

No. 1-12-2194

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 4774
)	
ROBERT HARREL,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment affirmed over defendant's claim that he was denied his constitutional right to self-representation at trial.
- ¶ 2 Following a bench trial, defendant, Robert Harrel, was convicted of aggravated false personation of a peace officer, robbery and theft, then sentenced to respective consecutive terms of seven and six years' imprisonment, and a concurrent term of six years' imprisonment. On appeal, defendant contends that the trial court violated his constitutional right to self-

representation, that the evidence was insufficient to support his robbery conviction, and that his robbery and theft convictions must be vacated under the one-act one-crime doctrine.

¶ 3 The record shows that prior to trial, on July 25, 2011, defense counsel requested a plea offer from the State. The State subsequently offered defendant eight years' imprisonment in exchange for his plea of guilty to aggravated false personation of a police officer and robbery, and the matter was continued several times for a discussion of the possible plea agreement.

¶ 4 On November 30, 2011, defense counsel indicated that the State had left the plea offer open until that day, but that defendant had informed her that he did not want to accept it. When counsel asked defendant if that was correct, defendant replied that he would like an additional 30 days to consider the offer, citing a death in his family. The State opposed defendant's request, noting that the offer had been open since July 25, 2011. The court agreed, observing that it had already given defendant additional time, and that the matter was before the court for final consideration of the State's offer. During the colloquy that followed, the court asked:

"COURT: Are you accepting the offer?"

DEFENDANT: Well, I was up under the influence—up under the understanding—

COURT: Are you accepting the offer?"

DEFENDANT: I would like to consider it because I thought that they was—

COURT: Mr. Harrel, are you accepting the offer?"

DEFENDANT: At this time—

COURT: Time for consideration is over.

DEFENDANT: At this time, Judge, your Honor, I'm not trying to disrespect you, I would like to consider a longer time for to [sic] consider this here.

COURT: Motion denied."

¶ 5 The State withdrew the offer, and defendant stated "I would like to go *pro se* then. I would like to defend myself. I can't work with you." The court passed the case to allow defendant to talk to counsel, and, when the case was recalled, counsel indicated to the court that defendant was "persist[ing] in his request to have an additional 30 days." The court denied the request, and stated:

"COURT: I asked if you would accept that offer, you said no, you're going to trial. The offer is withdrawn. There's no more time needed to consider something that doesn't exist anymore. The State's offer is withdrawn.

Now we're in trial posture. What kind of trial, Mr. Harrel?

DEFENDANT: I would like to go *pro se*, for the record.

COURT: And, Mr. Harrel, what is the nature of the charges against you? What's the class of offense that you are facing?

DEFENDANT: Well, at first they say it's a Class 1 and 2. At first it was a theft and then they turned it in—it was a nonviolent crime, they turned it into a robbery. And I was upset, I had a death and I'm fighting for—

STATE: Your Honor, he also has another charge. Agg [sic] false impersonation of a police officer.

DEFENDANT: That's 1 and 2.

STATE: They're both Class 2's. He's Class X mandatory by background.

COURT: Do you know the range of penalty that you face if you were to be found guilty?

DEFENDANT: At one time I thought it was 3 to 7. I wanted to get back in to the law library.

COURT: If you were to—and do you know whether or not your background causes the time to be extended up to twice where it normally is?

DEFENDANT: Yes, ma'am. I had one previously and—

COURT: So that means you're facing 14 then on a Class 2.

DEFENDANT: Yes, ma'am.

STATE: He's facing 6 to 30. He has more than one agg [*sic*] false impersonation of an officer in his background.

COURT: So you're facing 6 to 30.

DEFENDANT: I understand it now.

COURT: You know how serious it is?

DEFENDANT: Yes ma'am, I see now.

COURT: Do you have any legal training whatsoever?

DEFENDANT: Well, I didn't have anyone to talk to ma'am.

COURT: Mr. Harrel, would you answer the question, please, because you're not going to be able to represent yourself if you don't listen and respond appropriately and go off on speeches.

DEFENDANT: Yes, ma'am.

