

No. 1-10-2957

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 4511
)	
ALFONSO CAZARES,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.

Justices Howse and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* While defendant's conviction for aggravated battery based on a single verdict is proper, his second conviction is vacated because there cannot be a second conviction based on the same single verdict form and defendant's mittimus should

be corrected to reflect the conviction and sentence.

¶ 2 BACKGROUND

¶ 3 Following a jury trial in June 2010, defendant, Alfonso Cazares, was found guilty of two counts of aggravated battery against Detective Ronnie Lewis, a police officer, while performing his duties in a lineup room on February 19, 2009. Defendant was sentenced to two concurrent terms of 5 years and 6 months imprisonment. Defendant now appeals his conviction. For the reasons that follow, we affirm in part and vacate one of the convictions in part.

¶ 4 A. Trial

¶ 5 Following the February 19, 2009 altercation in a police line up, defendant was indicted on two counts of aggravated battery for intentionally or knowingly and without lawful justification making "physical contact of an insulting or provoking nature" with Detective Lewis, an officer performing his duties. The following evidence was presented at defendant's jury trial.

¶ 6 Detective Ronnie Lewis, Matthew Castro and Alejandro Valenzuela testified for the State at trial. Detective Lewis testified that on February 19, 2009, he was assisting in a lineup room in which defendant was a filler, which is a person who is not a suspect but is used to fill a lineup. Defendant was not following instructions and was otherwise disruptive, i.e. uttering profanity and racial slurs, and sitting improperly for the lineup. Lewis testified he approached defendant to calm him down at which time defendant hopped up on a bench, grabbed Lewis's tie with his left hand and starting punching Lewis in the face with his right hand. Lewis tried to pull away by backing up and protected himself by blocking defendant's punches and punching back. When another officer intervened, the two officers put defendant on the ground and handcuffed him.

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This altercation took place in less than a minute.

¶ 7 Mr. Castro, a filler for the lineup, testified that defendant was not listening to officers instructions, used racial slurs and was swearing. Mr. Castro stated he has bad eyesight and approached the defendant in the court room before identifying him, but averred that he does not wear glasses. Mr. Castro, further stated defendant was acting obnoxiously and childishly, and that he never heard defendant request not to be in the lineup. Detective Lewis told defendant to sit appropriately several times. Defendant did not follow the simple directions given him. Lewis then approached defendant at which time defendant stood up on the bench, grabbed Lewis's tie and started striking him in the face, hands and body. Other officers arrived, grabbed defendant by his legs and arms and handcuffed him.

¶ 8 Mr. Valenzuela, another filler, testified that defendant refused to follow instructions and made racial comments. He also never heard defendant request not to be in the lineup. Defendant was sitting Indian style with his feet on the bench, and after Detective Lewis asked defendant to sit down correctly five or six times, the detective approached him and asked what his problem was, why he was not cooperating, and how old he was. Defendant then charged upwards, grabbed Lewis's tie, pulled him down and punched Lewis's upper body and face. Detective Lewis began to punch defendant in an attempt to pry him off. Mr. Valenzuela stated he did not see Detective Lewis punch defendant before defendant struck him. Other officers arrived, wrestled defendant to the ground and handcuffed him. Both Mr Castro and Mr. Valenzuela stated they received no promises from the State's Attorney's Office in exchange for their testimony.

¶ 9 Defendant testified on his behalf that while in custody for a misdemeanor, he reluctantly

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agreed to participate in a lineup. According to defendant, when he told the transporting officers he did not want to participate, they told him to tell the officers conducting the lineup.

¶ 10 Defendant was put in a lineup room with Detective Lewis, a female officer and five other fillers. Defendant testified that he knew Lewis was a police officer, and that he told the officers he did not want to participate. He acknowledged that when he was told to sit on the bench he did not do so, and that when he sat on the bench, he did not sit still, leaned to the side and also refused to remove his vest when asked to do so. Defendant stated Detective Lewis tried to remove defendant's vest and when unable to, began to punch him in the face. Defendant then grabbed Lewis's midsection and hid his face to prevent further punches. Lewis then grabbed defendant and slammed him on the floor. Other officers arrived and handcuffed him.

