out of one act and the charging document shows the State did not intend to apportion Mena's conduct, his convictions for both attempted murder and aggravated battery violate the one-act, one-crime rule. Mena's conviction for aggravated battery must be vacated. See *People v. Cardona*, 158 Ill. 2d 403, 411 (1994) ("when multiple convictions are obtained for offenses arising out of a single act, sentence is imposed on the most serious offense").

¶ 15 While we affirm Mena's conviction for attempted murder, we vacate the sentence for aggravated battery, and, as indicated in the trial court's oral pronouncements, the court's guilty finding on that count will merge with the conviction for attempted murder. We also order the mittimus corrected to reflect a single conviction and sentence for attempted murder.

¶ 16 Affirmed in part; vacated in part; mittimus corrected.