

No. 1-11-1954

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 13684
)	
DAVID YARBOUGH,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was not denied his right to counsel and due process where he waived closing argument and the court did not deprive him of the right to present such argument; defendant's multiple convictions did not violate one-act one-crime doctrine; sentence for aggravated battery on a public way reduced to five years' imprisonment; mittimus corrected; affirmed as modified.
- ¶ 2 Following a bench trial, defendant David Yarbough was convicted of aggravated discharge of a firearm and aggravated battery on a public way, then sentenced to concurrent terms of six years imprisonment. On appeal, defendant contends that the trial court denied him the right to counsel and due process when it entered judgment without hearing closing

arguments. He also contests the propriety of his sentence, and contends that his convictions violate the one-act one-crime doctrine.

¶ 3 Defendant was charged with three counts of attempted first degree murder (Counts I-III), armed habitual criminal (Count IV), aggravated battery with a firearm (Count V), aggravated discharge of a firearm (Count VI), and two counts of aggravated battery (Counts VII, and VIII (on a public way)), in connection with an incident that occurred on December 25, 2008, in which defendant fired a gun multiple times, wounding David Marshall (victim) in the left leg. Defendant was ultimately convicted of Count VI (defendant knowingly or intentionally discharged a firearm in the direction of the victim), and Count VIII (defendant, in committing a battery, shot the victim in the leg while on a public way).

¶ 4 The evidence adduced at trial showed that defendant was married to Andrea Stallworth who was the aunt of John Marshall. On December 23, 2010, defendant and Stallworth went to Marshall's home in Hanover Park so that defendant could meet the family. They had dinner with Marshall, his wife Linda, their children, and the victim, who was his nephew and had a 2006 theft conviction.

¶ 5 On Christmas eve, John Marshall, the victim, Linda, and Marshall's three children went to the home of his mother, Barbara McFarland, at 1415 20th Avenue in Maywood, Illinois. When they arrived, Marshall's brother, Milton McFarland, and sister, Yvette Wright, and defendant were present. Marshall, McFarland, the victim and defendant played cards, after which defendant went to the basement.

¶ 6 About 10 p.m., Yvette and Milton told Marshall they were concerned about defendant and his "associates" coming to the house. Marshall told Stallworth to let defendant know that they did not want people, who were unfamiliar to his mother, coming over because she had a stroke and was old. Stallworth talked to defendant, who approached Marshall "pretty upset," and agitated, saying to him and Milton, "I'm going to holler at you niggers." He then went out to the

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front porch, where Marshall told defendant that he did not appreciate him bringing people over to his mother's house. Defendant responded, "you all got a problem with who I mess with, who I associate with?" Marshall said no, but that he did not want them to come over to his mother's home.

¶ 7 The victim came out to see if everything was okay, and tried to stop the argument, then went back inside. At that point, Linda opened the door, and defendant pushed past her into the house, saying that he "need[ed] to get my stuff." Marshall placed defendant in a "full Nelson," and escorted him to the front door. Defendant told Wright, who was on the porch, that "he was going to shoot women, old people, and children, and if [she] was standing there when he got back [she] was going to get it too." Linda then heard defendant tell someone on his phone that he was "about to come back over here and shoot this mother f****r up, kill these folks," before he drove away.

¶ 8 Fifteen minutes later, as Marshall was putting his children in his car and the victim was starting his car, defendant returned. When he was 20 feet away from the victim, defendant told him that he wanted to speak to him, and that they were "family." Marshall told the victim not to approach defendant, and told defendant to leave. Defendant then pulled his hand out of his pocket, and Marshall saw "the redness of a light," which he thought was a gun, and told the victim to run.

¶ 9 Linda and the victim saw defendant raise the gun with a red laser point on it. Linda saw him point it at Marshall, who pushed Linda down and dove to the ground next to the car, and then heard multiple gun shots. The victim saw defendant fire his gun in the direction of himself and Marshall, and, as the victim fled, he got hit in the left leg by one of the first of eight gunshots. Several of the gunshots hit Wright's car, and when the firing ceased, Marshall got in his car, and drove his family to safety.

¶ 10 At the close of the State's case-in-chief, counsel moved for a directed finding on all

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counts. The court found that the evidence was insufficient to sustain all counts but Counts VI and VIII (aggravated discharge with a firearm and aggravated battery on a public way), and entered a directed finding on the remaining counts.