¶ 11 Defendant denied ever punching Detective Lewis, grabbing his tie, or choking Lewis. He denied using racial slurs but stated he used minor profanities.

¶ 12 Finally, defendant testified he informed police he needed medical treatment. In rebuttal, Detective Szudarski testified for the State that he asked defendant whether he was okay or needed medical attention and defendant replied that he did not and was okay.

¶ 13 B. Jury instruction and sentencing

¶ 14 Prior to trial, on June 8, 2010 there was a jury instruction conference. The State submitted a single set of verdict forms for the jury, under which the jury would return a single general verdict of guilty or not guilty of aggravated battery. Defense voiced no objection and offered no instructions.

¶ 15 Following closing arguments, the parties reviewed the jury instructions again, and agreed

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the aforementioned instructions were proper. The jury deliberated and returned a general verdict of guilty of aggravated battery.

¶ 16 The trial court sentenced defendant to five years and six months in the Illinois Department of Corrections for each count, to be served concurrently. Defendant's mittimus lists the offenses of conviction as "Aggbtry/harm/peace officer." This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant raises two arguments in this appeal: (1) the trial court erred when it submitted a single general verdict form to the jury; (2) the trial court erred when it sentenced defendant on both counts to two concurrent sentences on a single general jury verdict.

¶ 19 For the reasons that follow, we find: (1) the trial court did not err in submitting a single jury verdict, (2) defendant can only be convicted and sentenced to one count of aggravated battery based on a single general jury verdict and (3) defendant's mittimus will be amended to reflect the charges and verdict.

¶ 20 A. Conviction on a general verdict was proper

¶ 21 Defendant asserts the trial court's instructions allowed the jury to return a general guilty verdict of aggravated battery when there were two distinct acts and two separate crimes.

Defendant accordingly asserts his Federal and State constitutional rights of conviction by a unanimous jury were violated. The State responds that when two counts in one indictment are for one continuous transaction, a single verdict form is valid. We agree with the State.

¶ 22 First, the State correctly contends that this matter was forfeited by defendant's failure to object at trial and to raise the issue in his posttrial motion. In order to preserve an issue for

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review, a defendant must make a timely objection at trial and include the allegations of error in a post-trial motion. *People v. Naylor*, 229 Ill. 2d 584, 592 (2008), quoting *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 23 Furthermore, defendant failed to offer alternate instructions or verdict forms; nor does the record indicate alternate instructions or verdict forms were tendered. Unless all instructions, both given and refused, are contained in the record, "a claim of error based on the giving or refusal of instructions will not be heard." *People v. Reynolds*, 294 Ill. App. 3d 58, 69 (1st Dist. 1997); *People v. Daily* 41 Ill. 2d 116, 121 (1968). Thus, this argument is waived.

¶ 24 Defendant, nevertheless asks us to review this issue under the plain error rule. Defendant argues that the State's violation of his right to conviction upon a unanimous jury verdict constitutes plain error. The plain error rule allows a reviewing court to consider a trial error not properly preserved when "(1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial." *People v. Byron*, 164 Ill. 2d 279, 293, (1995); *Harvey*, 211 Ill. 2d at 387.

¶ 25 Even if the issue were properly before us, the trial court did not err. When several counts are charged, a general verdict form is sufficient when the various counts state the same transaction. *People v. Travis*, 170 Ill. App. 3d 873, 892 (1988); *People v. Josephine*, 165 Ill. App. 3d 762, 767 (1987); *Reynolds*, 294 Ill. App. 3d at 69.

