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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-1978
)	
STEFAWN GILBERT,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant's convictions of aggravated battery violated the one-act, one-crime rule, and we remanded for the trial court to vacate the less serious conviction; (2) the trial court erred in imposing a public defender reimbursement fee when the court had not provided the required notice and conducted a proper hearing on defendant's ability to pay; we vacated the fee and remanded for a proper hearing; (3) because the trial court's order mislabeled a public defender reimbursement fee and miscalculated the total assessments imposed, we remanded for the court to make the required corrections.

¶ 2 Following a jury trial, defendant, Stefawn Gilbert, was convicted of two counts of aggravated battery (720 ILCS 5/12-4(a), (b)(1) (West 2010)). Both counts alleged that defendant stabbed the

same victim during the same incident. The trial court sentenced defendant to concurrent terms of four years' imprisonment and imposed a \$750 public defender fee. The court imposed the fee without asking defendant any questions about his ability to pay. According to the "Order Assessing Fines, Fees, Costs and Restitution" (Order), the \$750 public defender fee is mislabeled, and the total of fines, fees, and costs is miscalculated. On appeal, defendant claims that his convictions violate the one-act, one-crime rule and that his public defender fee must be vacated. The State agrees; however, the State argues that it should be allowed to choose which conviction should be vacated and that the cause should be remanded for a hearing to determine defendant's ability to pay the public defender fee. The State also contends that, because the cause must be remanded, the trial court should modify the mittimus to reflect the correct amount of fines, fees, and costs imposed. For the reasons that follow, we (1) remand the cause for the trial court to vacate the less serious conviction, (2) vacate the public defender fee and remand the cause for the trial court to determine defendant's ability to pay that fee, and (3) order the trial court to modify the mittimus to reflect the proper amount of fines, fees, and costs imposed.

¶ 3

I. BACKGROUND

¶ 4 The facts relevant to resolving the issues raised are as follows. Defendant was charged by information with two counts of aggravated battery. Counsel was appointed to represent defendant, and, soon thereafter, defendant was indicted.

¶ 5 The first count of the indictment charging defendant with aggravated battery provided, in relevant part:

“[T]hat [defendant] *** on or about **JUNE 19, 2011**, in the County of Lake and State of Illinois, committed the offense of **AGGRAVATED BATTERY**, in that the defendant, in

committing a battery in violation of 720 ILCS 5/12-3 [(West 2010)], knowingly caused great bodily harm to [the victim], in that the defendant stabbed [the victim] about the body with a knife, in violation of 720 ILCS 5/12-4(a) [(West 2010)].”

The second count was identical to the first, except that the second count charged that defendant “by the use of a deadly weapon, being a knife, knowingly caused bodily harm to [the victim], in that the defendant stabbed [the victim] about the body with a knife, in violation of 720 ILCS 5/12-4(b)(1) [(West 2010)].”

¶ 6 Evidence presented at defendant’s jury trial revealed that defendant stabbed the victim three times. The State never attempted to differentiate among the stabs defendant inflicted. Rather, the State treated the incident as one continuous act. The jury found defendant guilty of both counts, and defendant moved for a new trial or for judgment notwithstanding the verdict. Nowhere in the motion did defendant argue that his convictions violated the one-act, one-crime rule. The trial court denied the motion.

¶ 7 Subsequently, defendant was sentenced to concurrent terms of four years’ imprisonment. In imposing the sentence, the court ordered defendant to pay a \$750 public defender fee. The court observed that “[n]obody specifically mentioned [the fee],” but the court nevertheless “had the information it need[ed to impose it].” Nothing in the record indicates that defendant was given notice that the court was considering assessing such a fee.

¶ 8 In the Order, which is a preprinted form that the court filled out, the \$750 public defender fee is listed as a “1st Offense” driving while under the influence (DUI) fine. Additionally, the Order indicates that \$1,159 in fines, fees, and costs were imposed, when, in actuality, the amount totals \$1,149. Defendant moved to reconsider his sentence, but he never claimed that the public defender

fee was improperly imposed or mislabeled or that the amount of fines, fees, and costs imposed totaled less than what the court indicated. The court denied the motion, and this timely appeal followed.

¶ 9

II. ANALYSIS

¶ 10 In essence, three issues are raised in this appeal. Specifically, we are asked to consider (1) whether defendant's convictions of both counts of aggravated battery violate the one-act, one-crime rule, and, if they do, whether the State may choose which conviction to vacate; (2) whether the public defender fee was imposed following a proper hearing, and, if not, whether the fee must be vacated outright or whether the cause must be remanded for a proper hearing; and (3) whether the mittimus must be modified to reflect the proper total of fines, fees, and costs imposed. We consider each issue in turn.

