

FIFTH DIVISION
MARCH 8, 2013

No. 1-11-3791

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. 11 CR 2851 |
| |) | |
| ISRAEL HIDALGO, |) | Honorable |
| |) | Shelley Sutker-Dermer, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction for aggravated battery is not an excess conviction and need not be vacated because it arose from a separate physical act than his conviction for robbery. Defendant's extended-term sentence for aggravated battery is improper where the aggravated battery and robbery were not unrelated courses of conduct. Defendant was properly subject to the three-year term of Mandatory Supervised Release that accompanies a Class X felony because he was sentenced, based upon his background, to a Class X sentence of 13 years in prison. The DNA analysis fee must be vacated as defendant provided a DNA sample in a previous case; defendant may offset a certain fine with presentence custody credit.
- ¶ 2 After a bench trial, defendant Israel Hidalgo was convicted of robbery and aggravated

battery. He was sentenced, because of his background, as a Class X offender to 13 years in prison for the robbery conviction. He was also sentenced to a concurrent extended-term sentence of eight years for aggravated battery.

¶ 3 On appeal, defendant first contends that his conviction for aggravated battery violates the one-act, one-crime doctrine because it was based on the same physical act as his robbery conviction. In the alternative, he contends that the trial court erred when it sentenced him to an extended-term sentence for aggravated battery. Defendant next contends that the trial court improperly imposed the three-year term of mandatory supervised release (MSR) that accompanies a Class X felony when he is only subject to a two-year term of MSR based upon his conviction for the Class 2 felony of robbery. Defendant also challenges the imposition of certain fines and fees. We affirm defendant's convictions and sentences but correct the fines and fees order.

¶ 4 Defendant's arrest and prosecution arose out of a February 2011 incident during which the victim Gregory Goddo was beaten and his cellular phone taken.

¶ 5 Defendant was charged by information with robbery in that he knowingly took a cell phone from the victim by the use of force or by threatening the imminent use of force, and with aggravated battery in that he knowingly or intentionally caused great bodily harm when he punched and kicked the victim about the face and body.

¶ 6 In its opening statement the State described the offenses as follows:

"The victim had a cell phone in his hand. The defendant approached, demanded the cell phone, threatened the victim, then punched him in the eye and kneed him also and kicked him with his feet as well as took the cell phone and ran off with it."

¶ 7 At trial, the victim testified that defendant, who lived four houses away, was outside the

Mega Mall as the victim exited. Defendant wanted to use the victim's phone. When the victim refused, defendant "got all crazy," hit the victim in the face, and "smacked" the phone out of his hand. Defendant also kned the victim in the face. Defendant then took the phone and left. The victim contacted the police and later identified defendant.

¶ 8 During cross-examination, the victim testified that defendant hit him in the face four times and kned him twice. The victim denied owing money to defendant. He also denied that he had done drugs with defendant.

¶ 9 Officer Dennis Sugrue testified that after receiving a flash message regarding a robbery, he saw defendant on a sidewalk holding a cellular phone. Defendant matched the description given in the flash message. Defendant was detained and transported approximately three blocks to the victim's location. The victim then identified defendant as the person who hit him and took his phone. The victim also identified the phone.

¶ 10 During closing argument, the State waived its right to open, and defense counsel argued that the victim's testimony was not credible. In rebuttal, the State argued that because the aggravated battery was predicated upon a battery on the public way there was no need to prove a "massive injury," and then continued addressing the robbery charge as follows:

"And as far as the robbery count goes, there is no defense to that.

He took the phone from him by threat and by force. That's obvious."

¶ 11 Following the arguments, the trial court found defendant guilty of robbery and aggravated battery. He was sentenced, due to his background, as a Class X offender to 13 years in prison for the robbery. He was also sentenced to a concurrent extended-term sentence of eight years for the aggravated battery.

¶ 12 On appeal, defendant first contends that his conviction for aggravated battery must be

vacated because it violates the one-act, one-crime rule when it was carved out of the same "act" that formed the basis of his conviction for robbery.