¶ 26 In *Reynolds*, in considering what constitutes the "same transaction," this court found the joinder provision of the Code of Criminal Procedure of 1963 to be informative. It states in pertinent part; "separate counts may be charged in a single indictment if they are based on the

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same act or on [two] or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4(a). *Reynolds*, 294 Ill. App. 3d at 70. The factors to be considered are: (1) proximity of time and location; (2) existence of a shared common purpose; and (3) similarity of the evidence to establish elements of the offense. *Reynolds*, 294 Ill. App. 3d at 70, citing *People v. Jackson*, 233 Ill. App. 3d 1089, 1098 (1992); *People v. Mays*, 176 Ill. App. 3d 1027, 1037 (1988).

¶ 27 In *Reynolds*, defendant was indicted on twenty-four counts which included three counts for aggravated sexual assault of a minor, three counts for sexual assault, two counts for child pornography and four for obstruction of justice. *Reynolds*, 294 Ill. App. 3d at 60-61. The jury was given general verdict forms "guilty" and "not guilty" for each offense and not for each count. *Id.* The jury returned a general verdict of "guilty" for each of the offenses. *Id.*

¶ 28 Defendant argued the convictions must be reversed because he was denied his rights under the United States and Illinois constitutions to unanimous jury verdicts. *Reynolds*, 294 Ill. App. 3d at 69. Regarding the criminal sexual assault and aggravated sexual abuse verdict forms, defendant argued the jury should have been given separate forms for each type of sexual penetration and for each of three identifiable "episodes" of sexual interaction. *Reynolds*, 294 Ill. App. 3d at 70. He asserted "the signed verdicts may not have reflected unanimous agreement on a particular "episode." *Id.*

¶ 29 The *Reynolds* court disagreed. In doing so, it relied on the joinder provision and decisions from other states which have concluded that when a state proceeds on a theory that a defendant engaged in a continuous course of conduct, a separate verdict form is not required for

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each individual occurrence. *Reynolds*, 294 Ill. App. 3d at 70., citing *Soper v. Seattle*, 731 P.2d 587, 591 (Alaska App. 1987); *People v. Winkle*, 206 Cal. App. 3d 822, 830 (1988); *State v. Spigarolo*, 556 A. 2d 112, 129 (1989). (the lack of a unanimous jury instruction did not deprive the defendant of his right to a unanimous verdict when the state had proceeded under a theory that the defendant's conduct was "in the nature of a continuing offense.") *Spigarolo*, 556 A. 2d at 129; *Id.*

¶ 30 In *Reynolds*, the State proceeded on a theory of continuous course of conduct. *Reynolds*, 294 Ill. App. 3d at 71. Accordingly, the court rejected defendant's argument that in regard to the criminal sexual assault and aggravated sexual abuse counts, defendant asserts there were at least three episodes of unlawful conduct alleged, and the jury might not have agreed on the specific type of penetration or the specific incident of sexual interaction. *Id.* This court held that no such agreement was required because all of the episodes were part of an ongoing relationship. *Id.* The general verdict was proper. *Id.* Similarly, in regards to the obstruction of justice counts, the State showed that the defendant's efforts to remove the victim from Illinois and to obtain retractions of her statements were part of a continuous course of conduct to thwart a single prosecution. *Id.* The court held that the evidence supported obstruction of justice counts as part of the same transaction, and the general verdict form was proper. *Id.*

¶ 31 Additionally, the court in *Travis*, 170 Ill. App. 3d at 890, held that the jury need only be unanimous with respect to the ultimate question of defendant's guilt or innocence of the crime charged, and the unanimity is not required concerning alternate ways in which the crime can be committed. In *Travis*, a jury instruction allowed defendant to be convicted of murder as a

