

2013 IL App (1st) 110886-U

FIFTH DIVISION
JUNE 14, 2013

No. 1-11-0886

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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 11852
)	
FILIBERTO SOTELO,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's aggravated driving under the influence of alcohol convictions affirmed over his challenges to the trial court's compliance with Supreme Court Rule 431(b), and to statements made during the State's closing arguments.

¶ 2 Defendant, Filiberto Sotelo, was convicted of three counts of aggravated driving under the influence of alcohol and sentenced to concurrent 54-month terms of imprisonment. On appeal, defendant contends that his convictions must be reversed because the court did not comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) when questioning prospective jurors, and because the State committed prosecutorial misconduct by making certain statements during closing arguments. Defendant also contends that, if his convictions are affirmed, his mittimus must be corrected to avoid a violation of the one-act, one-crime rule.

¶ 3 During jury selection, the court advised the venire of certain principles that “apply to this criminal trial like they would apply to every other criminal trial in the history of our country[.]”

The court explained:

"This is how the trial starts. The accused is presumed to be innocent. We don't take a position, well, he must have done something wrong or he or she wouldn't be here. It wouldn't have gone this far unless something happened. The accused is presumed to be innocent when the trial starts. Anybody have a problem with that fundamental principle of justice? When a criminal trial starts, the accused is innocent. If you have a problem, raise your hand. No hands are raised.”

¶ 4 It continued:

"There is only one way anybody can be guilty of a crime *** [and that] is if the government who brought the charges against the accused can prove guilt beyond a reasonable doubt. *** The government has the burden of proof. They have to prove the case

beyond a reasonable doubt. We don't guess or think or make a hunch somebody is guilty. Government has to prove guilt beyond a reasonable doubt. Anybody have a problem with that proposition? If you have a problem with that, raise your hand. No hands are raised.”

¶ 5 Finally, the court discussed the “last proposition”:

"[I]n a criminal trial, the accused does not have to prove their innocence. An accused does not have to testify. They don't have to call witnesses on their own behalf. In a criminal case, the burden of proof is on the government. They have to prove guilt beyond a reasonable doubt. The accused doesn't have to prove anything at all.

Hypothetically speaking, there can be a criminal trial. Government can call 100 witnesses against the accused. The accused, which is their right, may not testify or call any witnesses on their own behalf. If you hear from 100 people on one side and no people from the other side, there can be a doubt in a jury's mind of the guilt of the accused.

With that being said, does anybody have any opinions like the defendant must testify? No hands are raised."

¶ 6 After the jury was selected and the trial began, the State called Chicago police officer Elliot Musial who testified that on June 19, 2009, about 9 p.m., he was on duty at a roadside safety check in Chicago. The purpose of the check was to insure that drivers passing through the

safety check had valid licenses and were not under the influence of alcohol. Officer Musial testified that at the time defendant drove through the safety check, traffic was moving slowly and backed up for approximately four blocks. The officers were stopping one out of every ten drivers, and any drivers who were committing an obvious traffic violation. Officer Musial was the "point officer" who stopped and made first contact with the drivers.

¶ 7 About 9:20 p.m., Officer Musial made a hand gesture for defendant to stop his vehicle. He testified that defendant did not commit any obvious traffic violations, but was stopped because he was tenth in the sequence. Officer Musial made contact with defendant who stopped and rolled down his window. He spoke to defendant in English, and defendant responded in English. The officer asked if he had a driver's license, and defendant was unable to produce one. The officer noticed a strong odor of alcoholic beverages from his breath and from the inside of the vehicle, and observed that he had bloodshot eyes and slurred speech. Defendant spoke in a slight accent, but Officer Musial testified that he could tell the difference between slurred speech and an accent. Officer Musial asked defendant if he had been drinking, and he indicated that he had. Based on his observations, Officer Musial told defendant to exit the vehicle, and motioned for another officer, Roman Czygryn, to approach. Defendant did not have trouble exiting his vehicle, and he walked away, unassisted, with Officer Czygryn.

