

No. 1-09-2809

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FIFTH DIVISION  
May 27, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the  |
|                                      | ) | Circuit Court of |
| Plaintiff-Appellee,                  | ) | Cook County.     |
|                                      | ) |                  |
| v.                                   | ) | No. 08 CR 16996  |
|                                      | ) |                  |
| LENWOOD THOMAS,                      | ) | Honorable        |
|                                      | ) | James B. Linn,   |
| Defendant-Appellant.                 | ) | Judge Presiding. |

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JUSTICE JOSEPH GORDON delivered the judgment of the court. Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

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**ORDER**

*HELD:* The trial court properly denied defendant's motion to quash arrest and suppress evidence when there was probable cause to arrest him. Although defendant was proven guilty beyond a reasonable doubt of robbery, his conviction for aggravated unlawful restraint must be vacated when it arose out of the same physical act as the robbery conviction.

After a bench trial, defendant Lenwood Thomas was found guilty of robbery and unlawful restraint. He was sentenced to two concurrent terms of 54 months in prison.

On appeal, defendant contends that the trial court erred when it denied his motion to quash arrest and suppress evidence because there was no probable cause to arrest him. He also contends that he was not proven guilty beyond a reasonable doubt when the eyewitnesses' identifications were unreliable and no other "convincing" evidence tied him to the offense. Defendant further contends that his conviction for aggravated unlawful restraint violates the one-act, one-crime doctrine because it was based on the same physical act as the robbery conviction. In the alternative, he contends that his conviction for aggravated unlawful restraint should be reduced to unlawful restraint and the cause remanded for resentencing. We affirm the denial of the motion to suppress and defendant's conviction for robbery, but vacate his conviction for aggravated unlawful restraint.

Prior to trial, defendant filed a motion to quash arrest and suppress evidence. At the hearing on the motion, Officer Lazaro Altamirano testified that while he was conducting narcotics surveillance he observed defendant standing on the sidewalk yelling "rocks" at pedestrians and motorists. In Altamirano's experience, "rocks" is a term used by narcotics dealers to solicit persons interested in purchasing packaged crack cocaine. After five minutes, Altamirano radioed enforcement officers with defendant's description and location.

Officer Hadac testified that, based on Officer Altamirano's description, defendant was detained and taken into custody. A custodial search of defendant was then performed. A driver's license and a "Sam's Club" card, both bearing a name other than defendant's, were recovered. Hadoc testified that the name on the cards matched that of a robbery victim.

The trial court denied the motion, finding the testimony of the police officers to be credible with regard to "what caught their attention" about defendant.

At trial, the victim, Melvin Medrano, testified through an interpreter that he and Alfonso Lemus had stopped to check the loads on their trucks when a man approached and took their money. They then got back into their trucks and drove to a more populated location. The victim exited, checked his truck, and then got back inside when Lemus indicated that defendant was approaching.

Defendant walked around the side of the truck, put a gun to the victim's side, and demanded the victim's wallet. The victim complied.

The victim later gave a description of each offender to the police. He subsequently identified defendant, in a lineup, as the person who demanded his wallet. His driver's license and Sam's Club card were returned to him at that time.

Alfonso Lemus also testified through an interpreter. After the first robbery, he watched the offender get into a Lincoln Towncar. Later, when he and the victim were checking their loads, defendant approached and asked for directions. Lemus was suspicious because he had seen defendant get out of the same Lincoln Towncar that the first offender entered so he told the victim to get into his truck. As Lemus was slowly backing away toward his truck he saw defendant point a gun at the victim and the victim give defendant his wallet.

A few weeks later, Lemus went to the police station and viewed a lineup. He told police that he was 90% sure that defendant was the person who took the victim's wallet.

Detective Michael Malinowski testified that after he learned the victim's identification had been recovered from defendant, a lineup was then held and the victim identified defendant as the offender. Lemus also viewed the lineup, although he was only 90% sure that defendant was the offender.

Officer Hadac testified that when he took defendant into custody on an unrelated matter, a custodial search revealed a driver's license and a Sam's Club card bearing the victim's name. Hadac was present when the victim subsequently identified these items at the police station.

Defendant admitted that he was in possession of the victim's driver's license and Sam's Club card when he was arrested on an

unrelated charge. He had found the items in an abandoned building and was planning to put them in the mailbox. He denied robbing the victim.

At the conclusion of closing argument, the trial court stated that defendant's explanation of why he had the victim's property was "patently unbelievable." The court then found defendant guilty of robbery and unlawful restraint. Defendant was subsequently sentenced to two concurrent terms of 54 months in prison. Defendant's mittimus reflects convictions for robbery and aggravated unlawful restraint.

