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3-09-0603

Order Filed March 24, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	For the 12th Judicial Circuit
)	Will County, Illinois
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-1094
)	
MIGUEL VILLARREAL,)	
)	Honorable Amy Bertani-Tomczak,
Defendant-Appellant.)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Wright and Lytton concurred in the judgment.

ORDER

Held: Where defendant was convicted of two counts of attempt murder and one count did not allege a distinct act that supported the offense, the surplus count and sentence must be vacated under the one-act, one-crime doctrine.

Defendant Miguel Villarreal was charged in a second superseding bill of indictment with two counts (counts I and II) of attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)), and two counts of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)). On appeal, Villarreal argues that this court should vacate his count I conviction because convicting him under the allegation of count I, that he committed the offense of attempt murder when he isolated the child

with himself in a bedroom while he possessed a knife and convicting him of attempt murder in that he stabbed the child with the knife violates the one-act, one-crime doctrine. Because we agree Villarreal's count I conviction violates the one-act, one-crime rule, we vacate his conviction and sentence for count I.

FACTS

Defendant Miguel Villarreal was charged in a second superseding bill of indictment with two counts (counts I and II) of attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)), and two counts of aggravated battery of a child. (720 ILCS 5/12-4.3(a) (West 2008)). In the first count of attempt first degree murder, the State alleged Villarreal "performed a substantial step toward the commission of [the] offense, in that [he] isolated *** a person under 12 years of age, with himself in a bedroom, while he possessed a knife." In the second count of attempt first degree murder, the State alleged Villarreal "performed a substantial step toward the commission of [the] offense, in that [he] stabbed *** a person under 12 years of age, with a knife."

A jury trial ensued and the following evidence was adduced. Lucia Chaidez testified that on May 11, 2008, she was living in a townhouse in Romeoville with her three children, including a baby boy, who was fathered by Villarreal and who was born on March 27, 2008. Villarreal also resided at the Romeoville townhouse. On May 11, 2008, Chaidez attended mass with Villarreal and the baby. After mass, the trio returned home. Chaidez's two daughters were at her sister's home. Chaidez prepared to go into Chicago to get money that was needed to make car payments. Villarreal objected to Chaidez taking the baby with her. Chaidez did not want to leave the baby with Villarreal because the one time that she had, he had fallen asleep and the baby had been crying when her brother arrived at her home. Chaidez told Villarreal several times that she was not going to leave the baby with him. She felt as if she "was never going to see [her] baby." While Chaidez and Villarreal were debating

the issue, they were in their bedroom and Villarreal was holding the baby. He would not let Chaidez take the boy from his arms and he would not let her take him with her, although Chaidez also told Villarreal she would take the baby with her to pick up her daughters and then return home. At one point, Chaidez tried to grab the child from Villarreal's arms, however, she could not pry the baby away. Villarreal remained calm throughout the verbal exchange; he did not raise his voice. Several times during the dispute, Villarreal changed the baby's diaper.

Chaidez testified that until the argument about taking the baby with her, she and Villarreal had been "getting along fine" on that day. Eventually, Chaidez phoned Villarreal's uncle for advice. She handed the phone to Villarreal so he could speak with his uncle. The uncle told Villarreal to relax and calm down. Chaidez also phoned her priest. She also attempted to phone her sisters and the father of her daughters. When she eventually reached the girls' father, he told her to call the police. Chaidez phoned 911 and went outside to wait. When she left the bedroom, the baby was asleep in Villarreal's arms. When the police arrived they went to the bedroom with her. The door to the bedroom was locked and Chaidez provided the police with a key they used to open the door. The officers entered the bedroom and Chaidez went to the kitchen to wait. She heard her baby crying in pain. The officers called for her to come and get the baby. Chaidez grabbed the baby from the corner of the bed. She observed that Villarreal was covered in blood and had a knife stuck in his stomach. Villarreal had not displayed the knife to Chaidez that day, however, she had seen it before when he had shown it to her as part of "his collection." Villarreal had never threatened Chaidez or the baby with the knife or otherwise. When Chaidez took the baby from the bedroom, she observed he also had blood on him. Chaidez assumed the blood was Villarreal's. Chaidez took the baby and sat on the living room sofa with him. She attempted to give the baby a bottle but he continued to cry. The police yelled at her "to check" the baby. She removed the legs of the baby's pajamas however

she did not see any wounds. When the ambulance arrived, the baby's clothes were removed and she saw what looked like two cuts on the baby's body. Chaidez believed it was Villarreal who had injured the child. Phone records were introduced to verify Chaidez's testimony regarding the phone calls she made.