¶ 8 Officer Czygryn testified that he was working at the roadside safety check on June 19, 2009, and that about 9:30 p.m., after Officer Musial made contact with defendant, he was called over to continue the investigation. As he spoke to defendant, he detected an obvious odor of alcoholic beverages on his breath. He observed that defendant's eyes were bloodshot, his face was flushed, and his speech was slurred. Based on his observations, Officer Czygryn instructed defendant to perform three field sobriety tests.

¶ 9 The first test was the horizontal gaze nystagmus test, during which defendant was instructed to keep his head still and follow the movements of a pen or stylus with his eyes. Officer Czygryn testified that defendant failed part of the test because his eye movement in both eyes had a "lack of smooth pursuit." The officer explained that this means that "the pupil is jumping instead of proceeding in a smooth movement. Someone who is not under the influence will be able to follow the pen very smoothly and it's very obvious."

¶ 10 The second test was the "walk and turn" test, during which defendant was instructed to walk nine steps forward, rotate 180 degrees in small steps, and take nine steps back. He was told to walk in a heel-to-toe motion, with his shoes touching at every step. Officer Czygryn testified that defendant exhibited a sign of impairment during this test because his steps were too long and he could not keep his feet less than one-half inch apart.

¶ 11 The final test was the "one leg stand" test, during which defendant was instructed to pick up one leg, raise it six inches off the ground, and count to 30. Officer Czygryn testified that defendant put his foot down four times during the course of the test.

¶ 12 Based on the results of the sobriety tests and Officer Czygryn's observations of defendant, he placed him under arrest for driving under the influence of alcohol. Specifically, the officer testified that he based his decision on "his bloodshot eyes, his slurred speech, his flushed face, his inability to maintain his balance on [the] one-legged stand test and the odor of alcoholic beverage on his breath *** taken in aggregate[.]" Officer Czygryn then escorted defendant to the breath alcohol testing vehicle, where defendant agreed to take a breathalyzer test. Officer Czygryn observed defendant for 20 minutes to confirm that he did not take anything by mouth and did not vomit. Officer Czygryn ensured that the breathalyzer machine was functioning properly by performing an "air blank" which produced a result of "all zeros[.]"

indicating that the machine had been cleared of any prior test and was ready for a new sample. After 20 minutes, defendant submitted a breath sample, which resulted in a reading of 0.116, over the legal limit of 0.08. The State then entered into evidence a printout showing the .000% air blank and .116% results of defendant's breath sample.

¶ 13 Defendant was taken to the police station, and Officer Czygryn ran a check on defendant's driver's license which indicated that his license had been revoked. Defendant was read his *Miranda* rights, waived them, and agreed to make a statement. During the statement, defendant stated that he had consumed "six or seven beers" between 7 and 9:30 p.m.

¶ 14 On cross-examination, Officer Czygryn testified that during the horizontal gaze nystagmus test, defendant exhibited two of six possible clues of impairment, and the officer had been trained to look for four or more clues as a "failure" of the test. During the walk and turn test, defendant exhibited one of eight possible clues of impairment, and he had been trained to look for two or more clues as a "failure" of the test. On the one leg stand test, defendant exhibited one of four possible clues of impairment, and he had been trained to look for two or more clues as a "failure" of the test. Therefore, the officer stated "by definition[,] defendant passed the field sobriety tests.

¶ 15 On redirect, the officer testified that if an individual puts his foot down three or four times during the one leg stand test, he or she is considered to be incapable of doing the test. He also testified that, in his experience, approximately 10% of the time a subject will be able to technically pass field sobriety tests, but will be found to be over the legal limit after a breath test.

¶ 16 The defense called Dr. Ronald Henson, whom the court accepted as an expert in the specific type of breathalyzer machine used in this case, and in the theory of extrapolation of blood alcohol levels. Dr. Henson testified to a number of issues that he claimed affected the

reliability of defendant's breath sample result.

¶ 17 First, Dr. Henson testified that the type of breathalyzer machine used on defendant did not have "mouth alcohol detection capability." He explained that if he were to take "alcohol or beer or Scope mouthwash, *** swish it around and spit it back out and blow into the [breathalyzer machine]" the device would not generate an error message indicating that mouth alcohol is present, but instead would generate a numerical value result. On cross-examination, he testified that if an individual is observed for 20 minutes, and he does not put anything in his mouth for that period of time, "most of the time" there should be no mouth alcohol present, but "it is not a hundred percent."

