

No. 1-11-1168

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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. 10 CR 2949
)	
CESAR CAMAYO,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed where trial court's statements relating to gun shot residue test, if error, did not rise to the level of plain error; and defendant's convictions for aggravated discharge of a firearm did not violate the one-act, one-crime doctrine.

¶ 2 Following a bench trial, defendant, Cesar Camayo, was convicted of two counts of aggravated discharge of a firearm and sentenced to two concurrent terms of 10-years' imprisonment. On appeal, defendant contends the trial court committed plain error where it allegedly relied on personal knowledge in discounting the significance of the negative results of a gunshot residue test (GSR test). Defendant also contends that one of his convictions for aggravated discharge of a firearm violated the one-act, one-crime doctrine. We affirm.

¶ 3 On January 25, 2010, defendant was arrested following an incident involving an on-duty Chicago Police officer who was driving in his unmarked vehicle. Defendant was charged with multiple offenses including: two counts of attempted first-degree murder of a peace officer; two

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counts of attempted first-degree murder; and four counts of aggravated discharge of a firearm.

¶ 4 At trial, Chicago Police Officer Eric Wier, a patrolman for the Chicago Police Department's organized crime division, testified that on January 25, 2010, at about 3:30 p.m., he was traveling southbound on the 4700 block of South Throop Street in Chicago. Officer Wier was on covert patrol, wearing civilian clothing, a bulletproof vest, and his police badge around his neck. He was driving an unmarked Dodge Stratus when he came upon a gray sport utility vehicle (SUV) that was stopped and partially blocking the one-way street. Officer Wier sat several feet back and waited for the SUV to proceed. While he waited, Officer Wier observed a man, whom he later identified in court as defendant, standing outside the passenger side of the SUV speaking to the occupant of that vehicle through the open passenger door. Officer Wier could clearly see defendant's face and noticed a distinctive teardrop tattooed under his eye. After a short time, Officer Wier honked his horn and motioned for the SUV to move out of his way. Defendant turned to face Officer Wier and moved his hands forward with his thumbs up and his palms outstretched, then walked toward the rear of the SUV. At this time, defendant pulled from his coat a blue steel revolver and aimed it at Officer Wier. As Officer Wier accelerated around the left side of the SUV, defendant moved to the front of the SUV and fired a shot toward Officer Wier. When this shot was fired, Officer Wier's vehicle was "even" with the SUV. As he fled the area traveling southbound, Officer Wier heard another four or five shots being fired toward the rear of his vehicle. Officer Wier sped around the block to 47th and Throop Streets to radio for help. Officer Wier subsequently viewed a lineup and identified defendant as the man who shot at him.

¶ 5 At trial, the State presented evidence of a prior incident involving defendant that occurred in 2006 where defendant shot at and wounded Alan Leslie. Following his arrest for that shooting, defendant denied any knowledge of the incident. However, defendant later admitted he was present at the scene, but that he did not fire the shots. Following that trial, defendant was convicted of aggravated battery.

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¶ 6 Officer Michael O'Donnell, a detective assigned to the homicide division of the Chicago Police Department, testified that in 2006 he investigated the shooting of Mr. Leslie. Officer O'Donnell testified that defendant changed his story three times as to his whereabouts during the time of that shooting.

¶ 7 After the State rested, the parties stipulated as to the evidence surrounding the GSR testing. Defendant was taken into custody on January 25, 2010, at 4:58 p.m.; a GSR test was administered to defendant on that same date at 6:45 p.m.; and a proper chain of custody was maintained at all times. The parties further stipulated that Scott Rochowicz, an Illinois State Police crime lab technician, would testify that he administered the GSR test to defendant's hands and his clothing; that the GSR test results showed "[defendant] may not have contacted a PGSR-related item;" and that he may not have been in the environment of a discharged firearm. Additionally, it was stipulated that the tests showed defendant may not have discharged a firearm with either hand. Finally, the parties stipulated that Mr. Rochowicz would testify that if defendant had discharged a firearm, the particles had been removed by activity, or had not been detected by the procedure.

¶ 8 The defense rested without presenting any testimony. After hearing closing arguments, the trial court acquitted defendant of the attempted murder counts, but found defendant guilty on count 7 (which alleged defendant "knowingly discharged a firearm in the direction of a vehicle he knew or reasonably should have known to be occupied by [Officer] Wier,"), and count 8 (which alleged aggravated discharge of a firearm in that defendant "knowingly discharged a firearm in the direction of another person, to wit: [Officer] Wier").