On appeal, defendant first contends that the trial court erred by denying the motion to quash arrest and suppress evidence when the officers' account of the incident was incredible. In the alternative, defendant argues that even accepting the testimony as true, the officers still lacked probable cause to arrest defendant for the solicitation of unlawful business.

Defendant acknowledges that this issue is subject to forfeiture because it was not raised in his posttrial motion. See, e.g., *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (an issue must be raised both at trial and in a written posttrial motion in order to be properly preserved for appeal). However, defendant argues his contentions should be reviewed for plain error. In the alternative, he contends defense counsel was ineffective for failing to include this issue in the posttrial motion.

The plain error doctrine permits a reviewing court to address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The first step in determining whether the plain error doctrine applies is to determine whether any error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). Absent error, there can be no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

When reviewing a trial court's suppression ruling, this court applies a two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). The trial court's factual findings and credibility determinations are entitled to great deference and will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). However, the trial court's ultimate legal ruling as to whether suppression was warranted is reviewed *de novo*. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008).

Probable cause to arrest exists when the facts known to the police officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the individual to be arrested has committed a crime. *People v. Wear*, 229 Ill. 2d 545, 563 (2008). In other words, whether probable cause to arrest exists depends on the totality of the circumstances at the time

of the arrest. *Wear*, 229 Ill. 2d at 564. The standard for determining whether probable cause exists is the probability of criminal activity, not proof beyond a reasonable doubt. *People v. Lee*, 214 Ill. 2d 476, 485 (2005); see also *Wear*, 229 Ill. 2d at 564 (probable cause does not require a showing that the officer's belief that the suspect has committed a crime is "more likely true than false").

Here, defendant was arrested for soliciting unlawful business. A person solicits unlawful business when he stands upon the public way or interferes with or impedes any pedestrian or person in a vehicle for, among other purposes, the illegal sale of narcotics. Chicago Municipal Code, § 10-8-515(a), (b) (added Apr. 1, 1998). This solicitation may be accomplished by words, gestures, symbols or other "similar means." Chicago Municipal Code, § 10-8-515(b) (added Apr. 1, 1998).

Defendant first argues that the testimony at the hearing was a "story" designed by the officers to explain their search of defendant and that no surveillance operation would end after five minutes and before a narcotics transaction took place.

The trial court found Altamirano's explanation of what drew his attention to defendant, that is, defendant yelling "rocks" at pedestrians and motorists, to be credible. Based on the record, this court cannot say the trial court's credibility determination was against the manifest weight of the evidence. *Slater*, 228

Ill. 2d at 149. With regard to defendant's argument that no surveillance operation would end before a narcotics transaction had occurred, this court notes that defendant was arrested for soliciting unlawful business, not for the sale of narcotics. This court will not assume that a brief surveillance operation is inherently flawed or instruct officers on how to conduct such operations.

Defendant next argues that even accepting that the officers testified truthfully, there was no probable cause to arrest him. We disagree.

While defendant highlights that he was not observed with narcotics or engaged in a narcotics transaction, he ignores the fact that Altamirano watched as defendant yelled "rocks" to people in the vicinity. Altamirano testified that, in his experience, narcotics dealers use the term "rocks" to solicit people who want to buy packaged crack cocaine. Based on the totality of the circumstances, Altamirano believed there was a probability that criminal activity was occurring, defendant was soliciting customers for a narcotics transaction. See *Wear*, 229 Ill. 2d at 564. Accordingly, the officers had probable cause to arrest defendant for soliciting unlawful business.

This court is unpersuaded by defendant's reliance on *People v. Lee*, 214 Ill. 2d 476 (2005). In that case, the defendant was arrested after officers, who had received a citizen complaint

regarding drug sales, saw the defendant, who had previously been arrested for drug possession, standing on the corner with a gang member and another man. Our supreme court determined that the officers lacked probable cause to arrest defendant when they merely saw him standing next to a gang member on the street in an area known for drug sales. *Lee*, 214 Ill. 2d at 485-86.

Here, defendant was not silently standing on the street; rather, he was yelling a term used to solicit narcotics customers at passersby. Because the facts at the time of defendant's arrest would have led a reasonably cautious person to believe that defendant had committed a crime, probable cause to arrest defendant existed (*Wear*, 229 Ill. 2d at 563), and the trial court did not err when it denied the motion to quash arrest and suppress evidence (*Cosby*, 231 Ill. 2d 271). Absent error, there can be no plain error (*Williams*, 193 Ill. 2d at 349), and, defendant's claim must fail (*Patterson*, 217 Ill. 2d at 444).

In the alternative, defendant contends that he received ineffective assistance when counsel failed to include this claim in his posttrial motion. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish ineffective assistance, a defendant must show that the attorney's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defendant).

