No. 123901 & 123902 (cons.)

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JERRY BROWN & STEVIE SMITH Defendants-Appellees	)	Appeal from the Appellate Court of Illinois, Nos. 1-15-1311 and 1-15-1312. There on appeal from the Circuit Court of Cook County, Illinois, Nos. 10 CR 412401 and 10 CR 412401. Honorable Michele McDowell Pitman, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANTS-APPELLEES

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ISSUE PRESENTED FOR REVIEW

Whether the First District Appellate Court correctly ruled that a conviction and sentence for the offense of aggravated battery of a senior citizen must be vacated where there was but a single act committed by defendant and proved at trial.

STATEMENT OF FACTS

Jerry Brown and Stevie Smith were convicted, after a simultaneous bench trial, of robbery and aggravated battery of a senior citizen. Brown was sentenced to 15 years in prison for robbery and seven years in prison for aggravated battery of a senior citizen, with the sentences to be served consecutively. Smith was sentenced to a 12-year term of imprisonment for robbery with a consecutive six-year term of imprisonment for aggravated battery of a senior citizen. (R. PPP12-13)[1]

At trial, the State's theory was that William Burtner was on his way to the bank to make a deposit on behalf of the VFW when Smith approached him and punched him a single time and was then seen leaving with Burtner's bank bags. The actual occurrence was not witnessed by anyone other than Burtner. According to Tamara Esposito, a bank teller, Burtner told her that he had been punched in the side. (R. ZZ109) According to Cory Katsibubas, a paramedic who responded to the scene, Burtner said that he was hit from behind. (R. HHH29) There was bank surveillance video operating that did not capture the physical interplay between Smith and Burtner.

In closing, the State argued that "these defendants decided that Stevie Smith was going to . . . surprise him and take a shot to his ribs and drop him to the ground."

[1] Throughout this brief, the record will be cited according to the pages in Brown's record.

(R. MMM9) The State further argued: "They were just trying to take his bags and run. They gave him one shot, one shot, one punch to drop him to the ground." (R. MMM38-39)

On appeal, Brown and Smith argued the aggravated battery of a senior citizen conviction should be vacated under the one act, one crime rule, because it was based on the same act as the robbery. The State argued that the taking of the money from Burtner constituted a separate physical act from the battery, thereby supporting a separate conviction. *People v. Brown*, 2018 IL App (1st) 151311-B, ¶ 23; *People v. Smith*, 2018 IL App (1st) 151312-B, ¶ 23. The appellate court, after considering this Court's opinion in *People v. Coats*, 2018 IL 121926, rejected the State's claim, specifically finding that "the defendant committed only one physical act–Smith's single punch to Burtner's left side. No evidence indicates a second separate act or how the taking of the deposit bags occurred. . . . Simply stated, no evidence of a separate physical act exists to support a second conviction." *Brown*, 2018 IL App (1st) 151311-B, ¶ 28; *Smith*, 2018 IL App (1st) 151312-B, ¶ 28.

Accordingly, the appellate court vacated the defendants' convictions for aggravated battery of a senior citizen. *Brown*, 2018 IL App (1st) 151311-B, ¶ 30; *Smith*, 2018 IL App (1st) 151312-B, ¶ 29. The appellate court did not consider Brown's alternative argument that his aggravated battery of a senior citizen conviction should be reduced to aggravated battery on a public way because the State did not prove great bodily harm to Burtner. *Brown*, 2018 IL App (1st) 151311-B, ¶ 29.

ARGUMENT

The First District Correctly Ruled That the Defendants' Convictions for Aggravated Battery of a Senior Citizen Violated the One-Act, One-Crime Doctrine in the Absence of a Second Physical Act.

The State contends that "punching Burtner in the ribs and taking his money constituted two separate and distinct acts." (State's Brief at 8) The State does not set forth what the alleged "distinct act" was that was proved at trial with respect to the "taking." Rather, both the evidence and the State's arguments at trial consistently established that a single punch by Stevie Smith caused William Burtner to drop the bags of money. What the State is essentially arguing is that the taking and force elements of the offense of robbery are sufficient in the abstract to create a second physical act for one-act, one-crime analysis. Accepting the State's argument would upend decades of precedent and effectively write this important doctrine out of existence. This State's argument is also misguided as it wrongly assumes that the offense of robbery requires a defendant to carry away the victim's property. For these reasons, this Court should affirm the well-reasoned decisions of the appellate court.

