NOTICE
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2011 IL App (4th) 100417-U

Filed 9/8/11

NO. 4-10-0417

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: DANTE P., a Minor,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	Champaign County
v.	)	No. 09JD292
DANTE P.,	)	
Respondent-Appellant.	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: Where respondent's convictions on mob action and battery were based on separate acts and battery is not a lesser-included offense of mob action, we find no violation of the one-act, one-crime rule.

¶ 2 Where the supreme court recently found section 5-101(3) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-101(3) (West 2008)) was not unconstitutional under article I, section 8 of the Illinois Constitution (Ill. Const. 1970, art. I, § 8), we need not address respondent's argument.

¶ 3 In March 2010, the trial court found respondent, Dante P., born in January 1993, guilty of mob action and battery and adjudged him to be a delinquent minor. In April 2010, the court committed him to the Illinois Department of Juvenile Justice.

¶ 4 On appeal, respondent argues (1) his battery conviction must be vacated and (2) section 5-101(3) of the Act is unconstitutional because it denies juveniles the right to a jury trial. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In December 2009, the State filed a petition for adjudication of wardship, alleging respondent committed the offenses of mob action (count I) (720 ILCS 5/25-1(a)(1) (West 2008)), criminal damage to property (count II) (720 ILCS 5/21-1(1)(a) (West 2008)), battery (count III) (720 ILCS 5/12-3(a)(1) (West 2008)), and unlawful possession of cannabis (count IV) (720 ILCS 550/4(a) (West 2008)). The State alleged it was in the best interest of respondent and the public that he be adjudged a delinquent minor and made a ward of the court.

¶ 7 In March 2010, respondent's bench trial commenced. Kendrick Long testified he was 17 years old and lived in Champaign. On December 18, 2009, he saw a group of approximately 10 individuals cut through his fenced yard. Long approached the group, which he recognized included respondent and Brian Dunbar, and told them not to cut through his yard. Dunbar stepped up and swung at Long but missed. Long then hit Dunbar. Thereafter, respondent ran and hit Long. Respondent and Dunbar then jumped on Long and hit him more than 10 times with their fists. Long suffered injuries to his ribs, shoulder, and his hearing.

¶ 8 Tino Kelly, Long's cousin, testified he saw Dunbar jump the fence and take a swing at Long. Long responded by hitting Dunbar. Respondent and Dunbar then jumped on Long and hit him in the face, arms, and ribs. Kelly stated respondent hit Long "more than twice."

¶ 9 Champaign police officer Thomas Frost testified he arrived on the scene of what looked like "a small-scale riot." Long stated he had been battered. Several individuals were detained, and Long later identified respondent as one of the assailants.

¶ 10 Respondent testified on his own behalf. He stated he was walking by Long's house when Dunbar and Long got into an argument. Dunbar went into Long's yard, and they

both started fighting. When respondent went into the yard to break up the fight, a man hit respondent in the jaw. Respondent testified he never hit or pushed Long.

¶ 11 Following closing arguments, the trial court found respondent guilty of mob action (count I) and battery (count III) and not guilty of criminal damage to property (count II) and unlawful possession of cannabis (count IV). The court adjudged respondent to be a delinquent minor.

¶ 12 In April 2010, the trial court committed respondent to the Illinois Department of Juvenile Justice for an indeterminate term of 3 years or until he reaches 21 years of age. This court granted respondent's motion to file a late notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 A. One-Act, One-Crime Rule

¶ 15 Respondent argues his battery conviction must be vacated under the one-act, one-crime rule because it was predicated on the same act that formed the basis for his mob-action conviction and because it is a lesser-included offense of mob action. We disagree.

¶ 16 Initially, respondent acknowledges he failed to raise this issue in the trial court and urges us to review the matter under the plain-error doctrine. The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the

> integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

Our supreme court has held a violation of the one-act, one-crime rule results in a surplus conviction and sentence and affects the integrity of the judicial process, and thus satisfies the second prong of the plain-error doctrine. *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004); see also *In re Samantha V.*, 234 Ill. 2d 359, 378-79, 917 N.E.2d 487, 499 (2009) (finding the one-act, one-crime rule applies to juvenile proceedings and a violation of the rule satisfies the second prong of the plain-error doctrine). Thus, we will consider whether respondent's battery conviction must be vacated under the one-act, one-crime rule.

¶ 17 In *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977), our supreme court declared a criminal defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act.

> "Decisions following *King* have explained that the one-act, one-crime doctrine involves a two-step analysis. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper. *Rodriguez*, 169 Ill. 2d

at 186." *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010).

¶ 18 In determining whether respondent's conduct consisted of separate acts or a single physical act, our supreme court has defined "act" as "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566, 363 N.E.2d at 844-45. "[S]eparate blows, although closely related, [can] constitute[] separate acts." *People v. Crespo*, 203 Ill. 2d 335, 342, 788 N.E.2d 1117, 1121 (2001).

¶ 19 In *People v. Dixon*, 91 Ill. 2d 346, 349, 438 N.E.2d 180, 182 (1982), the defendant and at least one codefendant repeatedly struck another jail inmate with broom or mop handles causing multiple contusions, abrasions, and a groin injury to the victim. The supreme court denied the defendant's claim that his convictions for aggravated battery, mob action, and disorderly conduct were predicated upon a single act. *Dixon*, 91 Ill. 2d at 355-56, 438 N.E.2d at 185. The court concluded the evidence indicated the defendant struck the victim at least four or five times, and "the separate blows, even though closely related, were not one physical act." *Dixon*, 91 Ill. 2d at 356, 438 N.E.2d at 185.

