THIRD DIVISION
January 26, 2011

No. 1-08-0326

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEPHEN L. SPENCER, Defendant-Appellant.	)))))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 05 CR 27066 HONORABLE MICHAEL P. TOOMIN, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

ORDER

HELD: On reconsideration, this court affirms Spencer's conviction for attempted first degree murder, ruling it does not violate the one-act, one-crime rule. The court also declines to vacate Spencer's conviction for aggravated battery, as the term deadly weapon is not unconstitutionally vague, the evidence was sufficient to convict, and the inclusion of a dangerous weapon instruction was not plain error. However, the court corrects the mittimus to reflect 750 days of presentencing credit for time served.

Following a jury trial in the circuit court of Cook County, defendant Stephen L. Spencer (Spencer) was found guilty of attempted first degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West

2004)), home invasion (720 ILCS 5/12-11(a)(2) (West 2004)), and aggravated battery with a deadly weapon other than a firearm (720 ILCS 5/12-4(b)(1) (West 2004)). The trial court sentenced Spencer to consecutive terms of 25 years, 20 years, and 5 years, respectively, in prison.

On appeal, this court issued an order affirming the judgment of the circuit court and correcting the mittimus. *People v. Spencer*, No. 1-08-0326 (July 14, 2010) (unpublished order under Supreme Court Rule 23). Subsequently, in the exercise of its supervisory authority, our supreme court issued an order directing this court to vacate the judgment and reconsider the case in light of the recently decided *People v. Miller*, 238 Ill. 2d 161, ___ N.E.2d ___ (2010). *People v. Spencer*, No. 111092 (November 24, 2010). Accordingly, we now vacate our judgment in this case and reconsider Spencer's appeal. However, for the following reasons, we again affirm Spencer's conviction and modify the mittimus.

BACKGROUND

The record on appeal discloses the following facts. Nicola Graham (Nicola) testified that in June 2005, she ended a two-year relationship with Spencer. On October 21, 2005, she began moving into a new house at 10525 South Vernon Avenue in Chicago. On October 22, 2005, at approximately 1:30 a.m., Nicola heard a "big bang" and the breaking of her bedroom window. Nicola saw Spencer at the window and ran into another room to telephone the police. After the police arrived, Nicola went outside with them and saw a bar stool that was kept in her garage beneath the broken window.

Nicola's best friend, Nicole Nolen-Patrick, testified that Nicola telephoned her about the incident. Nolen-Patrick stated that she later spoke to Spencer by telephone. According to Nolen-Patrick, Spencer said, "She's lucky I didn't kill her ass."

Nicola testified that on October 31, 2005, she was home with her 10-year-old daughter, Lanique, her 6-year-old son, Joshua, and 7-year-old niece, Sakyyah. Before going to bed, Nicola checked to ensure the windows were closed. According to Nicola, her kitchen window had just been repainted and thus had no latches, but was closed when she retired at midnight.

Nicola then testified that at approximately 3 a.m., she was awakened by someone breaking an object over her face, which turned out to be one of her ceramic plates. The assailant was wearing a mask, a hat, a leather jacket, black pants, latex gloves, and shoe covers normally worn by surgeons. Nicola struggled with her assailant and eventually removed his mask to discover it was Spencer.

Nicola further testified that after the plate was completely broken, Spencer stabbed her in the chest, arms and face with a knife. Nicola broke free, but Spencer slammed her to the floor and stabbed her in the back.

Nicola testified that she screamed for help. Lanique appeared and begged Spencer to stop. Lanique then ran to the door. Spencer chased Lanique down, while Nicola tried to use her cellphone to call 911. However, Nicola hid the cellphone when she heard Spencer returning and was unable to contact 911.

Lanique testified that Spencer pushed the front door shut and slapped her twice in the back with a folding chair, before placing her in a chokehold around her neck.

Nicola testified that when Spencer returned, he was carrying Lanique in a headlock. Spencer then also grabbed Nicola, who again asked him to stop. According to Nicola, Spencer replied, "No, I'm going to kill you. I'm going to jail for life for this one."

Nicola then testified that she played dead. She heard Spencer tell Lanique to get a towel to wrap around Nicola's arm. Lanique testified that Spencer then walked out the front door. Lanique locked the door behind Spencer, then went to wrap towels around her mother because "blood was flowing everywhere." Nicola had Lanique dial 911. Nicola tried to speak to the 911 operator, but could not be understood because her lip was cut off in two places. Nicola passed the phone to Lanique. The police, an ambulance and neighbors later arrived at the house. Nicola testified she was taken to Christ Hospital for treatment.