The State initially contends that Smith and Brown have forfeited their one-act, one-crime argument by failing to raise it in the trial court. (State's Brief p. 8) However, this Court has held that violations of the one-act, one-crime doctrine are subject to review under the second prong of the plain-error rule. *People v. Coats*, 2018 IL 121926, ¶ 10; *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009). Under that rule, courts "may disregard forfeiture where a clear or obvious error occurs and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process." *Artis*, 232 Ill. 2d at 165. The rule is invoked

even in the absence of objection because "application of the rule is necessary to preserve the integrity and reputation of the judicial process." *Id.* at 166.

To apply the one-act, one-crime analysis, the reviewing court must initially determine whether the defendant's conduct consists of one act or several acts. *Coats*, 2018 IL 121926, ¶ 14; *Artis*, 232 Ill. 2d at 165. "Multiple convictions are improper if they are based on precisely the same physical act." *Artis*, 232 Ill. 2d at 165. If a single act is found to have supported multiple offenses, sentence should only be imposed on the most serious offense and the less serious offense should be vacated. *Id.* at 170.

A. The trial evidence and the State's arguments established that the robbery and aggravated battery of a senior citizen convictions were based on the same act.

As the appellate court found, the evidence in this case showed that Smith committed only a single physical act: a single punch to William Burtner's left side. *People v. Brown*, 2018 IL App (1st) 151311-B, ¶ 28; *People v. Smith*, 2018 IL App (1st) 151312-B, ¶ 28. Two State witnesses testified that Burtner told them that he had been struck a single time. (R. ZZ109; HHH29) There were no eyewitnesses to the incident other than Burtner, and no other witnesses contradicted the testimony that Burtner had been struck a single time.

In closing arguments, the State consistently argued that Smith punched or "took a shot" at Burtner, which "dropped" him to the ground. The prosecutor argued, "[T]hese defendants decided that Stevie Smith was going to . . . surprise him and take a shot to his ribs and drop him to the ground." (R. MMM9) The prosecutor also stated, "They were just trying to rob him. They were just trying to take his bags and run. They gave him one shot, one shot, one punch to drop

him to the ground." (R. MMM38-39) The State expressly relied on Burtner's statements to Esposito and Katsibubas in proving that Burtner "knew" that he "was punched in the side." (R. MMM74); (*see also* R. MMM14, 16, 41, 73, 78) The trial evidence and prosecutorial arguments therefore indicated Smith committed a single physical act of punching or striking Burtner one time during the incident.

The State argues there was a second physical act because Smith took "some additional step to take the bags into his hands and carry them to the getaway car." (State's Brief p. 10) The State argues that even if Burtner dropped the bags after being punched "Smith still needed to pick them up from the ground. That separate act was enough for one-act, one-crime purposes." (State's Brief p. 10-11) This argument is meritless.

First, the State's argument is defeated by the contrary position it took in the trial court. The State's theory below was that Smith inflicted a single punch to cause Burtner to part with the money bags. The State argued, "They were just trying to rob him. They were just trying to take his bags and run. They gave him one shot, one shot, one punch to drop him to the ground." (R. MMM38-39) The State did not seek to separate the aggravated battery and the robbery into two distinct acts. The State cannot now argue for the first time on appeal that the single punch can support multiple convictions. *See People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001) (holding that the defendant's multiple stabbings were considered a single attack for one act, one crime purposes, because the State's charging instrument and theory at trial did not treat each stab wound inflicted by the defendant as a separate act).