Officer Dustin Legner of the Village of Romeoville police department also testified. Legner stated that when he arrived at the Romeoville residence with Officer Giniat, Chaidez appeared "fairly calm." She told the officers Villarreal was in the upstairs bedroom with her son and that Villarreal would not let the child go. She told them she had wanted to leave the residence with the baby to visit her family in Chicago. The officers went to the bedroom and knocked on the door. There was no response, however, they could hear a baby screaming. The officers unlocked the door and observed Villarreal laying on the bed covered in blood; he had cuts on his neck and chest and a large knife sticking out of his stomach. Villarreal was holding the child in his right arm, next to his chest. The officers held Villarreal down and forcibly removed the child from his possession. Chaidez took the baby and left the room. Villarreal was belligerent and repeatedly told the officers to let him die and to leave him alone. Villarreal told the officers to bring his son back to the room so they could die together. He also offered to pay the officers if they let him die. Other officers arrived and Villarreal was restrained on the bed until the firefighters arrived. During the time they were restraining him, Villarreal struggled vigorously with the officers. Villarreal was taken from the scene by ambulance.

Officer Steve Giniat testified essentially as Legner did and added his observation that Villarreal never inquired after the welfare of his son. He also did not observe any signs of a struggle in the home, the bed was made and nothing unusual was on the floor. Giniat stated Chaidez appeared calm when he arrived on the scene.

Officer Mimi Bejda also testified. Bejda collected evidence at the scene and took

photographs. He also participated in the struggle to subdue Villarreal until the firefighters arrived. Bejda noted Villarreal had cuts on his left wrist.

Gregory Walling, a member of the Lockport Fire District, also testified. Walling stated that on May 11, 2008, he was dispatched to the residence in Romeoville. When Walling arrived, the police officers on the scene yelled to him from the upstairs. When Walling and another firefighter entered the upstairs bedroom, Walling observed Villarreal laying on the bed being restrained by two police officers. Villarreal stated to the firefighters, "just let me die." While they were treating Villarreal, one of the officers mentioned there was also blood on the child who was downstairs with Chaidez. Walling directed another firefighter to check on the child.

Firefighter Jeremiah Gericke was the paramedic who checked the baby. He undressed the child and observed puncture wounds to his left chest, one of which looked to be deep. Gericke testified Chaidez was visibly shaken when she realized the child had been injured. Gericke rushed the child out to the waiting ambulance.

Patrick Schneider, another firefighter, testified that the knife stuck in Villarreal was buried in his abdomen almost to the hilt. His other wounds appeared less serious. Villarreal resisted the paramedics' efforts at the scene. He requested at least five or six times that the firefighters leave him alone.

Dr. Karen Russell treated the Villarreal baby after he was brought to the hospital emergency room. The child had two laceration wounds to the chest wall above the heart that had been made by a sharp implement. The skin at the wound sites was gaping open to the muscle and the cuts were oozing blood. The baby's lungs had not been punctured. Russell sutured the wounds and the baby was discharged from the hospital.

Christopher Webb, a forensic scientist, testified that DNA found on the knife was a match

to Villarreal, but not to the baby. Webb testified that the absence of the baby's DNA on the knife was not necessarily indicative that the knife had not been used on the baby.

Detective Kenneth Kroll attempted to interview Villarreal at the hospital, however, Villarreal was hostile and uncooperative. He did not inquire about the welfare of his son. Kroll was in the surgery room when Villarreal was treated and the knife was removed from his abdomen. The knife penetrated Villarreal's muscle wall, however, no vital organs were punctured. Kroll collected for evidence the knife, which he described as a "locking blade folding knife, pocket knife, [with a blade length] between 3 and 4 inches." Kroll returned to the hospital two days later and Villarreal apologized to him for the way he behaved during the first interview. No discussion was had regarding the welfare of the baby.