¶ 13 Although defendant waived this issue by failing to raise it at trial or in a posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), this court may review this claim pursuant to the plain error doctrine (*People v. Carter*, 213 Ill. 2d 295, 299-300 (2004)).

¶ 14 The one-act, one-crime doctrine prohibits multiple convictions based on "precisely the same physical act." *People v. Nunez*, 236 Ill. 2d 488, 494 (2010). However, if a defendant commits multiple acts, then multiple convictions may stand provided that none of the offenses are lesser-included offenses. *Nunez*, 236 Ill. 2d at 494. Whether a defendant has been improperly convicted of multiple offenses arising out of the same act and whether a charge encompasses another as a lesser-included offense are questions of law that this court reviews *de novo*. *Nunez*, 236 Ill. 2d at 493.

¶ 15 One-act, one-crime analysis involves a two-step process. First, the court must determine whether the defendant's conduct consisted of multiple acts or a single act, as multiple convictions are improper when based on the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). In this context, an "act" is " 'any overt or outward manifestation which will support a different offense.' " *Nunez*, 236 Ill. 2d at 494, quoting *People v. King*, 66 Ill. 2d 551, 566 (1977). If a defendant is convicted of two offenses based upon the same physical act, the less serious offense must be vacated. *People v. Alvarado*, 2011 IL App (1st) 082957, ¶ 23.

¶ 16 If the reviewing court determines that more than one physical act was involved, then the court moves on to the second step and must determine whether any of the offenses are lesser-included offenses. *People v. Marston*, 353 Ill. App. 3d 513, 516-17 (2004). If any of the offenses are lesser-included offenses, then pursuant to *King*, the excess convictions must be vacated. *Id.* at 517. If none of the offenses are lesser-included offenses, then multiple

convictions are proper and may be entered against the defendant. *Id.*

¶ 17 Defendant's arguments focus on the "use of force" element of the charging instruments and he concludes that the State only charged him with a single act involving hitting the victim in the face. However, this argument overlooks the fact that the charging instrument also clearly added a separate act, taking property from the victim. See *People v. Pearson*, 331 Ill. App. 3d 312, 322 (2002) (holding that taking the victim's purse and knocking her to the ground were separate acts). Although striking the victim was closely related to taking his cell phone, two acts do not become one simply because they are closely related in time. *Id.* Therefore, we, like the *Pearson* court, find that the charging instruments alleged multiple acts taking this case outside the purview of *King*.

¶ 18 Moreover, even if we accept defendant's argument that striking the victim and taking his cell phone constituted a single act, we would conclude that multiple convictions were proper.

¶ 19 Our supreme court has held that it is inappropriate for the State to apportion related acts between crimes on appeal, when it did not do so at trial. *People v. Crespo*, 203 Ill. 2d 335, 343 (2001). In *Crespo*, the defendant stabbed the victim three times and was subsequently convicted of, *inter alia*, armed violence and aggravated battery. On appeal the defendant argued that his aggravated battery conviction must be vacated because it stemmed from the same physical act which formed the basis of his conviction for armed violence. Our supreme court acknowledged that each of the three stab wounds could support a separate offense, but reversed 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. *Crespo*, 203 Ill. 2d at 343-44. 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. *Crespo*, 203 Ill. 2d at 343. Rather, in order for multiple convictions to be sustained,

the indictment must indicate that the State intends to treat the defendant's conduct as multiple acts. *Crespo*, 203 Ill. 2d at 345.

¶ 20 Here, we acknowledge that during opening statements and closing arguments the State made little or no attempt to identify which acts constituted the separate acts necessary to support multiple convictions. That, however, does not end our analysis. We find *People v. Span*, 2011 IL App (1st) 083037 instructive. There, the defendant was convicted of armed robbery and aggravated battery. At trial, the victim testified that he was struck on the back of the head causing him to fall to the floor. As he tried to stand, he was struck again. When the defendant left, after attempting to break into a cash register, the defendant struck the victim again.