Dr. Steven Salzman, a trauma surgeon at Advocate Christ Medical Center, testified that when Nicola arrived at the hospital, a wound in her lip area and an artery in her right hand were actively bleeding. Dr. Salzman added that Nicola had stab wounds on her right hand, her upper right arm, left shoulder, her upper left back, her lip and forehead. Dr. Salzman stated that Nicola was put on a breathing tube because she had lost so much blood, and required liters of blood and fluid to be administered to her. Dr. Salzman further testified that Nicola required plastic surgery to her lip and right thumb. Dr. Salzman opined that Nicola's wounds could have been fatal if she had not received timely medical care.

Lanique testified that she went to the hospital by police car and received treatment from a physician. Lanique stated that she was limping and her back was sore and swollen.

The State also introduced police testimony regarding their investigation of the offense.

After the State rested its case, the trial court denied a defense motion for a directed finding. The defense presented two witnesses who testified to Spencer's reputation for peacefulness. The defense then rested.

Following closing arguments and jury instructions, the jury deliberated and found Spencer guilty of attempted first degree murder, home invasion, and aggravated battery with a firearm. Spencer filed a posttrial motion for a new trial. The trial court denied the posttrial motion. After hearing evidence in aggravation and mitigation, the court sentenced Spencer to consecutive terms of 25 years, 20 years, and 5 years, respectively, in prison. The trial court gave Spencer credit for 650 days served. Spencer filed a motion to reduce his sentence, which was also denied by the trial court. Spencer filed a timely notice of appeal to this court.

DISCUSSION

I

On appeal, Spencer first argues that he cannot stand convicted of both home invasion and attempted first degree murder because doing so violates the one-act, one-crime rule set forth in *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844-45 (1977). The one-act, one-crime doctrine prohibits multiple convictions when: (1) the convictions are carved from precisely the same physical act; or (2) one of the offenses is a lesser-included offense of the other. *People v. Lindsey*, 324 Ill. App. 3d 193, 200, 753 N.E.2d 1270, 1277 (2001). Thus, the first step is to determine whether the defendant's conduct consisted of a single physical act or separate acts. *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004). "Multiple convictions are improper if they are based on precisely the same physical act." *People v. Rodriguez*, 169 Ill. 2d

183, 186, 661 N.E.2d 305, 306 (1996). Our supreme court has defined an "act" as " 'any overt or outward manifestation which will support a different offense.' " *Rodriguez*, 169 Ill. 2d at 188, 661 N.E.2d at 307, quoting *King*, 66 Ill. 2d at 566, 363 N.E.2d at 845. If the court determines that the defendant's convictions are based on multiple acts, the court will determine whether any of the offenses are lesser-included offenses. If so, multiple convictions are improper. Conversely, if none of the offenses are lesser-included offenses, then multiple convictions may stand. *Harvey*, 211 Ill. 2d at 389-90, 813 N.E.2d at 194-95. We consider this issue *de novo*. *People v. Peacock*, 359 Ill. App. 3d 326, 331, 833 N.E.2d 396, 400 (2005).

In this case, Spencer concedes that there is no argument that a single act was involved, as home invasion requires the unauthorized entry of a dwelling place, but attempted first degree murder does not. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1163-64, 859 N.E.2d 290, 305-06 (2006). Hence, we focus on whether attempted first degree murder is a lesser-included offense of home invasion.

There are three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the "abstract elements" approach; (2) the "charging instrument" approach; and (3) the "factual" or "evidence" adduced at trial approach. *Miller*, 238 Ill. 2d at 166-67, ___ N.E.2d at ___. Our prior order in this case, relying on *People v. Kolton*, 219 Ill. 2d 353, 360-61, 848 N.E.2d 950, 954-55 (2006), and *People v. Novak*, 163 Ill. 2d 93, 105-13, 643 N.E.2d 762, 769-72 (1994), applied the charging instrument approach. However, in *Miller*, the Illinois Supreme Court adopted the abstract elements approach. *Miller*, 238 Ill. 2d at 175, ___ N.E.2d at ___. Accordingly, we compare the statutory elements of the two offenses.

If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. This is the strictest approach in the sense that it is "formulaic and rigid." *Miller*, 238 Ill. 2d at 166, ___ N.E.2d at ___. As the *Miller* court explained, "it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Id*.