However, because the trial court did not err when it denied the motion to quash arrest and suppress evidence, defendant suffered no prejudice. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (a court does not need to determine whether counsel was deficient before analyzing the prejudice suffered as a result of the alleged deficiencies). Absent prejudice, there is no basis to find ineffective assistance. *Edwards*, 195 Ill. 2d at 163 (failure to satisfy either part of the *Strickland* test defeats an ineffective assistance claim).

Defendant next contends that he was not proven guilty beyond a reasonable doubt because the witnesses were distracted, provided conflicting accounts of the offense, and were pressured to identify defendant in a physical lineup. Defendant also contends that the State failed to offer any further "convincing" evidence tying him to the offense.

In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229

Ill. 2d at 272.

When the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004); *People v. Parker*, 234 Ill. App. 3d 273, 274 (1992) (a reviewing court gives due consideration to the fact that the trier of fact observed the witnesses as they testified). A conviction will be reversed only when the evidence was so improbable or unsatisfactory that reasonable doubt remains as to whether the defendant was guilty. *Ross*, 229 Ill. 2d at 272.

Here, the case for conviction is strong. Viewing the evidence in the light most favorable to the State, as we must, the victim identified defendant in a lineup and at trial as the person who pointed a gun at him and demanded his wallet. Identification by a single witness is sufficient for the trier of fact to find a defendant guilty beyond a reasonable doubt. See *People v. Tatum*, 389 Ill. App. 3d 656, 661 (2009).

It is true, as defendant highlights, that the testimony of the victim and Lemus were not in complete harmony with regard to the details of the encounter. Although the men differed as to which side of the victim's truck defendant approached, whether defendant asked for directions, and whether Lemus told the victim to watch out, at trial they agreed that defendant pointed a gun

at the victim and demanded his wallet. In any event, the inconsistencies between the men's testimony were not fatal, as it was for the trier of fact, in this case the trial court, to resolve any inconsistencies or conflicts in the evidence and draw reasonable inferences from the testimony presented. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

The trial court stated that it found defendant's explanation for his possession of the victim's property to be unbelievable; this court gives due consideration to the fact that the trial court "saw and heard" defendant and the witnesses as they testified (*Parker*, 234 Ill. App. 3d at 274). It was for the trial court, as the trier of fact, to determine the credibility of each witness and the weight to be given to his testimony (*Ross*, 229 Ill. 2d at 272). Although there were inconsistencies in the witnesses' testimony, the trial court found them credible on the core issue of who robbed the victim, as evidenced by both the record and the verdict; this court will not substitute its judgment for that of the trier of fact on this issue (*Ross*, 229 Ill. 2d at 272).

Defendant also contests the credibility of the witnesses' identification when evaluated under the factors employed in assessing eyewitness identification, including: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy

of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989), citing *Neil v. Biggers*, 409 U.S. 188 (1972). However, consideration of these factors does not undermine the identifications.

Defendant is correct that he was a stranger to the witnesses, and that several weeks passed between the crime and the lineup identification of defendant. However, while defendant was an apparent stranger to the victim, the victim identified him as the offender at the lineup and at trial. The fact that defendant was a stranger to the witnesses was a factor for the court to consider when determining the credibility of the witnesses' testimony. *Slim*, 127 Ill. 2d at 307-08. The length of time between the crime and the identification does not destroy a witness's credibility, rather it goes to the weight the trier of fact assigns to the testimony. *People v. Austin*, 328 Ill. App. 3d 798, 805 (2002); see also *Slim*, 127 Ill. 2d at 313-14 (citing cases with lapses of between one month and two-and-a-half years between the crime and identification).

This court rejects defendant's argument that the witnesses were too distracted and disorientated to "get a good look" at defendant. Here, the record indicates that the victim was

preparing to drive his truck while a gun was pointed at him, and Lemus was walking away as the incident happened. While it is true that both men had been robbed shortly before the instant robbery, the victim testified that defendant walked up to his truck, pointed a gun at him and demanded his wallet. Lemus also testified that he saw defendant approach the victim with a gun and continued to watch defendant as he backed away.

Defendant also argues that because the victim and Lemus knew the victim's identification had been recovered and a suspect was in custody, they were under pressure at the lineup, and their subsequent identifications were unreliable. Defendant cites no authority for the proposition that identifications are rendered unreliable merely because a victim or witness knows that a suspect has been arrested. Indeed, common sense indicates that officers would not hold a lineup without including possible suspects. See *People v. Johnson*, 123 Ill. App. 3d 1008, 1013 (1984) (the fact that witnesses knew suspects were in a lineup was not suggestive *per se*, but is merely stating the obvious). The witnesses' knowledge that a suspect was in custody was a matter for the trier of fact to consider when evaluating the identifications.