¶ 21 The defendant argued on appeal that the counts in the indictment failed to differentiate between the blows supporting the attempted armed robbery charge as opposed to those blows supporting the aggravated battery charge in violation of *People v. Crespo*, 203 Ill. 2d 335 (2001). The court disagreed as the State in that case sought to apportion the defendant's acts among the separate charges before the trial court. *Span*, 2011 IL App (1st) 083037, ¶ 87. Additionally, the trial court, as the trier of fact, heard the victim's testimony and watched a surveillance video which showed that the final blow the defendant inflicted on the victim was separated from the two previous blows by the intervening act of the defendant's attempts to open the register. *Span*, 2011 IL App (1st) 083037, ¶ 88. Therefore, the court concluded that the trial court "would have understood the need to consider whether there was sufficient evidence to conclude that the defendant's actions constituted separate offenses," and that the defendant's convictions for attempted armed robbery and aggravated battery were not based on the same physical act. *Span*, 2011 IL App (1st) 083037, ¶ ¶ 88, 89.

¶ 22 Here, as in *Span*, the case was tried by the court, not a jury. The experienced judge would have been aware of the need to identify separate acts to support separate convictions. See *Span*,

2011 IL App (1st) 083037, ¶ 88. The trial court heard the victim describe how defendant "got all crazy", struck the victim, then took his cell phone. Attuned as it must have been to identifying separate physical acts, we cannot conclude that the trial court erred when it entered separate convictions for both aggravated battery and robbery.

¶ 23 Alternatively, defendant contends that the trial court erred when it imposed an extended-term sentence on his aggravated battery conviction because it was not the most serious class offense. The State responds that the extended-term sentence was proper because the aggravated battery was a separate course of conduct from the robbery. We agree with the State.

¶ 24 Extended term sentences are authorized by section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2 (West 2010)). Our supreme court has held that the plain language of this statute limits the imposition of extended term sentences to only the most serious class of offenses. See *People v. Jordan*, 103 Ill. 2d 192, 205-06 (1984). However, an exception to this rule applies when the extended-term sentence is imposed " 'on separately charged , differing class offenses that arise from unrelated courses of conduct.' " *People v. Bell*, 196 Ill. 2d 343, 350 (2001) quoting *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). To determine whether two offenses were part of unrelated courses of conduct, courts apply the "substantial change in the nature of defendant's criminal objective" test. *Id.* at 351.

¶ 25 The State argues that the answer to this question can be found in *People v. Radford*, 359 Ill. App. 3d 411 (2005). We disagree. In *Radford*, the defendant attempted to rob a man by placing a glass bottle in his back and suggesting that it was a firearm. When the robbery victim's wife said "it's not a gun," the defendant struck her in the face with the bottle cutting her lip and permanently scarring her. The trial court imposed extended-term sentences on both attempted armed robbery and aggravated battery convictions. This court held that the extended-term sentences were proper despite the limitation of section 5-8-2 because the offenses involved

unrelated courses of conduct. This court held that after it was apparent to defendant that he would be unable to complete the robbery he could have merely fled. *Id.* at 421. Instead the defendant's motivation changed from avarice to anger, his objective changed from robbery to battery, and he struck the wife in the face. *Id.* This court held that extended-term sentences were proper on both offenses under these circumstances. *Id.*

¶ 26 In this case, defendant's actions showed no change in criminal intent such that the two offenses constituted separate courses of conduct. Unlike *Radford*, there was only a single victim and it is impossible to discern a turning point in the offense where defendant's motivation changed. We see no reason to attribute the use of force necessary to wrest control of the victim's cell phone from him to a criminal objective different than that arising from the repeated blows to the victim's face. Although defendant may have used more force than necessary to take the victim's cell phone, there is nothing in the record to suggest that he did so because his criminal objective had changed. Accordingly, we find that the offenses of robbery and aggravated battery did not involve unrelated courses of conduct and imposition of an extended-term sentence for the aggravated battery conviction was improper.

