

No. 1-12-0311

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 2655
	)	
KARL SMITH,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Justices Howse and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's convictions for aggravated battery with a firearm and aggravated battery of a child toward David Curiel are vacated under the one-act, one-crime rule; mittimus corrected; and judgment affirmed in all other respects.

¶ 2 Following a jury trial, defendant Karl Smith was found guilty of two counts each of attempted murder and aggravated battery with a firearm, and one count each of aggravated battery of a child, home invasion, and armed robbery. The trial court sentenced defendant to an aggregate term of 99 years' imprisonment. On appeal, defendant contends that the one-act, one-crime rule requires that we vacate his aggravated battery convictions because they were based

upon the same physical acts underlying his attempted murder convictions, namely shooting the victims.

¶ 3 The record shows that defendant was charged in a multi-count indictment with offenses arising from a home invasion the morning of January 18, 2008. Defendant and two others forced their way into the west side apartment of Gabriel Curiel and his brother, Jonathan Collazo, when Gabriel's three minor children (Isaiah, David, and Javion) were also present. During that episode, six-year-old David was shot in the head, Gabriel was beaten, stabbed and shot, and money and cannabis were removed from Gabriel's safe.

¶ 4 After the jury returned verdicts finding defendant guilty as indicated above, the trial court merged the convictions for aggravated battery of a child and aggravated battery to David, then sentenced defendant to consecutive terms of 30 and 25 years' imprisonment for the attempted murder convictions, consecutive 22-year terms of imprisonment for home invasion and armed robbery, and concurrent, respective terms of 30 and 15 years' imprisonment for the aggravated battery with a firearm convictions as to David and Gabriel.

¶ 5 In this court, defendant does not challenge the sufficiency of the evidence to support his convictions. He solely contends that the one-act, one-crime rule requires that we vacate his aggravated battery convictions because they were based upon the same physical acts underlying his attempted murder convictions, namely shooting the victims, Gabriel and David.

¶ 6 Initially, the State points out that defendant did not raise this issue at sentencing or in his post-sentencing motion, and has thus forfeited it for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Notwithstanding, our supreme court has held that " 'an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process' " and may be reviewed under the second prong of the plain error doctrine. *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009) (quoting *People v. Harvey*, 211 Ill.2d 368, 389

(2004)); accord *People v. Carter*, 213 Ill. 2d 295, 299 (2004). Our review is *de novo*. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 17.

¶ 7 The one-act, one-crime rule, set forth in *People v. King*, 66 Ill. 2d 551, 566 (1977), prohibits multiple convictions based on "precisely the same physical act." *People v. Nunez*, 236 Ill. 2d 488, 494 (2010). In this context, an "act" is "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566. If defendant commits multiple acts, then multiple convictions may stand, provided that none of the offenses are lesser-included offenses. *People v. Kotero*, 2012 IL App (1st) 100951, ¶ 19 (citing *Nunez*, 236 Ill. 2d at 494).

¶ 8 The State concedes, and we agree, that defendant's conviction for aggravated battery with a firearm as to David should be vacated as it was based on the same act of shooting that formed the basis for his attempted murder conviction as to David. *Mimes*, 2011 IL App (1st) 082747, ¶ 46; *People v. Hardin*, 2012 IL App (1st) 100682, ¶ 35. As for the aggravated battery of a child conviction, which the trial court merged with the aforementioned aggravated battery with a firearm conviction, we also agree with defendant that the judgment thereon should be vacated as it was, again, based on the same act of shooting David (*People v. Segara*, 126 Ill. 2d 70, 77 (1988)) in violation of the one-act, one-crime rule (*King*, 66 Ill. 2d at 566).

¶ 9 However, the same cannot be said of defendant's convictions for aggravated battery with a firearm and attempted murder as to Gabriel. As the State points out, defendant's conviction for the attempted murder of Gabriel was based on the act of stabbing, whereas the aggravated battery with a firearm conviction was based on the act of shooting Gabriel, and neither crime is a lesser-included offense of the other. See *People v. Miller*, 238 Ill. 2d 161, 173 (2010) (abstract elements approach). Thus, we find no error in this instance, and the multiple convictions based on multiple acts may stand. *Kotero*, 2012 IL App (1st) 100951, ¶ 19 (citing *Nunez*, 236 Ill. 2d at 494).

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¶ 10 For the reasons stated, we affirm the judgment entered on defendant's convictions for attempted murder and aggravated battery with a firearm toward Gabriel Curiel, vacate the judgment on defendant's convictions for aggravated battery with a firearm and aggravated battery of a child toward David Curiel, order the mittimus to reflect this determination (*People v. Edwards*, 304 Ill. App. 3d 250, 255 (1999)), and affirm the judgment in all other respects.

¶ 11 Affirmed in part; vacated in part; mittimus corrected.