Furthermore, in parceling out a separate act of taking, the State wholly

misconstrues the elements of the offense of robbery. According to its statutory definition, robbery is committed when a person "knowingly takes property . . . from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (2009). From this definition, the State baldly asserts that the taking element of robbery is, *ipso facto*, a separate physical act from the act of force. But long established precedent from this Court provides that a robbery is complete when the force or the threat of the use of force has caused the victim to part with the possession of his property against his will. *People v. Gaines*, 88 Ill. 2d 342, 367 (1981); *People v. Smith*, 78 Ill. 2d 298, 303 (1980). In other words, contrary to the State's assumption, the taking element does not require that the defendant actually obtain possession of the property.

In *Gaines*, for instance, the defendant announced a "stick-up," and the victim removed two dollar bills from his pocket and dropped them to the floor. *Gaines*, 88 Ill. 2d at 367. One bill was later found on the floor, and the defendant was not found in possession of the other bill. *Id.* On appeal, the defendant suggested the other bill might also have been lying on the floor and argued that he could not have been guilty of armed robbery because he did not take physical possession of the bills. *Id.* This Court rejected the defendant's argument, finding that the offense was complete when the victim parted with his property. *Id.* As this Court concluded, "To constitute the offense of robbery it is not necessary that the defendant have picked up and carried off any of the bills." *Id.*

Likewise, in *Smith*, the defendant telephoned a retail store and threatened to detonate bombs placed inside the store unless $10,000 was delivered to a predetermined location. *Smith*, 78 Ill. 2d at 301. The money was delivered and

the defendant later picked up the money. *Id.* at 301-02. The defendant argued that he was only guilty of theft under the facts because the evidence did not show a taking from the person or presence of a victim. *Id.* at 302. This Court rejected that contention and likened the case to *Brinkley v. United States*, 560 F.2d 871 (8th Cir. 1977), where a bank manager, pursuant to instructions from a threatening caller, threw $75,000 over a specific viaduct intended for the threatening caller. *Id.* at 303. The *Brinkley* defendant was guilty of the bank robbery even though he never gained possession of the money. *Id.* (citing *Brinkley*, 560 F.2d at 873). This Court found *Brinkley* analogous to the factual pattern in the *Smith* defendant's case and reiterated the principle that "[t]he offense of robbery is complete when force or threat of force causes the victim to part with possession or custody of property against his will." *Smith*, 78 Ill. 2d at 303.

Gaines and *Smith* demonstrate that in this case, the robbery was complete when the single blow to Burtner caused him to part with the bank deposit bags. Smith's taking actual possession of the bags of money was not necessary to prove the taking element of the robbery. When Burtner was dispossessed of the bags, the robbery was completed, and Smith's escape from the scene with the bags did not establish an element of robbery. *See People v. Dennis*, 181 Ill. 2d 87, 103 (1998) ("[I]t is the force, not escape, which is the essence and constitutes an element of the offense" of robbery.). The State's attempt to re-define the offense of robbery to categorically include the carrying away of the victim's property should be rejected. Because the robbery and the aggravated battery convictions in this case were based on the same physical act of Smith punching Burtner, both convictions cannot stand.

B. The State's argument would override long established precedent and transform the one act, one crime rule into an elements-based analysis.

The State's argument is that whenever the offender takes actual physical possession of the object of the robbery, a second act is thereby established. Under this analysis, robbery is not and can never be subject to one-act, one-crime analysis. That is because every robbery requires an act of force or threat of force, meaning that one physical act must exist in that regard. And every robbery requires a taking from the person or presence of another, meaning that a second physical act is supplied under that element of the offense. No observations would need to be made or evidence admitted concerning any specific conduct of a defendant.

In other words, the State would substitute the one act, one crime rule's focus on physical acts with a test that considers the bare elements of an offense. Accepting the State's approach to the one act, one crime rule would wipe away decades of precedent looking to the particular facts of the defendant's conduct to determine whether separate acts were in fact proven. *See People v. King*, 66 Ill. 2d 551 (1977). The one act, one crime doctrine would be largely indistinguishable from the analysis for determining lesser included offenses, which compares, in the abstract, the elements of separately charged offenses. *People v. Miller*, 238 Ill. 2d 161, 174-75 (2010). Where this Court has consistently rejected the State's attempts to invalidate or reduce the scope of the one act, one crime rule in Illinois, this Court should likewise reject the State's attempt in this case to dramatically weaken the rule. *See People v. Artis*, 232 Ill. 2d 156, 168 (2009) (declining State's request to abandon the one act, one crime rule, noting the prejudice resulting from multiple convictions based on the same conduct); *In re Samantha V.*, 234 Ill. 2d

359, 373-75 (2009) (rejecting State's contention that the one act, one crime rule should not apply to juvenile proceedings).