¶ 27 The remedy defendant seeks on this issue is unclear. In the body of his brief, he requests that we reduce the sentence to the maximum non-extended term, but in his conclusion he requests remand for resentencing. When an extended-term sentence is improper, but it is clear from the record that the trial court intended to impose a sentence in excess of maximum non-extended term, we may use our power under Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) to reduce the sentence to the maximum non-extended term sentence. See *People v. Taylor*, 368 Ill. App. 3d 703, 709 (2006). Therefore, we vacate the extended-term portion of defendant's sentence and reduce his sentence to the maximum non-extended term for a Class 3 felony, five years. See 730 ILCS 5/5-4.5-40 (West 2010)

¶ 28 Defendant next contends that the trial court improperly imposed the three-year term of MSR that accompanies a Class X felony when defendant was convicted of the Class 2 felony of robbery.

¶ 29 Before addressing the merits of defendant's contention regarding his MSR term, this court notes that he has forfeited review of this issue by failing to object at sentencing or in a motion to reconsider sentence. *Enoch*, 122 Ill. 2d at 186. Although defendant acknowledges that he failed to object to the three-year term of MSR before the trial court, he contends this issue is not forfeited because the MSR term is void. See *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (a void sentence may be challenged at any time). We disagree.

¶ 30 Section 5-5-3(c)(8) of the Unified Code of Corrections provides that a defendant, over the age of 21, who is convicted of a Class 1 or Class 2 felony shall be sentenced as a Class X offender if he has prior convictions for two Class 2 or higher class felonies arising out of a different series of acts. 730 ILCS 5/5-5-3(c)(8) (West 2008); now 730 ILCS 5/5-4.5-95(b) (West 2010). The MSR term attached to a Class X sentence is three years. 730 ILCS 5/5-8-1(d)(1) (West 2010).

¶ 31 This court has previously held that when Class X treatment is accorded to a defendant, the MSR term applicable to such a sentence is automatically imposed (*People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995)), *i.e.*, a Class X offender receives both an enhanced prison term and an enhanced MSR term (*People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000)). See also *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009).

¶ 32 Defendant acknowledges that *Anderson*, *Smart*, and *Watkins* reached a result contrary to his argument, but argues they were wrongly decided in light of our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). However, this court's decisions in *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011), and *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010),

considered, and rejected, similar arguments. Thus, we continue to adhere to this court's decision in *Anderson*. Accordingly, as defendant was sentenced as a Class X offender he received both an enhanced term of imprisonment and an enhanced MSR term (see *Smart*, 311 Ill. App. 3d at 417-18). Because the three-year term of MSR was properly imposed by the trial court, defendant's failure to raise this issue at sentencing and in a motion to reconsider sentence has resulted in its forfeiture on appeal. See *People v. McKinney*, 399 Ill. App. 3d 77, 79, 83 (2010).

¶ 33 Defendant next contests the imposition of certain fees and fees. This court reviews the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). He first contends he was improperly assessed a \$200 DNA analysis fee because he previously submitted DNA for analysis. The State agrees that under *People v. Marshall*, 242 Ill. 2d 285, 302-03 (2011), the imposition of the DNA indexing fee in this case was improper because defendant provided a DNA sample in a previous case. Thus, the \$200 DNA analysis fee must be vacated.

¶ 34 Defendant further contends, and the State concedes, that he is entitled to a \$5 per day credit for each of the 137 days he was in custody before sentencing for a total of \$685. See 725 ILCS 5/110-14(a) (West 2010). Defendant has one fine against which he may apply this credit, the \$30 Child Advocacy Center assessment (see *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009)). We therefore order that the \$30 Child Advocacy Center assessment be offset by defendant's presentence custody credit. See 725 ILCS 5/110-14(a) (West 2010) (credit is applied against fines; in no case shall the amount credited exceed the amount of the fine). Accordingly, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the circuit court clerk to correct the order assessing fines and fees as stated above.

¶ 35 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the fines and fees order be corrected to reflect (1) the vacation the \$200 DNA analysis fee, (2) \$685 in

1-11-3791

presentence custody credit, and (3) that the \$30 Child Advocacy Center assessment fee is offset by defendant's presentence custody credit for a total amount due of \$430. We affirm defendant's convictions for aggravated battery and robbery, however, we vacate the extended-term portion of defendant's aggravated battery sentence and reduce the sentence to five years' imprisonment.

¶ 36 Affirmed in part and vacated in part; fines and fees order corrected.