

counts II, IV, and V, vacate the defendant's conviction on count III, and remand for new sentencing.

FACTS

On January 21, 2009, the defendant was released from a psychiatric facility. He used a payphone to call Tara Carver, his on-and-off-again girlfriend for more than a year. Tara was a petitioner for an order of protection against the defendant, her second against him, because of his prior violent conduct towards her, and this order was in effect on January 21, 2009. The order expressly stated: "Only the court can change this order. The Petitioner cannot give you legal permission to change this order. If you go near the Petitioner, even with the Petitioner's consent, you may be arrested." The defendant was aware of the order and the scope of its restrictions.

Tara was celebrating her birthday with Craig Smelser when she received the defendant's call. She took the call in a bathroom. Afterward, Tara and Craig continued celebrating. Around 1 a.m. they arrived at Tara's home and then went to sleep in Tara's bed. The defendant arrived at Tara's residence around 3 a.m. Upon gaining entry, the defendant walked towards the bedroom. An altercation ensued between Craig and the defendant. Craig was stabbed multiple times in his right hand, receiving severe injuries. After Craig escaped from the defendant, the defendant turned his attention to Tara, grabbing her by the hair and punching her repeatedly, breaking her nose, and knocking out multiple teeth. She escaped the home and ran to authorities who had begun to arrive on the scene. The defendant fled and later turned himself in to authorities still at the scene.

After the defendant was charged and pleaded not guilty, a one-day bench trial took place on March 24, 2010. During closing arguments, the trial judge asked a number of questions attempting to clarify the facts and the law pertaining to the case. Although the defendant claimed that Tara had invited him to her residence, the judge stated that he

believed that the defendant was without authority to enter Tara's home because of the order of protection, and the judge stated that could not be changed by any invitation on Tara's part because the order could only have been negated or modified through the court system. On March 29, 2010, the trial court found the defendant guilty on counts II through V and not guilty on count I. A posttrial motion for a new trial was filed on April 13, 2010, and a hearing on the motion and sentencing took place on June 3, 2010. At the hearing, the court reiterated its conclusion that because there was a valid order of protection against the defendant, he, as a matter of law, did not have legal authority to enter the residence. For that reason and due to the injuries sustained by Tara and Craig, the court denied the motion for a new trial and sentenced the defendant as stated above. On June 18, 2010, the defendant filed a timely notice of appeal.

ANALYSIS

On appeal, the defendant contends that the trial court erred as a matter of law in its finding that the order of protection circumvented any and all invitations by Tara relating to the "without authority" element of home invasion and that there is sufficient reasonable doubt on the "without authority" element because it is unclear if the defendant was invited over on the night of the occurrence. He also contends that the home invasion charges and the aggravated battery and the domestic battery counts violate the "one-act, one-crime" concept and are lesser-included offenses. The State raises a supplemental issue on appeal, confessing that the defendant may only be sentenced on one count of home invasion and that one of those counts must be vacated and the case remanded for resentencing.

We begin our analysis by considering the issue of whether the trial court erred in ruling that a valid order of protection leads to a *per se* finding that the defendant entered the premises "without authority" pursuant to the home invasion statute. This issue presented is purely one of law and the appropriate standard of review is *de novo*. *People v. Caballero*,

206 Ill. 2d 65, 87-88 (2002).

The defendant first contends that the home invasion convictions should be set aside because the case at issue is analogous to *People v. Reid*, 179 Ill. 2d 297 (1997). In that case, although there was an order of protection in place, the issue was whether the defendant violated the home invasion statute by entering the "dwelling of another" when the dwelling was an apartment which the defendant retained an ownership interest in as a cotenant, but not a possessory interest. *Reid*, 179 Ill. 2d at 314-15. The court ruled that the defendant did not violate the home invasion statute. *Reid*, 179 Ill. 2d at 317. The *Reid* court did not address the order of protection, focusing instead on the issue of whether the apartment was a "dwelling of another." The court held, "[A] defendant does not commit the offense of home invasion when he enters a dwelling which a protective order prohibits him from entering but of which he is an otherwise lawful tenant." *Reid*, 179 Ill. 2d at 316. The court also noted that during the drafting of the statute, that language was meant to specifically exclude domestic disputes from the reach of the statute. In the case at bar, the defendant was never a lawful tenant of the property; he merely lived there from time to time while he and Tara were involved in a romantic relationship, and once their relationship ended he no longer had any right to be on the property. Accordingly, we find *Reid* to be inapposite to the case at bar.

The defendant also contends he had authority to enter the premises because Tara invited him to her home, despite the order of protection. However, orders of protection are orders of the court, not of the victims. *People v. Townsend*, 183 Ill. App. 3d 268, 271 (1989); see also 750 ILCS 60/224 (West 2008) (the modification of an order may only be done through the courts). The defendant had no authority to enter the Carver residence because Tara did not have the authority to grant him entry, only the courts did, and his presence was barred due to the order. The order expressly stated that if the parties wished to resume their relationship, they were required to ask the court to modify or vacate its order. Because of the

existing order of protection, the defendant had no authority to enter the premises, even if he had consent from Tara to do so.