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principal or under an accountability theory based on three different mental states or by committing one of three felonies. *Travis*, 170 Ill. App. 3d at 882. Defendant argued the instruction denied him his right to a unanimous jury verdict because it did not require the jury to be unanimous on every element but only on the verdict in general. *Travis*, 170 Ill. App. 3d at 890. The court rejected this argument. The Court's reasoning included the following: "to hold otherwise would create chaos with an already overburdened criminal justice system. A contrary ruling would require one of two things; either the State would be required to proceed under one specific theory, which could allow a defendant to escape justice if the State cannot meet its burden, or the court would be required to give verdict forms which detail all the possible combinations of factors to insure the jury was unanimous on each factor..." *Travis*, 170 Ill. App. 3d at 892. See *Diaz*, 244 Ill. App. 3d 268, 270 (1993) (where the trial court instructed the jury to convict defendant of aggravated battery they had to find he either caused great bodily harm to the victim or caused bodily harm while using a deadly weapon, this court rejected defendant's argument that the jury instruction permitted the jury to return a general guilty verdict of aggravated battery even though one or more jurors disagreed as to which alternative course of conduct defendant committed.); *Rand*, 291 Ill. App. 3d 431, 438-40 (1997) (where the trial court instructed the jury that to find defendant guilty of stalking the State must prove defendant on at least two separate occasions knowingly followed or placed the victim under surveillance..., this court rejected defendant's argument that the court should have instructed the jury they must unanimously agree on which of the dates charged defendant surveilled, and held there was no constitutional violation because the jury was unanimous regarding its ultimate conclusion

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defendant was guilty of stalking.)

¶ 32 As highlighted by the State, Illinois cases are in full accord with common law and federal case law regarding constitutional unanimity. In *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) plurality opinion, quoting *McCoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J. concurring) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict"); *Richardson v. United States*, 526 U.S. 813 (1999) citing *Anderson v. United States*, 170 U.S. 481, 499-501 (1898), *Schad*, 501 U.S. at 631-32 (federal jury need not always decide unanimously which of several possible sets of underlying facts make up a particular element or which of several specified means the defendant used to commit an element of the crime).

¶ 33 Similarly, in the case at bar, defendant was charged with separate counts of a single offense that arose out of the same transaction or "continuous course of conduct". Defendant was charged with two counts of aggravated battery. One count charged defendant with committing a battery and making physical contact of an insulting or provoking nature to Detective Lewis, whom defendant knew to be a police officer engaged in the performance of his authorized duties, by choking and one count charged the same by punching Detective Lewis.

¶ 34 Defendant argues that the State's theory of the case distinguished between the choking

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and punching as two distinct acts. Defendant asserts that in opening statements and closing argument, the State repeatedly distinguished between the separate charged acts. We disagree. Though the separate acts were mentioned by the State, the record indicates that the State presented testimony and opening and closing arguments centered on the charge of aggravated battery as a whole. During the State's opening arguments the prosecution stated, "All of you are here today and all of you were here yesterday because of what he (defendant) did on February 19, 2009, at about 6:30 in the evening. And after you hear all of the evidence in the case you will know that this defendant is guilty of aggravated battery to a police officer." Thus, the State did not distinguish between the two counts but referred to a single incident of aggravated battery. At trial, the State showed the punching and choking occurred simultaneously as part of the same physical altercation.

¶ 35 Furthermore, the prosecution stated during closing arguments "You heard the charge in this case is aggravated battery. But how do you know that the State has proven the case of aggravated battery? You're going to know through jury instructions and the law..." The State also informed the jury that to convict defendant of aggravated battery the State must prove: (1) there was physical contact between defendant and Detective Lewis, (2) defendant knew Detective Lewis to be a peace officer; and (3) Detective Lewis was conducting official duties. The State argued the altercation was one continuous course of conduct which included punching and the pulling of Detective Lewis' tie by defendant. By way of photos, entered as State's evidence, the State also showed that Detective Lewis had sustained bodily harm due to this altercation with defendant and his attempt to defend himself. The State argued defendant had no right to punch,

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choke or touch Detective Lewis. The State then said defendant committed aggravated battery and should be found guilty of aggravated battery. The record shows the State's theory of the case, during opening statements, trial testimony and closing argument, was not two distinct crimes as defendant argues, but one continuous course of conduct.