¶ 11 The defense then rested. The court admonished defendant regarding his right to testify, and defendant persisted in refusing to testify.

¶ 12 The court then stated:

"[N]ow the evidence is closed.

Counsel [for] State, you waive your opening [*sic*] statement, and counsel for defense you can waive yours.

Then there's a finding of guilty as to Counts 6 and 8."

The State then asked to be heard, and was allowed to present closing argument¹. Defendant did not ask to respond, and the court then found defendant guilty of aggravated discharge of a firearm and aggravated battery on a public way.

¶ 13 Defendant filed a motion for a new trial, which the trial court denied. At the sentencing hearing which followed, the State presented in aggravation Maywood police detective Lawrence Connor who testified that defendant confessed to him that in April 1991, he shot a man in the chest at a 7-eleven store, and that he was in the Black Piece gang. The State noted that defendant ultimately pleaded guilty to attempted murder in that case, and was sentenced to 12 years imprisonment. The State referenced defendant's long history of violent crime, including a second degree assault conviction in Alabama for which he received a 10-year prison sentence, a 2001 aggravated unlawful use of a weapon (Uuw) by a felon conviction and sentence of three years imprisonment, and a 2005 aggravated Uuw conviction and sentence of four years imprisonment. The State then asked that defendant be sentenced to 25 years in prison to protect the public.

¹The record clearly shows that the State presented a closing argument contrary to the State's assertion in its brief.

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¶ 14 Defense counsel requested that the trial court consider the minimum sentence of six years which, he maintained, was substantial at 85%. Defendant spoke in allocution, stating that he wished he could change what had happened, that these people could have been his first family as he grew up in foster and Audy homes, and that he has made a lot of bad decisions in his life.

¶ 15 The court sentenced defendant to concurrent terms of six years' imprisonment. In doing so, the court noted that it considered the evidence, listened to the aggravation and mitigation, and reviewed the presentence investigation (PSI) report.

¶ 16 On appeal, defendant first contends that the court deprived him of the right to counsel, effective assistance of counsel, and due process when it abruptly and improperly decided the case and entered judgment without requesting closing arguments. He maintains that the court's actions deprived him of the right to a fair and an impartial trier of fact who would evaluate the merits of his case.

¶ 17 As an initial matter, defendant acknowledges counsel's failure to object to this process, but claims that this court should not deem the matter waived because the court's conduct is at issue, citing *People v. Heidorn*, 114 Ill. App. 3d 933, 936 (1983). We disagree.

¶ 18 Where, as here, defendant fails to properly preserve the issue for review, he has forfeited appellate review of the claim. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Although judicial misconduct can provide a basis for relaxing the forfeiture rule under *People v. Sprinkle*, 27 Ill. 2d 398 (1963) (*People v. Hanson*, 238 Ill. 2d 74, 117 (2010)), the supreme court has clarified that this exception applies only in extraordinary situations such as when the trial judge makes inappropriate comments to the jury or relies on social commentary in sentencing defendant to death (*People v. McLaurin*, 235 Ill. 2d 478, 488 (2010)). Neither situation is present in this case, and since defendant has not presented any extraordinary or compelling reason to relax the forfeiture rule under *McLaurin* where he was represented by counsel and had the opportunity to raise a contemporaneous objection, but did not, we decline to do so.

¶ 19 Notwithstanding, defendant further claims that the matter should be considered as plain error. The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a waived issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). Defendant maintains that the right to make a closing argument is a fundamental right so deeply embedded in the notion of a full and fair adversarial trial that its denial would mandate reversal without regard to prejudice. The first step in plain error review, however, is to determine if there was error at all. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find none in this case.

¶ 20 Defendant maintains that the court neither allowed, nor even sought closing arguments, thereby evincing no interest in the representations of counsel. We observe that the right to make a closing argument is rooted in the sixth amendment right to counsel, and that the trial court lacks discretion to deny a defendant this right. *Herring v. New York*, 422 U.S. 853, 860, 865 (1975). However, the right is not denied where defendant waives or makes no attempt to seek closing argument. *People v. Coleman*, 212 Ill. App. 3d 997, 1004 (1991).