Villarreal also testified. Villarreal testified that on May 11, 2008, he, Chaidez and the baby returned home from church at about 3:15 p.m. Chaidez told Villarreal she wanted to drop him off at home and go to Chicago. She did not tell him why she wanted to go to the city. When the group arrived home, they went upstairs to the master bedroom, where the baby also slept. Villarreal changed the child's diapers. Chaidez told Villarreal she was taking the baby with her. He offered to go with them but she declined. She would not tell him where in Chicago she was going. After about 15 minutes of discussion, Chaidez left the baby with Villarreal and left in the truck. When she returned she appeared to be agitated. Villarreal had prepared a bath for the baby in the adjoining bathroom, however, Chaidez refused to let him bathe the baby. He grabbed the child from Chaidez. Chaidez started yelling at Villarreal and they began arguing. The argument lasted for approximately 10 minutes. Chaidez attacked Villarreal, striking him with her fists. She then left the house again and was gone for 15-20 minutes. When Chaidez returned, she resumed the argument and started throwing things at Villarreal. He pulled a knife from his pocket and held it at his side. Chaidez

continued to throw things at Villarreal while he stood at the entrance to the bedroom. Chaidez was outside the bedroom and Villarreal closed the door against her. He turned and noticed the baby was bleeding. He did not know how it happened. He did not know what to do. He “lost it” and started hurting himself. He intended to kill himself. Villarreal stated he did not stab the baby; “it was an accident.” He did not realize until he accidentally stabbed the baby a second time that the baby was hurt. After the police arrived, Villarreal told them he wanted to die with his son. He offered the police money to let him die. He told them the baby was hurt. He struggled with the police because he was afraid and they were “manhandling” him. After he was at the hospital, Villarreal asked the nurses attending to him about the welfare of his baby. Villarreal testified that about one month before the incident he voluntarily left the home he shared with Chaidez for awhile because they needed “to get away *** from each other.” Finances were a big problem in the home.

After closing arguments, the jury retired to deliberate. During deliberations the jury sent the following questions to the trial court: “Please define great bodily harm”and “Does intent to kill mean isolated in a room with a knife?” After consulting with the attorneys, the trial court responded to the jury that it was for the jury as a “collective group”to decide what constituted great bodily harm and gave them the following jury instruction:

“A person intends to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct.”

The jury found Villarreal guilty of two counts of aggravated battery of a child and two counts of attempt first degree murder. With respect to the murder counts, the jury concluded Villarreal was guilty in that he isolated the baby while he possessed a knife and guilty in that he stabbed the baby

with a knife. The trial court sentenced Villarreal on the attempt murder counts only. He received a prison term of two 20-year periods to be served concurrently. Villarreal filed a motion to reconsider sentence and for a new trial which the trial court denied. He follows with this appeal.

ANALYSIS

On appeal, Villarreal argues that this court should vacate his count I conviction because convicting him under the allegation of count I, that he committed the offense of attempt murder when he isolated the child with himself in a bedroom while he possessed a knife and convicting him of attempt murder in that he stabbed the child with the knife violates the one-act, one-crime doctrine. Villarreal argues in the alternative that the State did not prove beyond a reasonable doubt the offense alleged in count I. Because we find for Villarreal on his first issue, we do not address his alternative argument.

Because Villarreal did not raise the one-act, one-crime issue through a trial objection and a posttrial motion, we must first consider whether we will conduct a review under a theory of plain error. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appeal, a defendant must object at trial and raise the issue in a posttrial motion). Under the plain error doctrine, a reviewing court may consider a trial error not properly preserved where the evidence is closely balanced or when the error is of such magnitude that the defendant was denied a fair and impartial trial and remedying the error is necessary to preserve the integrity of the judicial process. *People v. Nieves*, 192 Ill. 2d 487, 502-503 (2000). As a threshold consideration, however, we must first find the issue presents a reversible error. *People v. Williams*, 193 Ill. 2d 306, 348-49 (2000) (absent reversible error, there can be no plain error). Because, for the reasons that follow, we believe Villarreal's conviction on count I of the charges was reversible error, and because an alleged one-act, one-crime violation and the attendant potential for a surplus conviction and sentence affects the integrity of the

judicial process (*People v. Harvey*, 211 Ill. 2d 368, 389 (2004)), we find that the elements that allow for a plain error analysis have been fulfilled.