¶ 20 In his reply brief, respondent relies on *Crespo*, 203 Ill. 2d at 340, 788 N.E.2d at 1120, where the defendant was convicted of, *inter alia*, aggravated battery and armed violence. On appeal, the defendant claimed the aggravated-battery charge stemmed from the same physical act that formed the armed-violence charge, and the three stab wounds to the victim did not constitute different offenses to justify multiple convictions. *Crespo*, 203 Ill. 2d at 340, 788 N.E.2d at 1120. The State argued the defendant stabbed the victim three times and each act of stabbing constituted a separate offense. *Crespo*, 203 Ill. 2d at 340, 788 N.E.2d at 1120.

¶ 21 The supreme court noted that, although each of the victim's stab wounds could support a separate offense under *Dixon*, the State neither charged the defendant in that fashion nor presented or argued the case to the jury in that way. *Crespo*, 203 Ill. 2d at 342, 788 N.E.2d at 1121. The court concluded the State did not attempt to apportion these offenses among the various stab wounds and to do so on appeal would be unfair. *Crespo*, 233 Ill. 2d at 343, 788 N.E.2d at 1121-22.

¶ 22 In this case, we find *Dixon* is applicable and the concerns of *Crespo* are not present. In count I, the State alleged respondent committed the offense of mob action when he, "without authority of law, used force or violence, disturbing the public peace, acting together with one or more other persons, *** punched Kendrick Long and damaged the vehicle of James Royle." In count III, the State alleged respondent committed the offense of battery when he, "or one for whose conduct he is legally responsible, knowingly and without legal authority caused bodily harm to Kendrick Long, when [respondent] punched Kendrick Long."

¶ 23 The State sought convictions for mob action and battery based both on defendant's own actions and under an accountability theory. Long testified respondent hit him. Thereafter, respondent and Dunbar jumped on Long and hit him more than 10 times with their fists. Long suffered injuries to his ribs, shoulder, and his hearing. Tino Kelly testified he saw respondent hit Long "more than twice."

¶ 24 During closing argument, the State argued Dunbar and respondent came into Long's neighborhood "looking for trouble." After Dunbar swung at Long and missed, Long defended himself. Respondent and Dunbar then began beating Long, resulting in injury. The State contended respondent, acting together with Dunbar, disturbed the public peace by the use of

force or violence and inflicted injury. On the battery charge, the State mentioned its witnesses testified to respondent striking Long multiple times in the head.

¶ 25 Here, the evidence was sufficient to prove respondent, and those he was accountable for, committed several acts to support convictions for mob action and battery. Multiple punches were thrown by respondent and by Dunbar, for whose actions respondent was accountable. As in *Dixon*, the multiple strikes constituted separate acts. Unlike in *Crespo*, the State did not attempt to change its position on appeal to respondent's detriment. Accordingly, multiple convictions were proper as they were based on separate acts.

¶ 26 After finding the conduct involved multiple acts, we must now determine whether battery is a lesser-included offense of mob action. In *Miller*, 238 Ill. 2d at 173-74, 938 N.E.2d at 505-06, the supreme court held the abstract-elements approach is the proper analysis to apply when determining whether a charged offense is a lesser-included offense of another for purposes of the one-act, one-crime rule.

> "Under the abstract elements approach, a comparison is made of 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. *** In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Miller*, 238 Ill. 2d at 166, 938 N.E.2d at 502.

¶ 27 A person commits mob action when he, acting together with two or more persons and without authority of law, uses force or violence to disturb the public peace. 720 ILCS 5/25-

1(a)(1) (West 2008). "A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual ***." 720 ILCS 5/12-3(a) (West 2008).

¶ 28 A comparison of the two offenses indicates mob action does not require the perpetrator to cause bodily harm as battery does. All of the elements of battery are not included within in the offense of mob action. Further, it is possible to commit mob action without necessarily committing battery. Thus, battery is not a lesser-included offense of mob action. Accordingly, we find respondent was properly convicted of both battery and mob action.

¶ 29 B. Jury Trial

¶ 30 In his initial brief, respondent argued section 5-101(3) of the Act (705 ILCS 405/5-101(3) (West 2008)), which states "[m]inors shall not have the right to a jury trial unless specifically provided by this Article," is unconstitutional under article I, section 8 of the Illinois Constitution (Ill. Const. 1970, art. I, § 8), which guarantees the right to a trial by jury to criminal defendants, because juveniles are not afforded that same right. On June 30, 2011, the supreme court rejected a juvenile's "claim that section 5-101(3) of the Act is unconstitutional under article I, section 8 of the Illinois Constitution." *In re Jonathon C.B.*, No. 107750, slip op. at 24 (June 30, 2011) __ Ill. 2d __, __, __ N.E.2d __, __. In his reply brief, respondent concedes his argument based on our supreme court's recent jurisprudence. Thus, we need not address the issue.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against respondent as costs of this appeal.

¶ 33 Affirmed.