Here, Spencer claims that attempted first degree murder is a lesser-included offense of home invasion. A person commits the offense of attempted first degree murder when he or she, with the specific intent to kill, commits any act that constitutes a substantial step toward the commission of murder. 720 ILCS 5/8-4, 9-1(a)(1) (West 2004). A person commits the offense of home invasion (as charged in this case) when he or she knowingly, being a person who is not a peace officer acting in the line of duty, without authority entered the dwelling place of another, when he or she knew or had reason to know that one or more persons were present therein and intentionally caused injury, other than by discharge of a firearm. 720 ILCS 5/12-11(a)(2) (West 2004). Attempted first degree murder thus contains an element (the specific intent to kill) not included in the offense of home invasion. It is not impossible to commit home invasion without necessarily committing attempted first degree murder. Accordingly, following *Miller*, Spencer's argument fails.

II

Spencer next argues that his aggravated battery conviction must be vacated because that statute's lack of a definition for a deadly weapon renders it unconstitutionally vague as applied to

this case, where Spencer repeatedly struck Lanique with a chair. Under the United States and Illinois Constitutions, a law will be held unconstitutionally vague if a person of ordinary intelligence is not given a reasonable opportunity to know what is prohibited so that he or she can act accordingly, or if the statute fails to provide explicit standards for application such that law enforcement officials are free to use arbitrary and discriminatory enforcement methods. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see *People v. Burpo*, 164 Ill. 2d 261, 265-66, 647 N.E.2d 996, 999 (1995). However, as we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. "The absence of statutory definitions of a few terms does not render a statute void for vagueness." *People v. Boclair*, 202 Ill. 2d 89, 105-06, 789 N.E.2d 734, 744 (2002). Absent contrary legislative intent, a court will assume the words used in a statute have their ordinary and popularly understood meanings when assessing the constitutionality of the statute. *People v. Fabing*, 143 Ill. 2d 48, 54, 570 N.E.2d 329, 332 (1991). In addition, a statutory term will not be held unconstitutionally vague where the term has a well-settled definition in Illinois jurisprudence. See *People ex rel. Ryan v. World Church of the Creator*, 198 Ill. 2d 115, 131, 760 N.E.2d 953, 962 (2001).

Section 12-4 of the Criminal Code of 1961 provides that aggravated battery is committed when in "committing a battery, a person commits aggravated battery if he or she: (1) [u]ses a deadly weapon other than by the discharge of a firearm." 720 ILCS 5/12-4(b)(1) (West 2004). The statute does not further define the term deadly weapon, but the term is defined by not only the plain meaning of the two words, but also long-standing Illinois case law:

"A deadly weapon is not necessarily one manufactured for the special purpose of taking a life nor need it be of any particular size or description. *People v. Carter*, 410 Ill. 462, 465, 102 N.E.2d 312, 313 (1951). *It is an instrument that is used or may be used for the purpose of an offense and is capable of producing death*. *Carter*, 410 Ill. at 465, 102 N.E.2d at 313. 'Some weapons are deadly per se; others, owing to the manner in which they are used, become deadly. A gun, pistol, or dirk-knife is itself deadly, while a small pocket knife, a cane, a riding whip, a club or baseball bat may be so used as to be a deadly weapon.' *People v. Dwyer*, 324 Ill. 363, 364-65, 155 N.E. 316, 317 (1927). Those instrumentalities not considered deadly *per se* may clearly become such by the manner in which they are used. *People v. Lee*, 46 Ill. App. 3d 343, 348, 360 N.E.2d 1173, 1177 (1977). When the character of the weapon is doubtful or the question depends upon the manner of its use, it is a question for the fact finder to determine from a description of the weapon, the manner of its use, and the circumstances of the case. *Dwyer*, 324 Ill. at 365, 155 N.E. at 317." (Emphasis added.) *People v. Blanks*, 361 Ill. App. 3d 400, 411-12, 845 N.E.2d 1, 11-12 (2005).

Similarly, the California Court of Appeal has noted:

"If the terms 'deadly' and 'weapon' are examined in various dictionaries, a plain, commonsense definition of 'deadly weapon' appears: an instrument capable of being used offensively or defensively and likely to cause death or destruction. (See Black's Law Dictionary (4th ed. 1957); The American Heritage Dictionary of the English Language (1969); Webster's Third New International Dictionary (Unabridged 1964); Webster's

> Seventh New Collegiate Dictionary (1966).) We do not find this definition ambiguous. The consistency among the sources indicates the meaning is settled." *People v. Rodriquez*, 50 Cal. App. 3d 389, 398, 123 Cal. Rptr. 185, 190 (1975).

The court thus rejected the claim that the term "deadly weapon" was unconstitutionally vague. *Rodriquez*, 50 Cal. App. 3d at 398-99, 123 Cal. Rptr. at 190.

