

No. 2—09—0730
Order filed January 31, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Winnebago County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 08—CF—2321 |
| |) | |
| ANDRE A. FRIAR, |) | Honorable |
| |) | Gary V. Pumilia, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Applying the abstract elements test for charged offenses, possession of a stolen firearm is not a lesser included offense of residential burglary.

Following a jury trial, defendant, Andre A. Friar, was convicted of residential burglary (720 ILCS 5/19—3(a) (West 2008)) and possession of a stolen firearm (720 ILCS 5/16—16(a) (West 2008)). He was sentenced to concurrent terms of 10 years' imprisonment for the residential burglary conviction and five years' imprisonment for the possession of a stolen firearm conviction. On appeal, defendant argues that his conviction of possession of a stolen firearm must be vacated because it is a lesser included offense of residential burglary. We affirm.

I. BACKGROUND

On June 17, 2008, defendant and two codefendants, Joseph Guerin and Daquinn Whitfield, were charged by indictment with residential burglary and possession of a stolen firearm. The charge of residential burglary, as amended, alleged that the men “knowingly and without authority, entered the dwelling place of Gerald Follmar *** with the intent to commit therein a theft.” The charge of possession of a stolen firearm alleged that the men “knowingly possessed a firearm *** with knowledge that it had been stolen and without being entitled to possess that firearm.” On October 1, 2008, the trial court granted defendant’s motion to sever his trial from those of his codefendants. Defendant’s jury trial began on June 2, 2009.

Gerald Follmar testified that he lived at 6969 South Main in Rockford. On June 17, 2008, he and his family went on an outing and were gone between about 11 a.m. and 12:45 p.m. When they returned to the house, they discovered that it had been burglarized; furniture drawers were pulled out, and the house was in disarray. A window screen had been broken to gain entry. After the police arrived, they asked Follmar to identify what was missing, and he reported that the following items were gone: a gallon size Ziploc bag with smaller bags of foreign coins and rolls of pennies; a jewelry box containing, among other things, airline cards; a DVD player; a jar of coins; and a laptop. Follmar was also missing about \$600 cash.

A crime scene technician testified that when checking for fingerprints at the Follmar residence, he found a dimpled pattern on audio equipment and on three other objects.

Mike Bond testified that he ran an automotive repair shop on South Main and Prairie Road in Rockford. On the afternoon of June 17, 2008, he called the police about a suspicious vehicle in the neighborhood. Bond saw a dark, two-door GM with front-end damage at the intersection of

Prairie Road and Route 2 about six times in 15 minutes. The car initially contained three black men, then two, then one, and then it reversed count and contained two and three men again; “they were dropping them off and picking them up.” Bond initially provided police with a partial license plate number but then followed the car and got the full license plate number. The occupants of the car appeared to be in their 20s and 30s, with the driver appearing older and larger than the two passengers.

Ryan Kennedy testified that he lived on a farm of more than 60 acres on Prairie Road in Rockford. At about 2 p.m. on June 17, 2008, he was clearing brush when he saw two black men walking across his fields. He followed them in his truck. The men climbed a fence and went to Prairie Road, where they waved down a dark car that was heading south. Kennedy viewed the men from about 100 feet away. About one hour later, a sheriff asked him to view a vehicle and some individuals. Kennedy identified the car as the one he had seen and two men, including defendant, as the people who were crossing his property. Kennedy did not recognize a third individual. The following day, Kennedy took a detective to the part of the field that the men had walked through, and they found three gold coins there.

Winnebago County Sheriff Jeffrey Boatright testified that he was one of the officers who initially responded to the report of the burglary at the Follmar residence. At about 2:20 p.m., he responded to a call of a suspicious vehicle, and he obtained a description of a black car with front end damage, as well as a license plate number. Boatright located a black Monte Carlo on Prairie Road matching the description, and pulled it over at 2:54 p.m. The car contained three men. Defendant was seated in the rear passenger seat; Whitfield was in the front passenger seat; and Guerin, to whom the car was registered, was driving.

Kennedy was brought to the scene to make identifications. Follmar was subsequently brought to the scene and identified tubes of pennies that belonged to him, which were in plain view in the car. The police then impounded the car. Defendant told Boatright that he was picked up about 20 minutes before the stop, and that a laptop was already in the car when he got in. Defendant later told the police that he was picked up about 10 minutes before the stop. While at the scene of the stop, defendant picked up a gold coin from under his foot, which he claimed to have just found. Defendant was brought to the police station, and three more gold coins were found on his person, as well as \$151.15 cash and a black glove with a “rubberish” front. He told detectives that he would tell them “everything [they] need[ed] to know about the burglaries” if they could promise that his bond would be \$400 to \$500.