At a minimum, accepting the State's position would require this Court to overrule a number of cases in which courts found the single act of force justified only a single conviction. For instance, in *People v. Harvey*, 366 Ill. App. 3d 119, 121-22 (1st Dist. 2006), the appellate court vacated an aggravated battery conviction and sentence based upon the one-act, one-crime doctrine, where the single act of firing at and wounding a fleeing victim after having previously relieved the victim of his money was the basis for the trial court to impose consecutive sentences for armed robbery and aggravated battery. The fact that the defendant was taking possession of the victim's money when the victim took off in a vehicle did not supply an additional "act" that would bar the application of the one-act, one-crime rule.

Likewise, in *People v. Daniel*, 2014 IL App (1st) 121171, ¶¶ 54-55, the appellate court held separate convictions for armed robbery and unlawful restraint were improperly imposed, where the defendant ordered the complainant to lie on the ground, threatened him, and beat him with a gun. Even though that case involved the taking possession of property, the court concluded that the act of force present in the robbery was the same act of force that restrained the victim, and therefore the unlawful restraint conviction was vacated. *Daniel*, 2014 IL App (1st) 121171, ¶ 55.

Harvey and *Daniel*, like the present case, involved a single act by the defendant in which force was use or threatened. The State's position would vitiate the holdings in those cases by automatically allowing for separate convictions based on the differing elements of the crimes.

The State's argument would also nullify the reasoning of other cases in which a defendant's clearly distinct, separate acts of force led to multiple convictions under the one act, one crime rule. *See, e.g., People v. Pearson*, 331 Ill. App. 3d 312, 321-22 (1st Dist. 2002) (taking complainant's purse, *then* pushing her to the ground, constituted separate acts); *People v. Williams*, 143 Ill. App. 3d 658, 665-66 (1st Dist. 1986) (no one act, one crime violation where the defendant threatened a woman with a gun, ordered her in a car, and drove her around for 20 to 30 minutes before taking money from her purse, as the act of unlawful restraint "was not necessary to effectuate the armed robbery [and] exceeded the force requirement of armed robbery").

In short, some robberies, like the one in this case, can be completed in a single act that causes the victim to part with property. Other robberies may require multiple acts to effectuate the dispossession of property. *See, e.g., People v. Merchant*, 361 Ill. App. 3d 69, 74-75 (1st Dist. 2005) (robbery conviction affirmed where defendant snatched money from the victim, then engaged in a struggle with the victim over the money and pushed the victim into a window). The State's argument makes no distinction between the different scenarios and would automatically allow the offense of robbery to be carved into multiple convictions. Indeed, the State's proposed approach would extend beyond the crime of robbery and would permit any number of offenses, particularly those containing a force element, to be broken into separate crimes based merely on their elements in the abstract. This analysis would decimate the one act, one crime rule and undermine its goal of preventing multiple convictions based on the same physical act. This Court should therefore reject the State's arguments.

C. *People v. Coats* does not support the State's argument that two separate acts occurred in this case.

The State's argument relies almost exclusively on this Court's decision in *People v. Coats*, 2018 IL 121926. However, as the appellate court correctly found, *Coats* has no bearing on this case. *Brown*, 2018 IL App (1st) 151311-B, ¶¶ 26-28; *Smith*, 2018 IL App (1st) 151312-B, ¶¶ 26-28. Curiously, the State fails to make any argument applying the facts of *Coats* to the case at bar. The State cites to language in *Coats* that simply reiterates existing law and does not suggest how the landscape of one act, one crime analysis was altered as applied to the case at bar.

