

No. 1-10-0516

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,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 12142
)	
COLBY BELL,)	Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant's convictions for aggravated battery violated the one-act, one-crime rule, we vacate these convictions and affirm the trial court's judgment in all other respects.

¶ 2 Following a bench trial, defendant Colby Bell was convicted of one count of aggravated domestic battery, three counts of aggravated battery, and one count of unlawful restraint. He was sentenced, as a Class X offender, to concurrent prison terms of 18 years for aggravated domestic battery, 5 years on each of the aggravated battery counts, and 3 years for unlawful restraint. On appeal, defendant contends that his three convictions for aggravated battery violated the one-act,

one-crime doctrine. We agree.

¶ 3 On March 10, 2007, defendant was arrested following an incident where he beat his girlfriend Carolynn Conway and forced her into a car. Defendant was charged with multiple offenses, including aggravated domestic battery (count 2), three counts of aggravated battery (counts 5-7), and unlawful restraint (count 8). He was also charged with, but acquitted of, attempted first degree murder and kidnaping.

¶ 4 The evidence at trial revealed that defendant and Conway started dating in August 2006, and defendant moved into Conway's apartment in December 2006. Conway testified that on March 10, 2007, near 7100 South Bishop Street in Chicago, defendant repeatedly punched her in the face. He knocked her down onto the street several times, and then picked her up and continued to hit her with his fists. As Conway attempted to get away from defendant, he threw a glass bottle at her striking Conway on the back of the head. Lakeisha Starnes, an eyewitness to the beating, testified that she saw defendant beat Conway on the head with a gun before throwing the bottle at her. Detective Pamela Childs testified that she interviewed Conway and did not recall her saying that defendant hit her with a gun, and her report did not indicate that a gun was used to strike her.

¶ 5 Following the beating, defendant pushed Conway into a car, drove around with her inside for about two hours, and then stopped the car at a house in Waukegan. Conway was eventually taken to the hospital where she had 16 staples put into her head to close the wound, and had a splint put on her left index finger, which was fractured. On March 13, Conway returned to the hospital where it was determined that she had a depressed skull fracture, brain contusions, and bleeding. Doctor Jacinto Obregon, who treated Conway on March 13, testified that the skull fracture she suffered may have been caused by being hit with a bottle, but that the injury was more consistent with being hit with a gun.

¶ 6 Defendant testified that on the date in question, after Conway slapped him in his face, he threw a bottle in her direction. Although he did not intend the bottle to hit her, he admitted that it did. Defendant denied hitting Conway with a gun.

¶ 7 During closing arguments the State contended that it proved defendant guilty of attempted first degree murder because he used his fists to repeatedly strike Conway's head and body, beat her with a gun, and also hit her with a bottle. The State also argued that defendant committed the offense of aggravated domestic battery because Conway suffered great bodily harm, *i.e.*, a fractured skull, due to the force of "the blow" that she suffered. In maintaining that defendant committed the aggravating battery counts, the entirety of the State's argument consisted of it stating that it believed it had proven those counts.

¶ 8 Following the bench trial, defendant was convicted of one count of aggravated domestic battery, three counts of aggravated battery, and one count of unlawful restraint. In reaching its conclusion, the court found that the State proved defendant guilty of aggravated domestic battery, and specifically indicated that defendant's use of the bottle to strike Conway was the cause of the injuries under that count. The court also found that it did not believe there was a gun involved. In finding defendant guilty of the three aggravated battery counts, the court only commented that the State met its burden of proof.

¶ 9 On appeal, defendant contends that his three convictions for aggravated battery should be vacated because they violate the one-act, one-crime rule. He specifically maintains that these convictions were based on the same act, *i.e.*, defendant striking Conway about the head and body, as the aggravated domestic battery conviction. Although defendant concedes that he waived this issue by failing to object to this error at trial, we review one-act, one-crime issues pursuant to principles of plain error. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 10 We review *de novo* whether a defendant's convictions violate the one-act, one-crime

doctrine. *People v. Csaszar*, 375 Ill. App. 3d 929, 943 (2007). The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). If the same physical act forms the basis for two separate offenses charged, a defendant could be prosecuted for each offense, but only one conviction and sentence may be imposed. *People v. Segara*, 126 Ill. 2d 70, 77 (1988).