¶ 21 Here, we find that the court did not deny defendant his right to present a closing argument. After granting defendant's motion for a directed finding on six counts, admonishing defendant on his right to testify, the court stated the evidence was closed, and made a cursory reference to closing argument. Initially, neither party indicated a desire to present argument, and the court found defendant guilty of the two offenses. The State then informed the court that it wished to present a closing argument, and was allowed to do so. No similar representation was made by defense counsel, and the court entered its findings of guilt after the State's completion of its closing argument. The record thus shows that defendant had an opportunity to present a closing argument, but made no attempt to do so. Under these circumstances, we find that the court did not deny defendant his right to present closing argument (*Coleman*, 212 Ill. App. 3d at 1004), and thus no error by the court to warrant plain error review (*Lewis*, 234 Ill. 2d at 43).

¶ 22 In reaching this conclusion, we find defendant's reliance on *People v. Heiman*, 286 Ill. App. 3d 102, 112-13 (1996), *People v. Stevens*, 338 Ill. App. 3d 806, 810 (2003), and *People v. Smith*, 205 Ill. App. 3d 153, 156-57 (1990) misplaced. Unlike *Heiman*, and *Stevens*, the court here did not make any derogatory comments about defendant, or the witnesses, and did not show a prejudgment of the case before entering its findings. Instead, it listened to the opening statements of both parties, the presentation of evidence including the examinations of the witnesses, allowed the State's request to present a closing argument, then entered its findings. *Heiman* and *Stevens* are thus factually inapposite to the case at bar.

¶ 23 We reach the same conclusion with regard to *Smith*, 205 Ill. App. 3d at 156-57. In that case, the court stopped defense counsel after only one sentence of her closing argument and refused to allow her to continue, denying defendant his right to effective assistance of counsel. Here, counsel waived closing argument, and was not prevented by the court from arguing his case. Thus, unlike *Smith*, the court did not deny defendant his right to effective assistance of counsel.

¶ 24 Defendant nonetheless maintains that the trial court predetermined his guilt before the close of trial as evidenced by its complete indifference to hearing any argument from counsel at all before pronouncing judgment. He maintains that the "syllogism" here was "'verdict first - trial afterwards.'" In support, he cites *People v. Ojeda*, 110 Ill. App. 2d 480, 484 (1969) and *People v. McDaniels*, 144 Ill. App. 3d 459, 462-63 (1986). We find these cases factually inapposite.

¶ 25 In *Ojeda*, 110 Ill. App. 2d at 485, the trial court made statements evincing its disbelief of the defense witness before the witness took the stand. In *McDaniels*, 144 Ill. App. 3d at 461-63, during counsel's examination of one of the witnesses, the trial court interjected that it was ridiculous for defendant to claim self-defense, showing that it prejudged the validity of defendant's defense prior to hearing the totality of the evidence. Here, unlike *Ojeda* and *McDaniels*, there were no comments by the court indicating that it had prejudged defendant's

case. Accordingly, we find no error to warrant plain error review.

¶ 26 Defendant next contends that his convictions for aggravated discharge of a firearm and aggravated battery on a public way violate the one-act one-crime doctrine. He maintains that both offenses were based on a single physical act, namely, discharging the firearm at the victim.

¶ 27 Defendant did not raise this issue below, but maintains that we may address it for plain error because it implicates the integrity of the judicial process. For the reasons that follow, however, we find no error.

¶ 28 Under the two-step analysis for determining whether there is a violation of the one-act one-crime doctrine, we must first determine whether defendant's conduct involved multiple acts or a single act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). Multiple convictions are improper if they are based on precisely the same physical act, or where one offense is a lesser-included offense of the other. *Miller*, 238 Ill. 2d at 165.

¶ 29 In this case, defendant does not contend that either offense is a lesser-included offense, but solely maintains that the convictions were improper because they were based on precisely the same physical act, *i.e.*, discharging a handgun at Marshall. In support of his argument, defendant relies on *People v. Crespo*, 203 Ill. 2d 335, 339-41 (2001), and *People v. James*, 362 Ill. App. 3d 250, 256 (2005).