In *Coats*, the defendant was found in possession of a number of items of contraband, including a loaded handgun, a bag of cocaine, and a bag of heroin. *Coats*, 2018 IL 121926, ¶ 4. The defendant was convicted of, *inter alia*, armed violence (stemming from the possession of drugs while armed with a gun) and armed habitual criminal (stemming from the possession of the gun). *Id.* ¶¶ 5, 17. This Court granted leave to appeal to resolve a conflict between two appellate districts concerning whether the convictions for both armed violence and armed habitual criminal could survive scrutiny under one-act, one-crime analysis where a common fact was possession of a gun. *Id.* ¶ 7.

This Court rejected the defendant's attempt to carve out a novel rule of law in which the one act, one crime rule looked to the "crux" or "essence" of the charges, which in the case of armed violence and armed habitual criminal, was the possession of a handgun. *Id.* ¶ 18. The defense argued that this Court's decision in *People v. King*, 66 Ill. 2d 551 (1977), implicitly required a determination of whether the offenses shared a "crucial" act. *Id.* This Court found that neither *King*

nor any case decided in the subsequent four decades applied the one act, one crime rule in such a manner, and therefore, this Court soundly rejected the defendant's "crux" approach to the one act, one crime rule. *Id.*

As the appellate court found below, the result in this case does not depend on any explicit or even implied "crux" or "essence" analysis. *Brown*, 2018 IL App (1st) 151311-B, ¶ 28; *Smith*, 2018 IL App (1st) 151312-B, ¶ 28. The one act, one crime ruling is based on the fact of a single physical act committed in this case: "Smith's single punch to Burtner's left side." *Id.*

Furthermore, the facts of *Coats* are not remotely applicable to the facts of this case. In *Coats*, there was a shared act of possessing a handgun, but there was also a wholly separate and distinct act of possessing drugs. *Coats*, 2018 IL 121926, ¶ 17. It is settled law that the possession of two different items constitutes separate acts under the one act, one crime rule. *See People v. Almond*, 2015 IL 113817, ¶ 48 (possession of loaded gun qualified as "two separate acts —possession of a firearm and possession of firearm ammunition"); *People v. Hunter*, 2013 IL 114100, ¶ 25 (noting that "the simultaneous possession of different types of contraband may give rise to multiple separate offenses"). Accordingly, *Coats* is easily distinguishable from this case, and the State's reliance on *Coats* is meritless.

D. Conclusion

In summary, the State's attempt to sustain multiple convictions based on separate acts in this case has no basis in fact or law. The robbery and aggravated battery of a senior citizen convictions were based on the same physical act of punching Burtner–a single act that was sufficient to cause Burtner to part with his deposit bags. Adopting the State's theory of a second act based solely on the

taking element would upend decades of precedent applying the one act, one crime rule based on the particular evidence and arguments in a given case. Furthermore, this Court's decision in *Coats* is wholly distinguishable and does nothing to support the State's claims on appeal. For all of these reasons, the judgments of the appellate court should be affirmed.

If, however, this Court reverses the judgment, Brown respectfully requests that this Court remand his case to the appellate court for consideration of Brown's alternative argument that his conviction should be reduced to aggravated battery on a public way. *See Brown*, 2018 IL App (1st) 151311-B, ¶ 29.

CONCLUSION

For the foregoing reasons, Jerry Brown and Stevie Smith, Defendants-Appellees, respectfully request that this Court affirm the decisions of the First District Appellate Court vacating their convictions for aggravated battery of a senior citizen. If this Court reverses the judgment, Brown respectfully requests that this Court remand his case to the appellate court for consideration of Brown's alternative argument that his conviction should be reduced to aggravated battery on a public way.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Christopher Kopacz and Christopher Cronson, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14 pages.

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No. 123901 & 123902 (cons.)

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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JERRY BROWN & STEVIE SMITH Defendants-Appellees	)	Appeal from the Appellate Court of Illinois, Nos. 1-15-1311 and 1-15-1312. There on appeal from the Circuit Court of Cook County, Illinois, Nos. 10 CR 412401 and 10 CR 412401. Honorable Michele McDowell Pitman, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 12, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendants-appellees in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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