¶ 18 Dr. Henson also testified that he had examined the result printout from defendant's test, and it indicated that the breathalyzer machine did not use a cell enhancement module component ("CEM"). He testified that the CEM flushes the machine with heated air to ensure that there is no condensation with trapped alcohol molecules remaining in the machine from a previous test, and that the absence of a CEM affected the reliability of defendant's result.

¶ 19 Dr. Henson next testified that the National Safety Council recommends that two breath samples be taken. He acknowledged that the State of Illinois recommends only one sample, but testified that two samples should have been taken to look for consistency in the results.

¶ 20 Finally, Dr. Henson asserted that the result can only determine defendant's blood alcohol concentration at the time of the test, not at the time he was driving. He explained that there is a delay in time after a person ingests alcohol until his or her blood alcohol content is affected; after alcohol is ingested, it travels from the stomach to the small intestine, and only then is it absorbed into the blood stream. Therefore, it was possible that defendant's blood alcohol content was lower at the time he was driving than when he was subsequently tested.

¶ 21 On cross-examination, Dr. Henson acknowledged that he had not inspected the specific breathalyzer machine used, and he had not spoken to defendant or to the officers about the test.

¶ 22 In rebuttal, the State called Master Sergeant Robert Boone of the Illinois State Police, who testified that, the day before defendant's breath test, he had certified that the breathalyzer machine used by Officer Czygryn was working accurately. Sergeant Boone testified that he was certified in breathalyzer machines, and that the specific machine used in this case had an internal CEM. He acknowledged that the CEM has an on-off switch, and he did not know whether the CEM was activated during defendant's test. He testified, however, that even if the breathalyzer did not have a CEM, it would mean "absolutely nothing" about the validity of the results. The CEM heats the device to a temperature anywhere between 10 and 40 degrees Celsius, the operating range of the device. The purpose of the CEM is only to expedite the process of cleaning and resetting the unit so that it is ready to be used again in a shorter period of time. Before a breath test could be administered, the machine had to be tested for residual alcohol. If the machine was cleared of residual alcohol and ready for a new sample, the test result would produce a printout showing three zeros. The CEM would merely allow the machine to show those three zeros more quickly.

¶ 23 Sergeant Boone also testified that if a suspect is observed for 20 minutes and does not regurgitate or put any foreign substance into his mouth, any residual alcohol in the subject's mouth would be eliminated or absorbed into the system and the subsequent breath sample would be valid.

¶ 24 Defense counsel recalled Dr. Henson on surrebuttal, who disagreed with Sergeant Boone's testimony that the CEM had no effect on the reliability of the test results, and asserted that the CEM was not used or fully operational at the time defendant's test was administered

because the printout revealed that the temperature was 25 degrees Celsius. Dr. Henson testified that if a CEM was operational, he would expect to see a temperature reading of 33-35 degrees Celsius.

¶ 25 In closing argument, defense counsel argued:

"Now, when I think about these roadside safety checks, they remind me of fishing expeditions and the shows that I watch on TV, either [on] Animal Planet or Discovery Channel, where these fisherman throw out these big nets and *** they pull everything in. They see what they can catch in those nets.

If they are fishing for tuna, sometimes dolphins get caught in the nets, but they have to catch the tuna. They are doing their jobs.

*** This isn't an incident where [defendant] was driving all over the road [or] where there was an accident. This is an incident where they set out the net and the net caught traffic for four blocks back from the site of the checkpoint[.] *** They have got to catch some people there. They have to catch some criminals[, and] some DUIs. *** That's why they set these up. *** They are doing their jobs. *** [J]ust like in the fishing shows, when you are fishing for tuna, you are going to catch some other things in there."