When Guerin was brought to the police station, he had \$151.24 cash on his person. Whitfield had \$608 cash in his pocket. The police obtained Guerin’s consent to search the Monte Carlo, and they found a .32-caliber loaded revolver and holster in the glove compartment. The police contacted Follmar, who realized that a gun he kept under his mattress was missing, and he later identified the recovered gun as his. The front passenger seat of the car had a jar of pennies on the floorboard, a pair of brown work gloves, and a dimpled glove. The glove compartment contained, in addition to the gun, an airline mileage card issued to Mrs. Follmar and two additional gloves. In the back passenger seat, there was a laptop computer, a tube of pennies with writing on it, a skull cap, a tool made from a coat hanger, and other miscellaneous property. A set of bolt cutters was in the trunk, which also contained a DVD player, a laptop, a jewelry box, tubes of coins, and eight bags of coins belonging to Follmar. A piece of a Ziploc bag and a jar in the car contained a dimpled pattern, as

did other items. The dimpled pattern was consistent with the pattern of the dimpled glove found in the car and the glove found on defendant's person.

The jury found defendant guilty of both charges. Defendant filed a motion for a new trial on June 5, 2009. The trial court denied the motion on July 1, 2009, and proceeded to sentence defendant. Defendant filed a motion to reconsider his sentence, which was denied on July 13, 2009. Defendant timely appealed.

II. ANALYSIS

On appeal, defendant argues that he is entitled to have his conviction of possession of a stolen firearm vacated because it is a lesser included offense of residential burglary as charged in the indictment. Defendant did not raise the issue of a lesser included offense in any posttrial motions, but as both parties acknowledge, this issue is reviewable under the plain error doctrine because the potential for an extra conviction and sentence affects the integrity of the judicial process. See *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009). Whether an offense is a lesser included offense is a question of law that we review *de novo*. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

“Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act.” *People v. King*, 66 Ill. 2d 551, 566 (1977). In situations where there are multiple acts, prejudice “exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses.” *Id.* We use a two-step analysis to apply *King's* “one-act, one-crime” doctrine. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we must determine if the defendant's conduct involved multiple acts or a single act; multiple convictions may not stand if they are based on the exact same physical act. *Id.* Second, if the conduct does involve multiple acts, we must determine whether any of the offenses are lesser

included offenses; multiple convictions are improper if an offense is a lesser included offense. *Id.*

Regarding the first step of the *King* analysis, defendant does not contest that his conduct involved multiple acts. His burglary conviction was based on him entering Follmar's house with the intent to commit a theft inside. In contrast, defendant's possession of a stolen firearm conviction was based on the separate physical act of him knowingly possessing a stolen firearm at the time of the traffic stop.

For the second step of the *King* analysis, we determine whether an offense is a lesser included crime using either the charging instrument approach or the abstract elements approach. *Id.* at 175. Under the charging instrument approach, we look at the charging instrument to see if the description of the greater offense contains the broad foundation or main outline of the lesser offense. *Id.* at 166. Under the abstract elements approach, we look at the statutory elements. If all of the first offense's elements are included within the second offense, and the first offense contains no element not included in the second offense, the first offense is a lesser included offense of the second offense. *Id.* Our supreme court recently held in *Miller* that we should use the charging instrument approach to determine whether an *uncharged* offense is a lesser included offense, because that approach is based on the importance of providing the parties with notice of what offenses the defendant may be convicted of based on the crime's facts and what jury instructions may be sought. *Id.* at 173. Conversely, where charged offenses are at issue, the defendant had notice of the offenses and knew that the jury would be instructed on them. *Id.* Accordingly, the abstract elements test, a stricter test than the charging instrument approach, will apply for the charged offenses. *Id.* at 166, 173.

Defendant applies the charging instrument approach in his brief, which was filed before *Miller* was published. However, it is certain that under *Miller*, we must apply the abstract elements

test because the offenses at issue were both charged offenses. As stated, under this test, if all of the first offense's elements are included within the second offense, and the first offense contains no element not included in the second offense, the first offense is a lesser included offense of the second offense. *Id.* at 166; see also *Nunez*, 236 Ill. 2d at 496 (“A lesser-included offense is one that is composed of some, but not all of the elements of the greater offense and which does not have any element not included in the greater offense”). “In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense.” *Miller*, 238 Ill. 2d at 166.

Here, possession of a stolen firearm requires that (1) a person who is not entitled to possess a firearm (2) possess or delivers the firearm (3) knowing it to have been stolen or converted. 720 ILCS 5/16—16(a) (West 2008). Residential burglary requires that (1) a person knowingly enters or remains in another's dwelling place (2) without authority (3) with the intent to commit a felony or theft therein. 720 ILCS 5/19—3(a) (2008). None of the elements of possession of a stolen firearm are included in residential burglary, as residential burglary does not require the involvement of a firearm. Clearly, it is possible to commit the greater offense, residential burglary, without committing the offense of possession of a stolen firearm. Accordingly, under the abstract elements test, possession of a stolen firearm is not a lesser included offense of residential burglary, and defendant's argument fails.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Winnebago County circuit court.

Affirmed.