

No. 1-12-2129

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 15468
)	
KIRBY MYLES,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

PREISIDNG JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 **Held:** Defendant's right to due process was violated by his conviction of the uncharged offense of reckless conduct which was not a lesser-included offense of unlawful restraint; judgment reversed.

¶ 2 Following a bench trial, defendant Kirby Myles was convicted of reckless conduct and sentenced to 18 months' supervision. On appeal, he contends that the trial court violated his right

to due process by convicting him of the uncharged offense of reckless conduct. He also contests the sufficiency of the evidence to prove him guilty of that offense beyond a reasonable doubt.

¶ 3 The record shows that defendant was charged with attempted robbery, two counts of aggravated battery, and unlawful restraint, after an altercation with 17-year-old Brian Walsh on June 26, 2011. At trial, Walsh testified that about 8:30 that evening, he drove to the County Fair grocery store at 10830 South Western Avenue in Chicago, pulled into the parking lot, and turned right. After noticing that the store was closed, he attempted to pull out of the parking lot, but was cut off by the driver of a Maserati, which prevented him from doing so. Walsh observed that there were two men and two women in that car, and identified defendant as the driver.

¶ 4 Walsh further testified that defendant exited his car, and approached his vehicle on the driver's side. Defendant swore and yelled at him through the open window, asking if he knew how expensive his car was, and said that he "could have torn his shit up and that people get beat up for this." The male passenger exited defendant's car and also began to yell at him. Defendant then asked Walsh if he had any money, and when he responded that he did not, defendant hit him twice in the face with a closed fist. At that point, Walsh felt that he could not leave the parking lot, and took out his cellular phone telling the men he was going to call police. Walsh then stepped out of his car, and defendant and his passengers left in the Maserati. Walsh took down the license plate number of the car, and reported the incident to police. Two days later, he identified defendant in a photo array, and a few months later, he identified defendant in a lineup at the police station.

¶ 5 The parties stipulated that the video from the County Fair grocery store fairly and accurately depicted the events as described, and Walsh acknowledged that he could not see in the

video where he was hit in the face. Chicago police sergeant Mark McNamara testified that he spoke to Walsh after the incident, and Walsh told him that defendant punched him in the face. The surveillance video from County Fair and the certified copy of vehicle records showing that defendant was the owner of the Maserati were admitted into evidence.

¶ 6 The video shows Walsh cutting off defendant and pulling into the parking lot of the grocery store, followed by defendant driving into the parking lot and blocking Walsh's car from moving forward. The video further shows defendant immediately exiting his car with his male passenger, and approaching the driver's side window of Walsh's car. It also shows the male passenger reaching into Walsh's window while defendant is standing in front of it.

¶ 7 Defense counsel moved for a directed finding at the close of the State's case. In announcing its decision, the court noted that it had viewed the video at least four times and that it showed that Walsh cut defendant off when he pulled into the parking lot, and that defendant had cut someone else off. The court noted that defendant was an adult and appeared to be an experienced driver, who "hem[med]" in the teenaged Walsh, and addressed the resulting societal implications. The court also addressed the charges finding that the video shows the unnamed passenger in defendant's vehicle reach inside of Walsh's car and hit him, and that defendant was not accountable for his actions. The court further found that defendant's statement to Walsh regarding his money did not amount to a significant step taken toward the commission of robbery, but that defendant endangered the safety of his passengers and Walsh, who in fact received bodily harm. The court then granted defendant's motion for a directed finding on the attempted robbery and aggravated battery counts, but denied it with respect to unlawful restraint, finding that defendant's conduct amounted to reckless conduct.

¶ 8 Defendant chose not to testify or present evidence, and the court then found him guilty of reckless conduct. Defendant filed a motion for a new trial maintaining that the trial court erred in finding him guilty of reckless conduct because it is not a lesser included offense of unlawful restraint. Counsel further maintained that defendant was never placed on notice that he was facing a charge of reckless conduct, and, as such, he was denied effective assistance of counsel in defending himself against that charge. He further asserted that the testimony and evidence in this case do not support a finding of reckless conduct.

¶ 9 In denying that motion, the court found that reckless conduct can be a lesser included offense of unlawful restraint, and looked at the charging instrument to make that determination. The court found that defendant endangered Walsh's safety by pulling into the parking lot in a manner that would not permit him to just turn and drive away. As such, Walsh was "hemmed in," and although the court did not believe that defendant was responsible for his passenger striking Walsh, he endangered Walsh's safety under all of the circumstances. The court also denied defendant's subsequent motion to reconsider that ruling.

¶ 10 In this appeal from that judgment, defendant first contends that the trial court violated his right to due process by convicting him of the uncharged offense of reckless conduct. He maintains that reckless conduct was not a lesser included offense of unlawful restraint, and that his conviction should be reversed. The State responds that the court properly found defendant guilty of reckless conduct as a lesser included offense of unlawful restraint because the specific facts of the case supported it, and defendant was provided notice of the factual allegations that formed the basis of his reckless conduct conviction. Defendant disagrees, and in his reply brief maintains that in determining whether he had notice of the possibility of the lesser included

offense of reckless conduct, the court must look to the unlawful restraint count alone, as that was the charge that the trial court found to be the greater offense.

¶ 11 A criminal defendant has a due process right to notice of the charges brought against him, and thus may not be convicted of an uncharged offense. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). A defendant, however, may be convicted of an uncharged offense if it is a lesser included offense of a crime expressly charged in the indictment, and the trial evidence naturally supports conviction of the lesser and acquittal of the greater offense. *Kolton*, 219 Ill. 2d at 360.