¶ 26 In the State's rebuttal argument, it asked the jury, "Why do you care about this case? Why care? Because drunk drivers kill people every single day. 14,000 people a year." Defense counsel objected, but was overruled. The State continued, "14,000 people a year are killed by drunk drivers. This case is important because drunk drivers pose a danger to everyone out on the

street. That's why this case is important, and but for the fact that this man was pulled over on a roadside safety check, he could have caused harm that day as well." Defense counsel objected again, and was overruled.

¶ 27 After deliberations, the jury convicted defendant of three counts of aggravated driving while under the influence of alcohol. Defendant now appeals that judgment.

¶ 28 Defendant first contends the circuit court violated Supreme Court Rule 431(b) (eff. May 1, 2007), because it failed to adequately ensure that the jury understood and accepted the Rule 431(b) principles of law. Where an issue concerns compliance with a supreme court rule, review is *de novo*. *People v. Ware*, 407 Ill. App. 3d 315, 341 (2011).

¶ 29 Under Supreme Court Rule 431(b), a trial court must ask prospective jurors in a criminal trial whether they understand and accept the following four principles of law: (1) that defendant is presumed innocent of the charges against him; (2) that before defendant can be convicted the State must prove him guilty beyond a reasonable doubt; (3) that defendant is not required to offer any evidence on his own behalf; and (4) that if defendant does not testify, it cannot be held against him.

¶ 30 Defendant challenges the trial court's compliance with 431(b) in three ways. He first contends that the court's language asking whether the prospective jurors "had a problem" with the 431(b) principles does not adequately establish whether they understood and accepted them. Second, he contends that the trial court failed to tell the prospective jurors that defendant was not required to offer *any* evidence on his own behalf, and it did not ask whether they understood and accepted this principle. Finally, defendant argues that the court's statement, "the accused, which is their right, may not testify[.] *** With that being said, does anybody have any opinions like the defendant must testify?" did not adequately ensure that the prospective jurors understood and

accepted that defendant's failure to testify may not be held against him.

¶ 31 Defendant concedes he did not object to the circuit court's alleged failure to comply with Rule 431(b), but contends that we should review the court's alleged failure to comply with Rule 431(b) for plain error. The plain error rule is a narrow exception to the forfeiture rule which allows a reviewing court to consider unpreserved claims of error where defendant shows either that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under both prongs, defendant bears the burden of persuasion, and he must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545. If defendant fails to meet his burden, his procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 32 Accepting defendant's contention that the trial court failed to comply with Rule 431(b), we nevertheless find that plain error review is inapplicable. Defendant argues under the first prong, that the evidence was closely balanced. We disagree. There was overwhelming evidence presented at trial of defendant's guilt. After being stopped at a roadside safety check, defendant admitted that he had been drinking, and two officers testified that he had bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath. Defendant also exhibited several indications of intoxication during the field sobriety tests, and subsequently submitted a breath sample which resulted in a reading of 0.116, nearly one and one-half times the legal limit. He later admitted to drinking "six or seven" beers within two and one-half hours of his arrest.

¶ 33 Although defendant attempts to undermine the State's evidence, his arguments do not render the evidence closely balanced. Defendant first argues that the results of the breathalyzer test were challenged by his expert, Dr. Henson. Although Dr. Henson testified that he believed the test results were "unreliable," he acknowledged that he had not examined the specific

machine at issue, or spoken to defendant or the testifying officers. Further, the State presented the evidence of a rebuttal witness, Officer Boone, who had certified the specific machine at issue the day before defendant's test. Officer Boone contradicted the testimony of Dr. Henson and stated that the machine had an internal CEM, and testified that even if the CEM was not activated, there would be no impact on the test's reliability because the machine had been tested immediately prior to defendant's test to ensure that there was no residual alcohol remaining in the machine. The evidence also showed that Officer Czygryn had observed defendant for 20 minutes prior to the test, which even defendant's expert agreed would generally prevent the presence of any mouth alcohol.

¶ 34 Defendant also argues that he technically "passed" the field sobriety tests, because Officer Czygryn testified that in his training, he is instructed to look for more indications of intoxication than defendant exhibited to constitute a "failure" of the tests. Regardless of defendant's technical passing, defendant exhibited several indications of intoxication during the field sobriety tests, one of which was significant enough that the officer characterized defendant as unable to complete the test. Further, Officer Czygryn testified that in his experience, approximately 10% of the time a DUI suspect will technically pass field sobriety tests, but subsequently be found to have an above-the-limit blood alcohol content.