¶ 9 The trial court found that defendant's actions were "akin to road rage" because he became angry and fired a gun toward Officer Wier after the officer had honked his horn. The trial court also stated:

"The gunshot residue, from my understanding, can be -- the absence of it can be explained all kinds of ways. Lots of things can happen between the time a gun was

fired until the test is taken. *** [D]epending on the elements and sweat factors and other things about the physical conditions, [guns] don't always leave gunshot residue, but it was he."

¶ 10 On appeal, defendant first argues that the trial court, in finding him guilty, improperly relied on personal knowledge as to the significance of the negative results of the GSR test. Defendant did not properly preserve this issue for appeal (*People v. Allen*, 222 Ill. 2d 340, 350 (2006)) and, thus, the issue has been forfeited.

¶ 11 Defendant attempts to avoid the forfeiture rule by invoking the "Sprinkle Doctrine." Under this doctrine, the forfeiture rule is relaxed under extremely limited and extraordinary circumstances, which are not present here. *People v. Thompson*, 238 Ill. 2d 598, 612 (2010).

¶ 12 Defendant also argues this unpreserved issue can be reviewed under the plain-error doctrine. The two-prong, plain-error doctrine provides that courts may consider forfeited errors if: (1) there has been error and the evidence was so closely balanced that the error may have affected the outcome; or (2) the error was so serious that it denied defendant one of his substantial rights. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The plain-error exception under either prong applies only if an actual clear and obvious error occurred. *People v. Chapman*, 194 Ill. 2d 186, 226 (2000).

¶ 13 As to the first prong of the plain-error doctrine, we find that the evidence was not closely balanced. Officer Wier, who testified that on January 25, 2010, he was undercover and driving a covert vehicle near 4700 South Throop Street in Chicago. Officer Wier observed an occupied, gray SUV stopped in the middle of the street, with defendant standing next to it and speaking to its occupant. Officer Wier stopped about five feet behind the vehicle, honked the horn, and gestured with his hands for defendant and the SUV to move. Officer Wier had a clear view of defendant and saw a teardrop tattoo on his face. Defendant approached Officer Wier's vehicle, pulled out a revolver, and pointed it at Officer Wier. As Officer Wier drove around the SUV, defendant fired a round at Officer Wier. Officer Wier continued driving southbound on Throop Street, heard four or

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five more shots coming from behind him, and parked on 47th and Throop Streets. Officer Wier called for backup, described defendant, and identified him as the shooter that same day. Based on the strength and certainty of Officer Wier's eyewitness identification, which was never rebutted or discredited, the evidence cannot be deemed closely balanced for plain-error review. See *People v. Negron*, 297 Ill. App. 3d 519, 529 (1998) (stating that "[u]nless vague or doubtful *** even *** a single eyewitness will sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification."). Moreover, the trial court clearly found Officer Wier's testimony credible, and stated that defendant's actions were similar to road rage when he became angry and fired a gun toward Officer Wier after the officer honked his horn. The evidence here was not closely balanced. See *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23 ("the absence of physical evidence corroborating eyewitness identifications is not in itself a reason for reversal, since a single eyewitness identification can sustain a conviction").

¶ 14 As to the second prong of the plain-error doctrine, the contested comments by the trial court, at most, may have been inexact, but certainly did not rise to the level of plain error. The trial court reviewed the evidence, including the stipulation as to the GSR test. That stipulation included an agreement that Mr. Rochowicz would testify in part that if defendant had discharged a firearm, the gun shot particles had been removed by activity. The trial court concluded that despite the negative GSR test results, the other evidence— in particular, the testimony of Officer Weir—proved beyond a reasonable doubt that it was defendant who fired at the officer. Defendant failed to show "that any error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." See *Thompson*, 238 Ill. 2d at 613-14 (equating the second prong of plain-error review with structural errors—a systematic error that undermines the fairness of the defendant's trial). See *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 109 (defendant "bears the burden of persuasion" in a plain-error analysis).

¶ 15 Because defendant failed to preserve this issue and failed to establish plain error under either

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prong of that doctrine, we will not reverse the finding of guilty.