¶ 36 Moreover, defense counsel, in her closing argument, stated that "all the testimony was about one event, one frustrating event." Thus, a general verdict form was appropriate because both counts arose out of the same transaction or "continuous course of conduct" between defendant and Detective Lewis. Consequently, we follow *Reynolds*, *Travis*, *Diaz* and *Rand* and hold there was no constitutional violation because the jury was unanimous regarding its ultimate conclusion defendant was guilty of aggravated battery.

¶ 37 Defendant relies on *People v. Scott*, 243 Ill. App. 3d 167 (1993), for the proposition when a defendant is charged with multiple crimes, the jury must return a unanimous verdict of guilt as to each crime for which a conviction is sought. This reliance is misplaced. Because, in *Scott*, defendant was charged with three counts of delivering controlled substances to three different police officers on three different occasions. *Scott*, 243 Ill. App. 3d at 168. The court felt that given the facts of this case it was plausible that a unanimous guilty verdict could have been rendered without all twelve jurors agreeing that defendant delivered a controlled substance to a particular recipient as set forth in any individual count of the indictment. *Scott*, 243 Ill. App. 3d at 169. However, in the present case, the charges were based on one ongoing altercation, i.e. continuous course of conduct, an altercation between defendant and Detective Lewis. This court has previously held that a general verdict form is entirely appropriate when the separate counts

arise out of a single transaction. *Reynolds*, 294 Ill. App. 3d at 69-71, *Travis*, 170 Ill. App. 3d at 892, *People v. Josephine*, 165 Ill. App. 3d at 767.

¶ 38 B. One verdict supports one conviction

¶ 39 Defendant argues, in the alternative, that a single verdict can only support a single conviction, and therefore one of his two convictions should be reversed. The State concedes defendant's alternative argument. A general verdict can support a single conviction and sentence because the jury unanimously found defendant guilty of aggravated battery. Further, a general verdict can support a conviction and sentence so long as the "punishment imposed is one which is authorized to be inflicted for the offense charged in any one or more of the counts." *People v. Smith*, 233 Ill. 2d 1, 19 (2009).

¶ 40 The one-act, one-crime rule prevents multiple convictions when more than one offense is carved from the same physical act. *People v. Lindsey*, 324 Ill. App. 3d 193, 200 (2001); *People v. McCarter*, 339 Ill. App. 3d 876, 880 (2003). Under the one-act, one-crime rule a defendant may be convicted for one crime resulting from a single act. *People v. Dresher*, 364 Ill. App. 3d 847, 863 (2006); *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010). For multiple convictions to be sustained, the indictment must indicate that the State intended to treat defendant's conduct as multiple acts. *People v. Crespo*, 203 Ill. App. 2d 335, 345 (2001).

¶ 41 In *Crespo*, a jury convicted defendant of first degree murder, one count of armed violence, one count of aggravated battery causing great bodily harm, one count of aggravated battery using a deadly weapon in the stabbing of a victim. *Crespo*, 203 Ill. 2d at 337. The trial court sentenced defendant to 75 years for murder, 30 years for armed violence and 5 years for

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aggravated battery after merging the two aggravated batteries. *Id.*

¶ 42 Defendant appealed and argued his conviction for aggravated battery should be vacated because it stemmed from the same physical act as the armed violence charge. *Id.* On appeal to our supreme court, defendant argued the three stab wounds did not constitute different offenses such that multiple convictions could be sustained. *Crespo*, 203 Ill. 2d at 340. The State argued the three stab wounds were three separate and distinct acts each capable of independently sustaining a criminal conviction. *Id.*

¶ 43 Relying on *Dixon*, the *Crespo* court held that separate blows, although closely related, constituted separate acts which could properly support multiple convictions with concurrent sentences. *Crespo*, 203 Ill. 2d at 342, citing *People v. Dixon*, 91 Ill. 2d 346, 356 (1982).