¶ 11

A. Plain Error

¶ 12 Before doing so, we note that none of these issues were raised in the trial court. Generally, in order to raise on appeal an alleged error that arose during trial, a defendant must make an objection to that error when it happens at trial and raise that error in a written posttrial motion. *People v. Burton*, 2012 IL App (2d) 110769, ¶ 12. The failure to properly preserve an issue in the trial court results in forfeiture of that issue on appeal. *People v. Baez*, 241 Ill. 2d 44, 129 (2011). Defendant recognizes that he failed to preserve his claims that his convictions violate the one-act, one-crime rule and that his public defender fee was improperly imposed.

¶ 13 Nevertheless, defendant urges us to review these issues under the plain-error rule (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). Plain error is a limited and narrow exception to the general rule of forfeiture. *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). To obtain relief under the plain-error rule,

a defendant must first show that an error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If an error occurred, the court then considers whether the error is reversible. *Burton*, 2012 IL App (2d) 110769, ¶¶ 14-15. If the error is not reversible, the court need not go any further, because, without reversible error, the defendant cannot invoke the plain-error rule. See *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). On the other hand, if reversible error is identified, the defendant may obtain relief if the error complained of meets either prong of the two-pronged plain-error rule. See *id.* That is, the defendant, who bears the burden of persuasion, must establish that “either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.” *People v. Herron*, 215 Ill. 2d 167, 187 (2005). We review *de novo* whether a forfeited claim is reviewable as plain error. *Burton*, 2012 IL App (2d) 110769, ¶ 13.

¶ 14

1. One-Act, One-Crime

¶ 15 Here, we first examine whether defendant’s one-act, one-crime argument may be reviewed for plain error. We find that it may, as issues concerning a one-act, one-crime violation may be reviewed under the second prong of the plain-error rule. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010) (“forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process”).

¶ 16 One-act, one-crime violations arise when more than one offense is carved from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). A physical act is “any overt or outward manifestation which will support a different offense.” *Id.* Where a defendant commits multiple acts against a single victim, the State may obtain multiple convictions, but, in order to do so, the charging instrument and the State’s evidence at trial must differentiate among the various acts. *People v.*

Crespo, 203 Ill. 2d 335, 342-45 (2001). We review *de novo* whether there is a one-act, one-crime violation. *People v. Curtis*, 367 Ill. App. 3d 143, 147 (2006).

¶ 17 Here, the State made no effort to establish that defendant committed multiple acts against the victim. Instead, the State merely argued alternate theories of liability. Based on these facts, the State concedes that the evidence does not support multiple convictions. We agree.

¶ 18 However, the fact that a violation arose does not end our inquiry. Rather, we now must determine which aggravated battery conviction must be vacated. When a violation of the one-act, one-crime doctrine is identified, the defendant's conviction on the less serious offense should be vacated and the defendant should be sentenced on the more serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). In this case, aggravated battery with a deadly weapon (a knife) and aggravated battery causing great bodily harm are both Class 3 felonies carrying identical punishment, and both require proof of the same mental state. See 720 ILCS 5/12-4(a), (b)(1), (e)(1) (West 2010). Given these circumstances, we cannot determine which is the more serious offense. See *In re Samantha V.*, 234 Ill. 2d 359, 377-80 (2009).

¶ 19 Recognizing this, the State, citing *Artis*, claims that the cause should be remanded and that it should be allowed to “exercise its prosecutorial discretion in order to choose which of the two convictions should be vacated.” Our supreme court expressly rejected this approach in *Artis*. *Artis*, 232 Ill. 2d at 177 (concluding that, rather than allowing the State to choose which conviction should be vacated, “the better course is to continue to adhere to the principle that when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination.”). Accordingly, we remand the cause to the trial court. *Id.* On remand, the trial court is directed to determine which

count of aggravated battery is more serious, vacate defendant's conviction on the less serious count, and correct the sentencing order.

¶ 20 2. Public Defender Fee

¶ 21 We next consider whether the imposition of the public defender fee may be reviewed as plain error. We determine that it may, as it appears that our supreme court does not apply forfeiture to arguments concerning the imposition of a public defender fee. See *People v. Love*, 177 Ill. 2d 550, 564 (1997) (“Where *** the trial court wholly ignored the statutory procedures mandated for a [public defender fee] reimbursement order *** and instead ordered reimbursement *sua sponte* without any warning to the defendant, fairness dictates that waiver should not be applied.”).

¶ 22 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2010)) authorizes the trial court to order a criminal defendant for whom counsel has been appointed to pay a reasonable amount to reimburse the county or the state. However, prior to ordering reimbursement, the trial court must conduct a hearing regarding the defendant's financial resources. *Id.*; *Love*, 177 Ill. 2d at 559. The hearing “shall be conducted on the court's own motion or on motion of the State's Attorney *** no later than 90 days after the entry of a final order disposing of the case at the trial level.” 725 ILCS 5/113-3.1(a) (West 2010). Whether the public defender fee was properly imposed presents a question of law that we review *de novo*. See *People v. Gutierrez*, 2012 IL 111590, ¶ 16.