Spencer argues that the term is vague because it maybe a question of fact for the jury in some cases . He raises the example of a worker who throws a bag of ammonium nitrate fertilizer – which may be a bomb component – at his or her co-worker during an argument while unloading their truck. The Illinois Supreme Court has rejected this type of argument:

> " 'In order to succeed on a vagueness challenge to a statute that does not involve a first amendment right, a party must establish that the statute is vague *as applied to the conduct* for which the party is being prosecuted.' (Emphasis added.) [*People ex rel. Sherman v.*] *Cryns*, 203 Ill. 2d [264,] 291, [786 N.E.2d 139, 157 (2003)]. A mere hypothetical involving a disputed meaning of some terms of a statute does not make the statute unconstitutionally vague. [*People v.*] *Greco*, 204 Ill. 2d [400,] 416, [790 N.E.2d 846, 856 (2003)]. ' "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid ***." ' *In re C.E.*, 161 Ill. 2d 200, 211, [641 N.E.2d 345, 350] (1994), quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707, 107 S. Ct. 2095, 2100 (1987).
>
> A statute that does not impact first amendment rights 'will not be declared unconstitutionally vague on its face unless it is incapable of *any* valid application.'

> (Emphasis added.) [*People v.*] *Izzo*, 195 Ill. 2d [109,] 112, [745 N.E.2d 548, 551 (2001)]. A vagueness challenge against a statute that does not affect first amendment rights is examined 'in light of the particular facts of the case.' Greco, 204 Ill. 2d at 416[, 790 N.E.2d at 857]. 'When the statute is examined in the light of the facts of the case and the statute clearly applies to the party's conduct, then a challenge to the statute's constitutionality based upon vagueness will be unsuccessful.' Cryns, 203 Ill. 2d at 291-92[, 786 N.E.2d at 158]." *People v. Einoder*, 209 Ill. 2d 443, 451-52, 808 N.E.2d 517, 522-23 (2004).

Applying these principles, we conclude the statute is not unconstitutional on its face. In light of the facts of the case, Spencer could use the folding chair to commit an offense against another person, and was capable of causing Lanique's death with it. The statute gives a person of ordinary intelligence a reasonable opportunity to know that beating a 10-year-old girl repeatedly with a folding chair is an aggravated battery.

Alternatively, Spencer argues the proof was insufficient to establish that the chair was a deadly weapon in this case. "In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *People v. Jordan*, 218 Ill. 2d 255, 269, 843 N.E.2d 870, 879 (2006). A reviewing court does not retry the defendant and should not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of

inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *Sutherland*, 223 Ill. 2d at 242, 860 N.E.2d at 217. A conviction must be reversed only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of [the] defendant's guilt." *People v. Smith*, 185 Ill. 2d 532, 542, 708 N.E.2d 365, 370 (1999).

Spencer relies on Lanique's testimony that he "slapped" her with the chair. However, the jury also heard that Lanique was treated at the hospital because she was limping and her back was sore and swollen. Moreover, a rational jury could conclude that the chair was an instrument capable of causing death, in accord with the definition of a deadly weapon, even if great bodily harm was not inflicted in this case.

Spencer further argues that the jury was improperly given an instruction defining a "dangerous weapon" as "[a]n object or instrument which is not inherently dangerous may be a dangerous weapon depending on the manner of its use and the circumstances of the case," which resulted in an incorrect verdict. Issues raised on appeal are preserved for review by objecting during trial and filing a written posttrial motion raising the alleged error. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Spencer did neither, which ordinarily results in forfeiture. However, fundamental fairness requires a trial court to give correct instructions on the elements of an offense charged to ensure a fair determination of the case by the jury. Failure to so instruct the jury constitutes plain error. *People v. Williams*, 181 Ill. 2d 297, 318, 692 N.E.2d 1109, 1121 (1998). The plain error rule allows review where: (1) the evidence is closely balanced, regardless of the nature of the error; or (2) the error is so serious that the defendant was

denied a substantial right and a fair trial, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467, 475 (2005).

In this case, the evidence was not closely balanced, even on the element of a deadly weapon. As noted earlier, Spencer could use the folding chair to commit an offense, and was capable of causing Lanique's death with it, as shown by the injuries to Lanique. An incorrect instruction on an element of the offense is not necessarily reversible error, where that element is "blatantly evident" from the evidence. *People v. Hopp*, 209 Ill. 2d 1, 10-11, 805 N.E.2d 1190, 1196 (2004). Such is the case here. The instructional error here was not serious enough to prejudice Spencer's right to a fair trial. A review of the case law shows that the common law definition of a dangerous weapon is in fact rooted in the Illinois Supreme Court's discussion of what constitutes a deadly weapon" See *People v. Ross*, 229 Ill. 2d 255, 272-76, 891 N.E.2d 865, 876-78 (2008) (discussing *Dwyer* and its progeny in analyzing the dangerous weapon element of the armed robbery statute). Accordingly, we conclude that the inclusion of the dangerous weapon instruction was not plain error in this case.