However, the court in *Crespo* found that the counts charged in the indictment did not differentiate between the stab wounds and therefore the counts charged defendant with the same conduct under different theories. *Id.* The court also found, the State's theory at trial, as shown by its argument to the jury, supports the conclusion that the intent of the prosecution was to portray defendant's conduct as a single attack. *Crespo*, 203 Ill. 2d at 344. The court held the indictment must indicate the State intended to treat the conduct of defendant as multiple acts in order for multiple convictions to stand. *Crespo*, 203 Ill. 2d at 345.

¶ 44 Moreover, in *Diaz*, where the conduct giving rise to the aggravated battery issue instruction arose from one transaction or series of connected acts, the jury was instructed to convict defendant of aggravated battery if they found defendant guilty in one of two ways and it returned a general verdict of guilty. *Diaz*, 244 Ill. App. 3d at 273. Defendant requested his order

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of conviction and sentence be amended to reflect one conviction, not two, where his order of conviction and sentence stated he was convicted of two counts of aggravated battery. *Diaz*, 244 Ill. App. 3d at 274. The State agreed with defendant and this court amended the conviction and sentence to comport with the jury's verdict. *Id.* See *People v. Denson*, 407 Ill. App. 3d 1039, 1039 (2011) (State confessing error in obtaining multiple convictions were one jury verdict obtained).

¶ 45 As *Crespo* holds, the State in this case was permitted to seek multiple convictions because aggravated battery was charged two ways. However, the State argued and asked for a guilty verdict of aggravated battery and since the State requested a single verdict form, it asked the jury to return a finding of guilty or not guilty on acts based on the same transaction. Separate verdict forms were not requested by either party which precluded the trial court from entering sentences on both charges.

¶ 46 Therefore, we conclude that in this case where the State brought separate charges, but argued the charges were based on one transaction, one continuous course of conduct and submitted one verdict form, the State is precluded from obtaining two convictions. There can be but one conviction where both charges were predicated on a single act. *People v. Lily*, 56 Ill. 2d 493, 495 (1974). Accordingly, although we affirm defendant's conviction for one count of aggravated battery and the sentence imposed on a general verdict form of guilty, we vacate the conviction and sentence for the remaining count of aggravated battery. We amend the order of conviction and sentence to reflect one count of aggravated battery and one sentence of five years and six months.

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¶ 47. Defendant finally contends his mittimus should be corrected to reflect the jury's verdict. Again, the State concedes and we confirm. Whether a mittimus should be corrected is a question of law and will therefore be reviewed *de novo*. *People v. Kruger*, 175 Ill. 2d 60, 64 (1996). Where the mittimus does not correctly reflect the defendant's conviction and sentence, the mittimus should be amended to conform to the judgment. *People v. Pryor*, 372 Ill. App. 3d 442, 438 (2007). Defendant's mittimus will be amended to reflect one conviction and one sentence for aggravated battery wherein defendant made physical contact of an insulting and provoking nature to a peace officer.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, we affirm the trial court's judgment in part, vacate in part and remand these causes to the circuit court so defendant's mittimus may be corrected as directed.

¶ 50 Lastly, the State requests this court require defendant to pay costs and a fee of \$100 to the State for having to defend this appeal. In support, the State cites *People v. Nicholls*, 71 Ill. 2d 166, 174 (1978), in which the court held that the State is authorized by statute to recover attorney fees as costs in the appellate court against "an unsuccessful criminal appellant upon affirmance of his conviction." See 725 ILCS 5/110-7(h) (West 2004); 55 ILCS 5/4-2002.1 (West 2004). However, insofar as we find one of defendant's convictions should be vacated based on a single verdict form, defendant is not a completely unsuccessful criminal appellant, so recovery of costs is not warranted.

¶ 51 Affirmed in part, reversed in part, and remanded.

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