¶ 23 Here, the court held a perfunctory hearing, and defendant had not received notice and was not allowed to present evidence. See *People v. Spotts*, 305 Ill. App. 3d 702, 703-04 (1999). Thus, the State concedes that the order requiring payment must be vacated. Accordingly, we vacate the order requiring reimbursement of the public defender fee.

¶ 24 Although the parties agree that the \$750 public defender fee must be vacated, they differ on the question of whether it is permissible to remand for a proper hearing.¹ Not surprisingly, the State argues that it is, while defendant insists that it is not because the time within which the hearing had to be held has passed. While it is true that, when the reimbursement obligation is imposed by the *clerk of the circuit court*, the passage of time during the pendency of an appeal may bar a reimbursement order (see *Gutierrez*, 2012 IL 111590), that does not mean that the same course of action must be followed when the trial court imposes the fee following a perfunctory hearing, which is what happened in this case. In resolving what happens when the trial court imposes the fee following a faulty hearing, we find instructive *People v. Somers*, 2013 IL 114054.

¶ 25 In *Somers*, the trial court imposed a public defender fee after asking the defendant three questions. *Id.* ¶ 4. Specifically, the court inquired whether the defendant was physically able to work, whether the defendant would get a job when he was released from jail, and whether the defendant would use the money he earned from that job to pay his fines and costs. *Id.* The defendant responded affirmatively. *Id.* The issue raised on appeal to our supreme court was whether

¹We note that, in the transcription of the sentencing hearing that is contained in the report of proceedings, the court referred to the \$750 fee as a public defender fee, but, in the Order contained in the common-law record, this fee is listed as a DUI fine. Given that the Order is a preprinted form, that the DUI fine appears just below the public defender fee on this preprinted form, and that what is contained in the report of proceedings controls when there is a conflict between the common-law record and the report of proceedings (see *People v. Ramirez*, 344 Ill. App. 3d 296, 300 (2003)), we find that the reference to a \$750 DUI fine is a scrivener's error that in no way impacts our decision here.

the public defender fee must be vacated outright, as the trial court failed to comply with section 113-3.1(a) of the Code, or whether the perfunctory hearing the trial court conducted nevertheless satisfied the time limits of section 113-3.1(a) such that the cause could be remanded for a proper hearing. *Id.* ¶¶ 12, 13. The court concluded that a remand for a proper hearing was appropriate. *Id.* ¶ 13. In reaching that result, the court observed that there is a difference between a trial court not holding any type of hearing within 90 days and holding a hearing that is insufficient to comply with section 113-3.1(a). *Id.* ¶ 15. When the trial court fails to hold any type of hearing, the public defender fee must be vacated outright. *Id.* ¶¶ 16, 17. However, when the court has a hearing but that hearing is insufficient, then the cause can be remanded for a proper hearing. *Id.* ¶ 18.

¶ 26 Here, like in *Somers*, the trial court held a hearing of sorts within 90 days after entry of the final order disposing of the case at the trial level. Specifically, the court reviewed the “information” it had before it and, from that “information,” it found that defendant had the ability to pay a public defender fee. However, although this hearing was timely, it, like the hearing in *Somers*, did not comply with the other requirements of section 113-3.1(a). Because it did not, we, pursuant to *Somers*, vacate the public defender fee and remand the cause to the trial court for a proper hearing on the issue of defendant’s ability to pay a public defender fee.

¶ 27 B. Correction of Mittimus

¶ 28 Finally, the State contends, and defendant agrees, that the mittimus should be corrected to reflect the proper amount of fines, fees, and costs imposed. The Order indicates that a total of \$1,159 in fines, fees, and costs were assessed. However, the listed fines, fees, and costs actually total \$1,149. Because we are remanding the cause, we direct the court to properly calculate the amount of fines, fees, and costs defendant must pay, after determining the amount of any public defender fee.

¶ 29

III. CONCLUSION

¶ 30 In conclusion, defendant's convictions of aggravated battery cannot both stand, as they are based on the same physical act. Because we cannot determine which of the offenses is more serious, we remand the cause for the trial court to make that determination and vacate the less serious conviction. We also vacate the public defender fee, and, because the trial court timely imposed the fee following a perfunctory hearing, we remand the cause for a proper hearing on the issue of defendant's ability to pay the fee. Once a proper public defender fee, if any, is determined, the trial court must properly designate the fee as a public defender fee on the Order and properly calculate the amount of fines, fees, and costs imposed.

¶ 31 For these reasons, the judgment of the circuit court of Lake County is affirmed in part and vacated in part, and the cause is remanded.

¶ 32 Affirmed in part and vacated in part; cause remanded.