We now move to the issue of whether a new sentencing hearing is required. The defendant was convicted of home invasion charges with respect to both Craig and Tara, one for each person in the residence. The State raised as a supplemental issue on appeal that the defendant may only be sentenced on one count of home invasion and that, therefore, one of the convictions must be vacated and the case remanded for sentencing. We agree. It is well established that there can be only one conviction for home invasion stemming from a single entry into a residence, no matter how many persons are inside. *People v. Cole*, 172 Ill. 2d 85, 101-02 (1996). The references in the statute to entering a dwelling where "one or more persons" are present show that a single entry will support only a single conviction. *Cole*, 172 Ill. 2d at 101; 720 ILCS 5/12-11 (West 2008). Therefore, the trial court erred in sentencing the defendant on two counts of home invasion, and we vacate count III, the second conviction for home invasion, per the State's request. We also grant the State's request to remand for resentencing. Home invasion is a Class X felony under the Criminal Code of 1961 (720 ILCS 5/12-11 (West 2008)). Under the Unified Code of Corrections, the court shall impose consecutive terms if one of the offenses for which the defendant is convicted is a Class X felony and the defendant inflicted severe bodily injury. 730 ILCS 5/5-8-4(d)(1) (West 2008). The home invasion by the defendant resulted in severe bodily injury to both Tara and Craig. Now, even with count III vacated, a remand is required because the aggravated battery conviction must be served consecutively to the home invasion conviction that still stands.

In regard to sentencing, we find that the defendant's argument—that the convictions for aggravated battery and domestic battery as a subsequent offense should be vacated because they are lesser-included offenses of home invasion and, therefore, violate the one-act, one-

crime doctrine—is without merit. The *King* doctrine states, "If the offenses were based on a single act, *** then only the conviction for the most serious offense [is] permitted," but it also states, "[I]f the convictions were based on separate and distinct acts requiring different elements of proof, *** the offenses did not arise from the same conduct." *People v. King*, 66 Ill. 2d 551, 562 (1977).

If there are multiple acts as defined in *King*, their interrelationship does not preclude multiple convictions. *People v. Rodriguez*, 169 Ill. 2d 183, 189 (1996). The one-act, one-crime doctrine requires us to ask, first, whether the defendant's conduct consisted of separate acts or a single physical act and whether any of the offenses are lesser-included offenses. *Rodriguez*, 169 Ill. 2d at 186. The elements of home invasion are (1) an unauthorized entry of a dwelling and (2) the intentional injury of a person therein. 720 ILCS 5/12-11 (West 2008). The "entry into a dwelling" element is not required for either aggravated battery or domestic battery as a subsequent offense. Aggravated battery requires only a battery that causes great bodily harm, permanent disability, or disfigurement. 720 ILCS 5/12-4 (West 2008). As the appellate court has previously held, convictions for aggravated battery and home invasion do not violate the one-act, one-crime doctrine. *People v. Marston*, 353 Ill. App. 3d 513, 520 (2004). Convictions for home invasion and domestic battery as a subsequent offense are based on interrelated acts rather than a single act because "[t]he fact that [the] defendant unlawfully entered [the] home [was] an overt or outward manifestation supporting the home invasion conviction, a separate act from causing [the victim] bodily harm." *People v. Priest*, 297 Ill. App. 3d 797, 802 (1998). Therefore, neither the aggravated battery nor the domestic battery is to be considered as having taken place within the same criminal act as the home invasion.

We also note that neither domestic battery nor aggravated battery is a lesser-included offense of home invasion. If all 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. *People v. Miller*, 238 Ill. 2d 161, 166 (2010). Under this approach, neither offense is a lesser-included offense of home invasion. First, domestic battery as a subsequent offense has two elements that home invasion lacks, those being (1) the victim's identity as a household member and (2) a previous conviction for domestic battery. 720 ILCS 5/12-3.2, 12-11 (West 2008). As to the aggravated battery conviction, that crime requires great bodily harm, permanent disability, or disfigurement, whereas home invasion requires only injury. 720 ILCS 5/12-4, 12-11 (West 2008). Therefore, we find that neither aggravated battery nor domestic battery is a lesser-included offense of home invasion. Accordingly, the separate convictions for home invasion, aggravated battery, and domestic battery should not be vacated because they do not violate the one-act, one-crime doctrine of *King*, nor are they lesser-included offenses.

CONCLUSION

For the foregoing reasons, we affirm the defendant's convictions on counts II, IV, and V, vacate his conviction on count III, and remand for resentencing.

Affirmed in part and vacated in part; cause remanded.