¶ 35 Defendant also contends that the officers did not have prior knowledge of defendant's normal appearance, such that their descriptions of him having bloodshot eyes, and a flushed face were not reliable. Similarly, he maintains that the officers may have been mistaking his accent for slurred speech. We find defendant's arguments speculative and unsupported by the record. There was no evidence presented at trial that bloodshot eyes and a flushed face were consistent with defendant's normal appearance, and Officer Musial explicitly testified that he could tell the

difference between slurred speech and an accent.

¶ 36 Finally, defendant argues that his statement that he had consumed "six or seven beers" between 7:00 and 9:30 p.m., could not be accurate because defendant was stopped by police around 9:20 p.m. We are unconvinced. Defendant's confusion as to the exact time period does not undermine his statement that he had recently consumed six or seven beers.

¶ 37 Therefore, we find that the evidence in this case was not closely balanced, and the alleged error may not be reached under the first prong of plain error. We also note that defendant does not argue that the trial court's alleged failure to comply with Rule 431(b) may be reached under the second prong of the plain error analysis—that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Hillier*, 237 Ill. 2d at 545. Indeed, our Supreme Court has held that such failure "does not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence[.]" and thus, is not a structural error necessarily requiring reversal. *Thompson*, 238 Ill. 2d at 611. Therefore, we also find that the alleged error may not be reached under the second prong of the plain error analysis. Defendant's failure to object at trial constituted a forfeiture of the circuit court's alleged error in its Rule 431(b) questioning, and he has failed to establish plain error.

¶ 38 Defendant next argues that he was deprived of a fair trial due to comments made by the State during closing argument. Both parties acknowledge that our supreme court has applied both abuse of discretion and *de novo* analyses to the review of alleged prosecutorial misconduct during closing arguments. Defendant argues that we should apply *de novo* review, citing *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007), and the State requests that we review for an abuse of discretion, citing *People v. Blue*, 189 Ill. 2d 99, 128 (2000). We recognize that our appellate courts are divided on the standard of review, however, where we would reach the same result

under either standard, we will refrain from discussing the applicable standard until our supreme court resolves the conflict. *People v. Maldonado*, 402 Ill. App. 3d 411, 421-22 (2010).

¶ 39 Defendant specifically challenges the following comments during the State's rebuttal argument, "Why do you care about this case? Why care? Because drunk drivers kill people every single day. 14,000 people a year *** are killed by drunk drivers. This case is important because drunk drivers pose a danger to everyone out on the street. That's why this case is important, and but for the fact that this man was pulled over on a roadside safety check, he could have caused harm that day as well." He contends that these comments were made for the sole purpose to inflame the passions and prejudices of the jury, and they assumed facts not in evidence regarding the number of people killed each year by drunk drivers. The State contends that its comments were responsive to defense counsel's closing arguments, and that even if found to be improper, they were not a material factor in defendant's conviction.

¶ 40 Prosecutors are afforded wide latitude in closing argument. *Wheeler*, 226 Ill. 2d at 123 (2007). When reviewing a claim of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *People v. Spicer*, 379 Ill. App. 3d 441, 463 (2008). In closing, the State may comment on the relevant evidence as well as any fair and reasonable inferences therefrom. *People v. Allen*, 401 Ill. App. 3d 840, 855 (2010). Defendant cannot object to comments made in rebuttal when defense counsel invited the alleged error. *Spicer*, 379 Ill. App. 3d at 463.