¶ 30 In *Crespo*, the victim was stabbed three times in rapid succession, and the supreme court found that where the State did not charge each of the stabbings as separate acts in the indictment, and the State argued at trial that defendant's conduct was a single act, defendant's convictions for both aggravated battery and armed violence could not be sustained. *Crespo*, 203 Ill. 2d at 339-40, 343-45. The court also held that to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair. *Crespo*, 203 Ill. 2d at 343. In *James*, 362 Ill. App. 3d at 255-56, defendant's convictions for aggravated domestic battery and attempted first degree murder were based on the same physical act of stabbing the victim multiple times,

and the reviewing court held that where the State did not treat each stabbing as a separate crime, his convictions for both offenses could not be sustained as they violated the one-act one-crime doctrine.

¶ 31 Here, unlike *Crespo* and *James*, the State did not treat the multiple shootings as one single act. Rather, the indictment showed that the State separately charged defendant with discharging a firearm in the direction of the victim, Count VI, and also with shooting the victim in the leg, Count VIII. In addition to these distinct acts set out in the indictment, the State specifically noted in its opening statement that defendant began by firing the gun "in the direction of the victim. Several bullets go through Yvette Wright's car, and the victim is struck through and through the leg." Thus, the indictment, the evidence presented at trial, and the argument presented by the State indicate the State's intention to treat defendant's conduct as involving separate acts for which separate convictions must be sustained. Accordingly, we find *Crespo* and *James* inapplicable to the case at bar.

¶ 32 Defendant next contends that the court erred in imposing a companion extended term of six-years' imprisonment on his Class 3 aggravated battery conviction. He maintains that his sentence should be vacated and the cause remanded to the trial court for resentencing.

¶ 33 Defendant acknowledges that he failed to preserve this issue for review, but maintains that a void sentence may be reviewed at any time and is not subject to forfeiture (*People v. Thompson*, 209 Ill. 2d 19, 27 (2004)), and that plain error also applies. We observe that when defendant has been convicted of multiple offenses that are part of a single course of conduct, he may be sentenced to an extended term sentence only for those offenses within the most serious class. 730 ILCS 5/5-8-2 (West 2010). Here, aggravated battery on a public way was not the most serious class offense (720 ILCS 5/12-3.05 (West 2010); 720 ILCS 5/24-1.2 (West 2010)), of which he was convicted, and the statutory sentencing range for that offense was two to five years' imprisonment (730 ILCS 5/5-4.5-40 (West 2010); 720 ILCS 5/12-3.05 (West 2010)).

Thus, the six-year term imposed by the court fell outside the statutory range and was void.

¶ 34 The State concedes the error; however, the parties differ on the consequence. Defendant maintains that the matter should be remanded for resentencing, relying on *People v. Hurley*, 277 Ill. App. 3d 684, 687-88 (1996), and the State requests a reduction to five years' imprisonment, relying on *People v. Pittman*, 316 Ill. App. 3d 245, 253 (2000). In *Hurley*, the court's comments during sentencing showed that it mistakenly considered defendant eligible for an extended term sentence, and then used that as a reference point in deciding the appropriate sentence; thus, the court's mistaken belief that defendant was eligible for an extended term sentence arguably influenced its sentencing decision. *Hurley*, 277 Ill. App. 3d at 687. Here, by contrast, the record discloses no comparable deliberations by the court, but rather the application of a concurrent term of imprisonment to a companion conviction. Thus, we find *Hurley* distinguishable from the instant case.

¶ 35 In *Pittman*, 316 Ill. App. 3d at 253, the trial court imposed an extended term of eight years' imprisonment, three years of which were found to be void. The reviewing court then reduced defendant's sentence to five years, the maximum permitted for the offense. We note that the supreme court has cited *Pittman*, in holding that it is the unauthorized portion of the sentence that is void and subject to challenge. *People v. Harvey*, 196 Ill. 2d 444, 448 (2001). Here, likewise, we find that the one-year extended portion of the sentence was not authorized, and we, therefore, reduce defendant's sentence for aggravated battery on a public way to the maximum five years' imprisonment permitted by the law.

¶ 36 Finally, defendant maintains, the State concedes, and we agree that the mittimus should be corrected to reflect 736 days of presentence custody credit. Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we correct the mittimus accordingly (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)).

¶ 37 In sum, we find that defendant was not denied his right to counsel and due process where

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he waived closing argument, and that defendant's convictions did not violate the one-act one-crime doctrine. We also reduce defendant's sentence on the aggravated battery conviction to five years' imprisonment, and correct the mittimus as indicated.

¶ 38 Affirmed, as modified.