¶ 11 However, if more than one conviction could be supported by the defendant's conduct, the indictment must indicate that the State intends to treat such conduct as multiple acts warranting multiple convictions. *People v. Crespo*, 203 Ill. 2d 335, 342-45 (2001). A defendant is prejudiced where the State treats closely related acts as one in the indictment and at trial, but changes its course on appeal to contend that there were separate acts supporting separate convictions. *People v. Bishop*, 218 Ill. 2d 232, 245-46 (2006); *Crespo*, 203 Ill. 2d at 343. Furthermore, counts charging a defendant with the same conduct under different theories of criminal culpability are insufficient to differentiate the charges. See *Crespo*, 203 Ill. 2d at 342.

¶ 12 Here, defendant was convicted of aggravated domestic battery as stated in count 2 which charged that defendant committed the offense when he caused great bodily harm to Conway by striking her about the head and body, and he had a dating relationship with her. Neither defendant nor the State challenges this conviction.

¶ 13 Counts 5, 6, and 7, respectively, charged that defendant committed aggravated battery when he caused great bodily harm to Conway by striking her about the head and body (count 5); caused bodily harm to Conway by striking her about the head and body with a glass bottle (count 6); and caused bodily harm to Conway when he struck her about the head and body while on a public way (count 7). We find that all three aggravated battery convictions must be vacated because these indictments failed to treat the conduct of defendant as multiple acts.

¶ 14 The State correctly concedes that count 5 should be vacated because the charge is materially identical to the aggravated domestic battery charge in count 2 as both counts allege great bodily harm based on Conway being struck about the head and body. Accordingly, the counts failed to treat the conduct of defendant as separate acts to support separate convictions and we vacate count 5.

¶ 15 The State also correctly concedes that count 6 should be vacated. Here, the court specifically found the great bodily injury alleged in count 2 was caused by defendant hitting Conway with the beer bottle. The element of "great bodily harm" to support a charge of aggravated battery is a question of fact to be determined by the trier of fact. *Crespo*, 203 Ill. 2d at 344. Accordingly, the act of hitting Conway with a bottle causing great bodily harm (count 2) was the same act alleging ordinary bodily harm (count 6). Under the one-act one-crime doctrine, we vacate the aggravated battery conviction for count 6.

¶ 16 Finally, we also vacate count 7 which charged battery as aggravated by the conduct occurring on a public way because the count was predicated on the same conduct, *i.e.*, causing bodily harm to Conway by striking her about the head and body. As held by the supreme court, "each strike or blow to the victim could support a separate finding of guilt for aggravated battery *** if the charging document reflects the State's intent to apportion the accused's conduct." *In re Samantha V.*, 234 Ill. 2d 359, 378 (2009), citing *Crespo*, 203 Ill. 2d at 345. In the present case, the State did not apportion defendant's conduct separately and thus, cannot support multiple convictions for the same charged conduct. *Samantha V.*, 234 Ill. 2d at 377-78 (holding that multiple convictions violated the one-act, one-crime rule where the State did not differentiate between the multiple strikes to the victim's head when it charged the defendant with the same conduct under two different theories of criminal culpability); *Crespo*, 203 Ill. 2d at 342-45 (finding that convictions for both aggravated battery and armed violence violated the one-act,

one-crime rule where the same physical act of stabbing formed the basis for both crimes, and the State did not differentiate between the separate stabs).

¶ 17 Given that the State treated defendant's conduct as a single attack, we also must do so on appeal. *Crespo*, 203 Ill. 2d at 345. Therefore, we need not reach the question of lesser included offenses (*Crespo*, 203 Ill. 2d at 345; *In re Rodney S.*, 402 Ill. App. 3d 272, 282 (2010)), which is now governed by the abstract elements analysis (see *Miller*, 238 Ill. 2d at 162). We thus vacate the aggravated battery convictions, which are Class 3 felonies (see 720 ILCS 5/12-4(e) (West 2006)), and order that aggravated domestic battery, which is a Class 2 felony (720 ILCS 5/12-3.3(b) (West 2006)), stands. See *People v. Garcia*, 179 Ill. 2d 55, 71 (1997) (holding that where guilty verdicts are obtained for multiple counts arising from the same act, a sentence should be imposed on the most serious offense).

¶ 18 Accordingly, we vacate the judgment entered on defendant's convictions of aggravated battery; order the clerk of the court to correct the mittimus to reflect convictions for aggravated domestic battery and unlawful restraint; and affirm the judgment of the trial court in all other respects.

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