The one-act, one-crime rule allows multiple convictions when a defendant commits more than one criminal act in an episode or transaction. *People v. Banks*, 260 Ill. App. 3d 464, 471 (1994). If, however, the convictions for both offenses are based on a single physical act, multiple convictions cannot stand. See *Banks*, 260 Ill. App. 3d at 471 (finding no violation of the rule where defendant's acts which caused injuries to the victims constituted deeds distinct from his acts of firing in the direction of a crowd of unarmed people); *People v. Crespo*, 203 Ill. 2d 335, 342-44 (2001) (where State did not differentiate between separate stab wounds but rather charged defendant with the same conduct under different theories of criminal culpability, multiple convictions could not be sustained). For purposes of the one-act, one-crime doctrine, an "act" is defined as any overt or outward manifestation that will support a separate offense. *Crespo*, 203 Ill. 2d at 341. So long as there are multiple acts, their interrelationship does not preclude multiple convictions for offenses that are not by definition lesser included offenses. *Banks*, 260 Ill. App. 3d at 471. Whether multiple convictions are in derogation of the one-act, one-crime doctrine is an issue we review *de novo*. *People v. Witherspoon*, 379 Ill. App. 3d 298, 304 (2008).

In the instant case, we note the State has crafted the charges in an attempt to state multiple distinct acts of attempt murder. The count II conviction was based on a charge alleging Villarreal stabbed the child with a knife, and the count I conviction was based on a charge alleging Villarreal isolated the child in the bedroom with him while he possessed a knife. The State's attempt to parse Villarreal's actions into multiple distinct acts fails, however, because the act of Villarreal in isolating the child with him in the bedroom with a knife is not an act in this case that actually supports a separate offense of attempt murder. See *Crespo*, 203 Ill. 2d at 341 (an "act" is defined as any overt

or outward manifestation that will *support a separate offense*) (Emphasis added.) Therefore, a conviction based on the count I charge cannot stand.

The State charged Villarreal in count I with the offense of attempt first degree murder. Attempt first degree murder is committed when the defendant takes a substantial step toward the commission of a murder with the specific intent to kill the victim. See *People v. Garrett*, 216 Ill. App. 3d 348, 353 (1991). The State's characterization of Villarreal's action in count I, that he "isolated ***[the child], with himself in a bedroom, while he possessed a knife[.]" cannot be used to infer a distinct act of taking a substantial step toward the commission of murder with the specific intent to kill the victim. Even the State admits in its brief that Villarreal's act of locking himself in the bedroom with the baby while in possession of a knife would "arguably" have been innocuous in and of itself. This case, as charged, is unlike those in which, for example, "one stick-up," involving the armed robbery of several victims, supports multiple convictions, or multiple cuts on the victim each constitute distinct acts. See *People v. Myers*, 85 Ill. 2d 281, 288-289 (1981). In these given examples, whether it be one act against multiple victims or multiple acts against the same victim, each act against a victim or each act itself stands on its own as a separate offense. In contrast, in the instant case, Villarreal's act of isolating himself in a room with the child and a knife does not constitute a separate offense of attempt murder against the child.

Moreover, apart from parsing Villarreal's actions into two separate acts in the charging instruments, the State did little more than point out to the jury that there was a charge under count I. In its closing argument, the State, focusing on the child's most serious puncture wound, stated, "[a]nd we submit that when he reached back that second time and came down with that knife, we submit that he had the intent to kill that child." That the jury was confused by the State's approach is evident in its query to the trial court: "Does intent to kill mean isolated in a room with a knife?"

The State's lack of any substantial argument to support the charge of count I is a further indication that the State's focus in this case was on Villarreal's act of stabbing the child, the only act that supports the attempt murder conviction.

For these reasons, we conclude that notwithstanding the State's attempt to separate Villarreal's actions into distinct acts, under the facts of this case, there was but one continuous act supporting one attempt murder conviction. Where more than one offense is carved from the same physical act, prejudice results to the defendant. See *Myers*, 85 Ill. 2d at 287. For this reason, the surplus conviction and sentencing of Villarreal under count I must be vacated. Because we have reversed Villarreal's conviction under count I based on his one-act, one-crime argument, we do not address his sufficiency of the evidence issue.

For the foregoing reasons, the defendant's conviction and sentence for count I, attempt murder, is vacated.

Count I vacated.