III

Finally, Spencer argues that his mittimus must be corrected to reflect credit for 750 days, not 650 days, spent in custody prior to sentencing. The State largely agrees, but maintains Spencer is entitled to 749 days of credit, contending he is not entitled to credit for the day he was sentenced. Pursuant to Supreme Court Rule 615 (134 Ill.2d R. 615), a reviewing court may correct the mittimus without remanding the cause to the trial court. See, *e.g.*, *People v. Davis*, 303 Ill. App. 3d 684, 688, 708 N.E.2d 1181, 1184 (1999).

Except for certain specified offenses, a prisoner serving a term of imprisonment receives one day of good conduct credit for each day of his prison sentence. 730 ILCS 5/3-6-3(a)(2.1) (West 2006). A sentence of imprisonment begins on the date when a defendant is received by the Department of Corrections (Department). 730 ILCS 5/5-8-7(a) (West 2006). There is an apparent split of opinion in this court as to whether, under sections 3-6-3 and 5-8-7 of the Unified Code of Corrections (730 ILCS 5/3-6-3, 5-8-7 (West 2006)), the day of sentencing is included in computing of the presentencing credit.

The Fourth District has held that the day of sentencing is not included in calculating the presentence credit if the defendant is remanded to the Department on the same day. O the other hand, several cases outside the Fourth District, including this district, have held implicitly in their calculation of presentencing credit that the day of sentencing is included. See *People v. Williams*, 394 Ill. App. 3d 480, 481-82, 917 N.E.2d 547, 548-49 (2009), *appeal allowed* (January 27, 2010) (and cases cited therein). The *Williams* court reasoned:

> "After considering the above cases, we find little concrete legal foundation for the split in cases. The cases that include the day of sentencing in the presentencing credit apparently follow the undisputed rule that a portion of a day spent in custody adds a day of credit by implicitly acknowledging that a defendant in custody spends a portion of the sentencing day in custody prior to sentencing. The cases excluding the day of sentencing from the credit seek to prevent a defendant from receiving double credit: one day under section 5-8-7 for the portion of the sentencing day spent in presentencing detention and one day under section 3-6-3 for the portion of the same day spent after issuance of the

> mittimus commences the prison sentence in the Department's legal (if not physical) custody.
>
> We find the concern over double credit persuasive and thus hold that a defendant is not entitled to credit for the day of sentencing if the mittimus is issued effective that same day. Conversely, where the mittimus is not issued or not effective on the day of sentencing, the defendant is not yet in Department custody so that the presentencing credit under section 5-8-7 applies rather than any credit under section 3-6-3. Since defendant's mittimus issued on the day of his sentencing, he is entitled to 287 days' credit [as opposed to 288 days] for presentencing detention." *Williams*, 394 Ill. App. 3d at 483, 917 N.E.2d at 549-50.

Following *Williams*, this court also noted in *People v. Jones*, 397 Ill. App. 3d 651, 656, 921 N.E.2d 768, 771-72 (2009):

> "[T]he fact that the Unified Code of Corrections demarcates two separate periods for calculating defendant's sentencing credit suggests that a defendant should not receive credit twice for a single day. In the statute quoted above, subsection (a) delineates the postsentencing credit, while subsection (b) delineates the presentencing credit. 730 ILCS 5/5-8-7 (West 2006). The fact that the two separate subsections set out two different time periods suggests a legislative intent that a defendant should not receive credit twice for the same day."

In this case, the potential double credit problem does not exist. This court may take judicial notice of the Department's records, because they are public documents. *People v. Peterson*,

372 Ill. App. 3d 1010, 1019, 868 N.E.2d 329, 336 (2007). Here, the Department's records show an admission date of December 21, 2007 – well after November 20, 2007, the date Spencer was sentenced. Accordingly, we conclude that Spencer is entitled to presentencing credit for the date of sentencing. Therefore, we order the mittimus corrected to reflect 750 days of presentencing credit for time served.

CONCLUSION

In sum, we affirm Spencer's conviction for attempted first degree murder, as it does not violate the one-act, one-crime rule. We decline to vacate Spencer's conviction for aggravated battery, as the term deadly weapon is not unconstitutionally vague, the evidence was sufficient to convict, and the inclusion of a dangerous weapon instruction was not plain error. However, we correct the mittimus to reflect 750 days of presentencing credit for time served.

Affirmed; mittimus corrected.