Defendant's final argument is that the mere fact that defendant had the victim's identification did not sufficiently tie him to the crime when he did not have the wallet or the

remainder of its contents when he was arrested. However, defendant ignores the fact that in addition to possessing the victim's identification, he was also identified by the victim.

Taking the evidence in the record in the light most favorable to the State (*Ross*, 229 Ill. 2d at 272), and giving due consideration to the fact that the trial court was able to observe the witnesses as they testified (*Parker*, 234 Ill. App. 3d at 274), this court cannot say that no rational trier of fact could have found defendant guilty. Accordingly, as the evidence in the record is not so unsatisfactory that it creates a reasonable doubt of defendant's guilt (*Ross*, 229 Ill. 2d at 272), we affirm defendant's conviction.

Defendant next contends that his conviction for aggravated unlawful restraint must be vacated because it violates the one-act, one-crime rule when it was carved out of the same act that formed the basis of his robbery conviction. The State responds that defendant committed two acts when he used a gun to restrain the victim and then demanded the victim's wallet.

Although defendant waived this issue by failing to raise it at trial or in a posttrial motion (*Enoch*, 122 Ill. 2d at 186), this court may review this claim pursuant to the plain error doctrine (*People v. Carter*, 213 Ill. 2d 295, 299-300 (2004)).

When multiple charges arise from the same act, a defendant may be convicted and sentenced only for the most serious offense.

*People v. King*, 66 Ill. 2d 551, 566 (1977). One-act, one-crime analysis involves a two-step process. First, the court must determine whether the defendant's conduct consisted of multiple acts or a single act, as one physical act cannot be the basis for multiple convictions. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). For purposes of the one-act, one-crime rule, a single act is any overt or outward manifestation that will support a different offense. *King*, 66 Ill. 2d at 566. When a defendant's conduct involved multiple acts, this court must determine whether any of the offenses are lesser-included offenses, as a conviction for a lesser-included offense is improper. *Miller*, 238 Ill. 2d at 165.

Our supreme court has held that it would be "profoundly unfair" to permit the State to treat a defendant's conduct as separate acts for the first time on appeal. *People v. Crespo*, 203 Ill. 2d 335, 343 (2001). Rather, in order for multiple convictions to be sustained, the indictment must indicate that the State intends to treat the defendant's conduct as multiple acts. *Crespo*, 203 Ill. 2d at 345.

A careful review of the indictment in this case reveals that the counts charging defendant with armed robbery and aggravated unlawful restraint did not differentiate separate acts; rather, these counts rely on the same conduct, pointing a gun at the victim, to charge defendant under different theories of criminal

conduct. The armed robbery count of the indictment charged defendant with committing armed robbery in that he committed robbery while armed with a firearm and the aggravated unlawful restraint count charged defendant with detaining the victim with a handgun. The State cannot now argue on appeal that defendant's conduct consisted of two separate acts. *Crespo*, 203 Ill. 2d at 343.

Here, defendant approached the victim, pointed a gun at him, and demanded his wallet. The act of pointing a gun was part of the same physical act that formed the basis of defendant's conviction for robbery, *i.e.*, his demand for the victim's wallet.

This court's decision in *People v. Lee*, 376 Ill. App. 3d 951, 956-57 (2007) is instructive. In that case, the defendant approached the victim from behind and demanded money. The victim complied without turning around or seeing the gun. This court vacated defendant's conviction for aggravated unlawful restraint because, as the State conceded, that offense was carved from the same physical act that formed the basis of the defendant's conviction for armed robbery. *Lee*, 376 Ill. App. 3d at 956-57.

We are unpersuaded by the State's reliance on *People v. Crespo*, 118 Ill. App. 3d 815, 823-24 (1983). In that case, the court determined that the defendant committed separate acts which supported convictions for both armed robbery and unlawful restraint when he threatened to shoot anyone who withheld money

during a robbery, forced victims to lie on the floor, and another offender held a victim at knife-point during and after the robbery. Thus, the defendant's convictions did not violate the one-act, one-crime rule because he committed "separate and distinct acts" which constituted an offense that was not a lesser-included offense of the more serious crime charged. *Crespo*, 118 Ill. App. 3d at 824.

Here, defendant pointed a gun at the victim and demanded his wallet. The encounter was brief and the act supporting the unlawful restraint, pointing the gun, was done to accomplish the robbery. Accordingly, defendant's conviction for aggravated unlawful restraint was a violation of the one-act, one-crime rule (*King*, 66 Ill. 2d at 566), and must be vacated.

Because this court vacates defendant's conviction for aggravated unlawful restraint, we need not address defendant's contention that this offense must be reduced to unlawful restraint.

Accordingly, this court affirms the denial of the motion to quash arrest and suppress evidence as well as defendant's conviction for robbery. We vacate defendant's conviction for aggravated unlawful restraint.

Affirmed in part; vacated in part.