¶ 16 Defendant next contends that one of his convictions for aggravated discharge of a firearm must be vacated because it violated the one-act, one-crime doctrine. He specifically maintains that these convictions were based on the same act, *i.e.*, shooting at Officer Wier. Although defendant concedes that he waived this issue by failing to object to this error at trial, we review one-act, one-crime issues pursuant to the second prong of the plain-error doctrine because the potential for an unwarranted conviction and sentence threatens the integrity of the judicial process. *People v. Carter*, 213 Ill. 2d 295, 299 (2004).

¶ 17 In *People v. King*, 66 Ill. 2d 551 (1977), our supreme court set forth what has since come to be known as the one-act, one-crime doctrine. *Id.* at 566. As originally formulated, that doctrine concerned the potential for prejudice in the imposition of multiple convictions, and specifically provided:

"Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *Id.*¹

As our supreme court has more recently noted:

¹The one-act, one-crime doctrine was subsequently extended to the imposition of sentences, such as the ones imposed here, that are to run consecutively. *People v. Artis*, 232 Ill. 2d 156, 165 (2009) (citing *People v. Rodriguez*, 169 Ill. 2d 183, 187 (1996)).

"Decisions following [*People v. King*, 66 Ill. 2d 551 (1977)] have explained that the one-act, one-crime doctrine involves a two-step analysis. [Citation.] 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." *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

Thus, even where "the convictions were based on interrelated acts rather than the same act, we proceed to the second prong [and ask]: are any of the offenses lesser-included offenses?". *People v. Peacock*, 359 Ill. App. 3d 326, 333 (2005).

¶ 18 As to that issue, we note that our courts "have identified three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the 'abstract elements' approach; (2) the 'charging instrument' approach; and (3) the 'factual' or 'evidence' adduced at trial approach." *Miller*, 238 Ill. 2d at 166. Nevertheless, in *Miller* our supreme court has made it clear that in situations—such as the one presented here—where a defendant is *charged* with multiple offenses and the question is whether one of those *charged* offenses is a lesser-included offense of another *charged* offense, courts must apply the "abstract elements" approach. *Id.* at 174-75. As our supreme court has explained, under that 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. [Citations.] Although this approach is the most clearly stated and the easiest to apply [citation], it is the strictest approach in the sense that it is formulaic and rigid, and considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense.

[Citations.]" *Id.* at 166; see also *People v. Novak*, 163 Ill. 2d 93, 106 (1994).

One-act, one-crime challenges are reviewed *de novo*. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

¶ 19 With this background in mind, we will now consider defendant's argument as to the one-act, one-crime doctrine. To sustain a conviction for aggravated discharge of a firearm, the State must prove that a defendant knowingly or intentionally "[d]ischarge[d] a firearm in the direction of another person *or* in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person." (Emphasis added.) 720 ILCS 5/24-1.2(a)(2) (West 2010). Here, count 7 charged that defendant committed aggravated discharge of a firearm in that he "knowingly discharged a firearm *in the direction of a vehicle* he knew or reasonably should have known to be occupied by a person, to wit: [defendant] fired shots at a vehicle occupied by Eric Wier." (Emphasis added.) Count 8 charged that defendant committed aggravated discharge of a firearm in that he "knowingly discharged a firearm *in the direction of another person*, to wit: Eric Wier." (Emphasis added.)

¶ 20 We must initially determine whether defendant's conduct constituted multiple acts. The evidence in the present case showed that defendant moved to the rear of the SUV and raised his gun at the officer. Officer Wier, after seeing defendant pointing a gun at him, began to accelerate past the SUV. Defendant then moved toward the front of the SUV and fired a round at the officer. As Officer Wier continued down the block, defendant fired four or five additional shots at the officer's vehicle. Defendant clearly fired his gun on two separate and distinct occasions, *i.e.*, the single shot when Officer Wier was passing the SUV, and the multiple shots fired toward the back of Officer Wier's vehicle as Officer Wier was driving down the block. Accordingly, we find that defendant's conduct did, in fact, constitute multiple acts. However, defendant's conduct can be viewed as "a series of incidental or closely related acts." *King*, 66 Ill. 2d at 566.

¶ 21 Defendant argues that his alleged conduct must be considered as "one physical course of

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conduct" and, under *People v. Crespo*, 203 Ill. 2d 335 (2001), one count of aggravated discharge must be vacated. In *Crespo*, the defendant stabbed the victim three times in rapid succession and subsequently was convicted, *inter alia*, of armed violence and aggravated battery. Our supreme court acknowledged that each of the stab wounds could support a separate offense, but vacated the defendant's aggravated battery conviction because the indictment did not apportion the three stab wounds between the offenses, and the State did not argue each separate offense to the jury. *Id.* at 343-44. The court concluded that based upon the record, the State prosecuted the case by portraying "defendant's conduct as a single attack." *Id.* at 344. Therefore, the court concluded that it would be profoundly unfair "to the defendant to permit the State to apportion the offenses between the stab wounds for the first time on appeal." *Id.* at 343.