¶ 12 In determining whether an offense is a lesser-included offense of a charged offense, the supreme court has concluded that the charging-instrument approach is best utilized. *Kolton*, 219 Ill. 2d at 361. Under this approach, the lesser offense need not be a "necessary" part of the greater offense, provided that the allegations in the charging instrument contain a "broad foundation" or "main outline" of the lesser offense. *People v. Kennebrew*, 2013 IL 113998, ¶30, and cases cited therein.

¶ 13 The inquiry into whether defendant may be convicted of an uncharged offense is a two-tiered process. *Kolton*, 219 Ill. 2d at 361; *People v. Lipscomb*, 2013 IL App (1st) 120530, ¶11. The court must first determine whether the offense is a lesser included offense, and only after so deciding, should the court examine the evidence to determine whether the evidence was sufficient to uphold the conviction on the lesser offense. *Kennebrew*, ¶30. Whether a charged offense encompasses a lesser-included offense presents a question of law which is reviewed *de novo*. *Kolton*, 219 Ill. 2d at 361.

¶ 14 In this case, defendant was charged with attempted robbery, two counts of aggravated battery, and unlawful restraint. The court directed a finding in favor of defendant on attempted

robbery and aggravated battery, and at the close of the trial found him guilty of reckless conduct as a lesser included offense of unlawful restraint.

¶ 15 A person commits reckless conduct when he, in relevant part, recklessly performs an act or acts that causes bodily harm to or endangers the safety of another person. 720 ILCS 5/12-5 (West 2012). The question before this court is whether that offense is a lesser included offense of unlawful restraint, the offense charged in the indictment. The State asserts that this determination is made from the indictment as a whole while defendant maintains that it is restricted to the greater offense.

¶ 16 As noted above, the supreme court held in *Kennebrew*, ¶30, that under the charging instrument approach, the facts alleged in the charging instrument must contain a "broad foundation" or "main outline" of the lesser offense. That holding suggests that the indictment be looked at as a whole in determining whether the offense is a lesser-included offense. We note, however, that in describing this matter in *Kennebrew*, the supreme court cited its prior decisions in *Miller*, 238 Ill. 2d at 166 and *Kolton*, 219 Ill. 2d at 361, where the court held that under the charging instrument approach, the allegations in the charging instrument are looked at to see whether "the description of the greater offense" contains a broad foundation or main outline of the lesser offense, suggesting a narrower focus.

¶ 17 In this case, defendant was convicted of reckless conduct as a lesser offense of unlawful restraint. The charging instrument provided that defendant had committed unlawful restraint in that he knowingly without legal authority detained the victim. Although a broad foundation or outline of reckless conduct may reasonably be inferred from the totality of the charges set forth in the indictment, *i.e.*, defendant intentionally or knowingly caused bodily harm to the victim by

striking him, and demanded his money by the use of force or threatening the imminent use of force, the same cannot be said by focusing on the description of the greater offense of unlawful restraint.

¶ 18 The elements of reckless conduct, namely, that defendant performed acts that caused bodily harm or endangered the safety of Walsh (720 ILCS 5/12-5 (West 2012)) cannot be inferred from the allegation that defendant detained the victim. Detaining a person restricts their movement, but does not necessarily result in harm or endangerment to their safety. *People v. Wisslead*, 108 Ill. 2d 389, 400 (1985). As such, the indictment did not provide the broad foundation or main outline of reckless conduct so that he could plan his trial strategy against this possible lesser-included offense. *Kolton*, 219 Ill. 2d at 361, 363.

¶ 19 Notwithstanding, the State alternatively contends that defendant's conviction could be upheld by finding that reckless conduct is a lesser included offense of aggravated battery where the charging instrument alleged that defendant committed the aggravated battery in that he intentionally or knowingly caused bodily harm to the victim by striking him. Although reckless conduct has been found to be a lesser-included offense of aggravated battery (*People v. Roberts*, 265 Ill. App. 3d 400, 402 (1994)), we find it inappropriate in this case where defendant was acquitted of the charge of aggravated battery because the trial court found that defendant was not accountable for the actions of his male passenger who struck the victim. Defendant, therefore, could not be found guilty of any of the lesser included offenses of aggravated battery because he was not responsible for the conduct of his male passenger. Under these circumstances, finding defendant guilty of reckless conduct as a lesser offense of aggravated battery would violate the double jeopardy clause, for the acquittal of the greater offense of aggravated battery operated as

an acquittal, and as a bar, to any subsequent prosecution of all lesser-included offenses. *People v. Henry*, 204 Ill. 2d 267, 289 (2003). We, therefore, reject the State's alternative contention.

¶ 20 The record suggests that in finding defendant guilty of reckless conduct (a misdemeanor), rather than unlawful restraint (a Class 4 felony), the trial court was attempting to exercise lenity given the circumstances of the case. In general, the exercise of lenity in defendant's favor should not be used to his advantage on appeal (*People v. O'Malley*, 108 Ill. App. 3d 823, 833 (1982)); however, in this case, the trial court acted without the proper authority (*People ex rel. Daley v. Suria*, 112 Ill. 2d 26, 36 (1986)) where reckless conduct was not a lesser included offense of unlawful restraint. As a consequence, we must reverse the judgment of the circuit court of Cook County.

¶ 21 Reversed.