¶ 41 The State claims that its remarks were invited by defense counsel, when it analogized the roadside safety check with a fishing expedition and argued that defendant was merely in the "wrong place at the wrong time." The State argues that this analogy "denigrated the use and

importance of roadside safety checks as an effective method of detecting drunk drivers" and "deprecated the seriousness of drunk driving." Thus, the State's comments were proper response to defense counsel's argument. Viewing the prosecutor's remarks within the context of the entirety of the closing argument, we find that they do not fall outside the wide latitude given to the State during closing argument. See *Wheeler*, 226 Ill. 2d at 122-23. In closing arguments, defense counsel argued that this was not a case where defendant "was driving all over the road" or where he had been in an accident. Instead, defense counsel argued, this was merely a case where the where the police set out a wide net because they were just "doing their jobs" and needed to catch "some DUIs." This argument could be reasonably interpreted to minimize the harm of DUI, and to imply that it is not very important to stop a driver who has been drinking so long as he or she is not "driving all over the road" or causing accidents. Additionally, defense counsel's argument about officers having to "do[] their jobs[,] and "catch some DUIs[,]"" disparages the importance of roadside safety checks, implying that the purpose of such checks is to allow officers to meet job quotas. The State therefore, was justified in raising the importance of the roadside safety checks and the potential harm caused by drunk driving in its response.

¶ 42 Moreover, even if we were to find the comments improper, defendant's claim would fail because the alleged error was harmless. When, as here, a defendant makes a timely objection and preserves the error, we review for harmless error and it is the State that carries the burden of proving beyond a reasonable doubt that the jury verdict would have been the same absent the error. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). Although a prosecutor's remarks may sometimes exceed the bounds of proper comment, the relevant question for a reviewing court is whether the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. *Wheeler*, 226 Ill. 2d at

123. Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In our review, we take into account the content and context of the comments, their relationship to the evidence, and their effect on defendant's right to a fair and impartial trial. *People v. Love*, 377 Ill. App. 3d 306, 313 (2007). If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to defendant's conviction, a new trial should be granted. *Wheeler*, 226 Ill. 2d at 123.

¶ 43 In this case, we conclude that the State's remarks were harmless because, as previously found, the evidence of defendant's guilt was overwhelming. We do not believe that the jury could have reached a contrary verdict had they not been made. We also note that when examining the allegedly improper comments in the context of the closing argument as a whole, the comments were brief, the argument was otherwise properly focused on the evidence, and the trial court properly instructed the jury on the purpose of closing argument and to disregard any statement or argument not based on the evidence. *People v. Hall*, 194 Ill. 2d 305, 350 (2000).

¶ 44 Finally, defendant contends the mittimus must be corrected because his convictions violate the one-act, one-crime rule, which prohibits multiple convictions where more than one offense is carved from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977).

Defendant was charged by information with ten counts of driving under the influence of alcohol, but the State proceeded to trial on three counts: counts 3, 4, and 5. Count 3 was based on defendant's driving with a blood alcohol concentration of .08 or more, and was aggravated by defendant's three prior DUI convictions; count 4 was based on his driving while under the influence of alcohol, and was also aggravated by defendant's three prior DUI convictions; and

Count 5 was based on his driving with a blood alcohol concentration of .08, and was aggravated by the fact that defendant's driver's license was revoked. Although the jury convicted defendant of only those three counts, defendant's mittimus shows convictions for all 10 charges originally brought by the State.

¶ 45 Defendant also asserts that he cannot be convicted of both counts 3 and 4 because they arose from the same physical act, and requests that we correct the mittimus to reflect convictions on counts 3 and 5. The State concedes the error, but asks instead that we correct the mittimus to reflect convictions on counts 4 and 5, citing *People v. Eubanks*, 279 Ill. App. 3d 949, 963 (1996), for the proposition that where multiple convictions are based on the same physical act, the State has the right to elect which conviction should be retained. While we recognize the general rule that defendant should be sentenced on the more serious offense and the less serious offense should be vacated (*People v. Artis*, 232 Ill. 2d 156, 170 (2009)), defendant does not argue that count 3 is more serious than count 4, that the case should be remanded to determine which count is more serious, or that there is any other reason why we should not enter a conviction on count 4 as requested by the State. Accordingly, we direct the clerk of the circuit court to correct the mittimus to reflect convictions only on counts 4 and 5. See *People v. Douglas*, 381 Ill. App. 3d 1067, 1069 (2008) (appellate court may correct the mittimus without remanding the cause to the circuit court).

¶ 46 Affirmed; mittimus corrected.