¶ 22 In this case, the State did not wait until this appeal to apportion defendant's acts. The written charges in counts 7 and 8 distinguished defendant's act of firing toward Officer Wier and his act of firing at the officer's vehicle. During opening statements, the Assistant State's Attorney distinguished defendant's initial single shot as Officer Wier was moving his vehicle around the SUV—from the "additional four to five shots"—as Officer Wier was driving away. Officer Wier, when testifying as to the events, described the single shot and the later four to five shots. We note that in moving for a directed verdict, defense counsel discussed the officer's testimony which described and distinguished the first shot and the later four to five shots. Furthermore, unlike *Crespo*, this case involved a bench trial. The trial judge heard Officer Wier's testimony as to defendant's initial discharge of his firearm—a single shot—and defendant's later discharge of his firearm—four to five shots. Therefore, "[u]nlike a jury, the experienced trial judge would have understood the need to consider whether there was sufficient evidence to conclude that the defendant's actions constituted separate offenses." *People v. Span*, 2011 IL App (1st) 083037, ¶ 88 (finding *Crespo* distinguishable). In this case, the charges, evidence, and argument at trial indicated that the State intended to, and did, treat defendant's conduct as involving separate acts for which separate

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convictions may be sustained. Thus, the holding in *Crespo* is inapplicable.

¶ 23 Having concluded that defendant's conduct involved more than one act, the second step of the one-act, one-crime analysis generally requires a determination using the abstract elements test of whether either count 7 or count 8 is a lesser-included offense of the other, such that multiple convictions are improper. *Miller*, 238 Ill. 2d at 175.

¶ 24 The application of the abstract elements approach generally involves two different statutory offenses with different elements and different sentencing schemes. See, e.g., *Id.* at 176 (theft is not a lesser-included offense of burglary); *Span*, 2011 IL App (1st) 083037, ¶ 91 (aggravated battery is not a lesser-included offense of attempted armed robbery); *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 10 (criminal sexual assault is not a lesser-included offense of home invasion); *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 45 (armed violence is not a lesser-included offense of attempted murder). However, the present convictions are premised on the same statutory offense with the same sentencing guidelines—i.e., aggravated discharge of a firearm—but on different statutory predicates. As stated above, the aggravated discharge of a firearm statute allows for a conviction based on the discharge of a firearm in the direction of a person and for the discharge of a firearm in the direction of a vehicle. The statute permits the State to bring separate charges for the separate acts of discharging a firearm in the direction of a person, whether or not that person is in a vehicle, and discharging a firearm in the direction of a vehicle with a passenger.

¶ 25 The holding in *People v. McCarter*, 339 Ill. App. 3d 876 (2003) is instructive, as it too involves multiple convictions under the same statute based on multiple acts. In *McCarter*, this court considered whether the defendant's convictions for three counts of unlawful use of a weapon by a felon violated the one-act, one-crime doctrine. Each count was based on the defendant's possession of a "different type[] of contraband: a rifle, a handgun, and ammunition." *Id.* at 881. The convictions were upheld because: (1) the State had complied with *Crespo* and brought separate charges "each of which would support a separate conviction;" and (2) none of the unlawful

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possession of a weapon by a felon charges "was a lesser-included offense" of any of the other charges. *Id.* at 882.

¶ 26 Similarly, counts 7 and 8 are based on different acts—defendant's initial single discharge of a firearm in the direction of Officer Wier—and his later multiple discharges of a firearm in the direction of the officer's vehicle. Each of defendant's acts would support a separate conviction under the statute. The two convictions do not violate the one-act, one-crime doctrine. Compare *People v. Hardin*, 2012 IL App (1st) 100682 (where court found only one conviction for unlawful discharge of firearm in the direction of vehicle occupied by two police officers could stand when both convictions were based on a *single* shot).

¶ 27 Defendant's convictions on count 7 and count 8 were not based on a single act, the state complied with the requirements of *Crespo*, and the convictions were not based on lesser-included offenses. Accordingly, we affirm defendant's convictions of aggravated discharge of a firearm in count 7 and count 8.

¶ 28 Affirmed.