COURT: Now, do you have any training whatsoever—

DEFENDANT: No, I don't.

COURT: —in representing yourself in court?

DEFENDANT: No, ma'am.

COURT: Have you ever done that?

DEFENDANT: No, ma'am.

COURT: Now, you know what you're facing, Mr. Harrel?

DEFENDANT: Yes, ma'am.

COURT: 6 to 30 on the top charge. Do you understand that?

DEFENDANT: Well, yes, ma'am.

COURT: You're willing to put your future in your hands with no legal experience?

DEFENDANT: Ma'am, I don't want to offend you and I don't know how to talk to you Judge Clay. They say you are a fair person.

COURT: I try to be.

DEFENDANT: The individual in my cell right now, he has been in front of you before and you sentenced him, his name is Mr. Cox, some years back.

But what—I didn't know how to talk. I don't want to offend anyone and I'm scared because I'm 62. I realize I did wrong, that I played some part in it, but God told me to come up here and hopefully if I could talk and say that, hey I was wrong, I know I hurt somebody by taking some money, but I did not rob anybody physically.

COURT: Mr. Harrel—

DEFENDANT: And I was hoping—if I could have got—I asked her to come out here and see if I could have got six years and I was willing to go.

DEFENSE COUNSEL: Your Honor, that request was not made of me.

STATE: But I will make a representation that [defense counsel] did ask of me what my offer was and if it was a final offer and I did tell her that on several occasions that I was not considering anything lower than what I had offered.

COURT: All right. And your attorney conveyed the State's offer to you, correct? It wasn't six years. No matter what you asked for, the State conveyed the offer, right?

DEFENDANT: What was the offer, Miss?

STATE: For the record, your Honor—

DEFENSE COUNSEL: The offer was eight, your Honor.

COURT: Which is now off the table.

DEFENSE COUNSEL: It was conveyed to him on several occasions—

COURT: Mr. Harrel, the right to represent yourself is not absolute. The court finds that you're unable to represent yourself and I won't allow you to go *pro se*. You have too many gaps in your comprehension of what you're facing and the history here, your own background and history. And it would be a travesty for the court to allow you to be your own attorney, and I will not do that. So your request to go *pro se* is denied."

¶ 6 At the subsequent trial, the victim, Marvin Wallace, testified that in the early afternoon of February 7, 2011, he was inside a "private viewing room" in an adult book and video store at 177 North Wells Street in Chicago. Upon exiting the store, he was approached by defendant, who stated that he was a police officer, flashed a badge inside a black wallet or portfolio, and asked Wallace, "Do you know what you did back there?" Wallace replied that he did not, and defendant asked him if he had read the sign indicating that the "release of bodily fluids" was prohibited. Wallace stated, "No, I'm sorry, I didn't see that."

¶ 7 Defendant asked to see his driver's license, and Wallace complied. Defendant asked if there was anyone who could post bail for him, and Wallace indicated that there was not.

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Defendant then stated, "Let's start walking towards the police station[.]" and the two started walking towards Daley Plaza.

¶ 8 As they proceeded, defendant stopped, and told Wallace, "I like you. Why don't you give me some paper for your license and we'll pretend we never saw each other." Wallace opened his wallet and told defendant that he had some money. Defendant said, "That's not enough" and asked Wallace how much it was "worth to [him.]" Wallace stated "\$100" and told defendant that he did not have it on him but he could go to a cash station. Defendant then said "Let's find a cash station."

¶ 9 Defendant escorted Wallace to a cash station, and Wallace inserted his ATM card and withdrew \$100, while defendant stood "right next to [him], no breathing space." He then gave the money to defendant, who stated, "That's not enough. This has to be worth more to you than \$100." As Wallace was about to insert his card again, two plainclothes police officers approached, and asked Wallace, "Do you know this guy?" Wallace replied, "Yes, I know him" because he was "embarrassed" and "frightened[.]" The officers then asked Wallace for defendant's name, and defendant replied, "Oh no, we know each other as acquaintances. He's giving me \$100 for my rent." Wallace asked the officers, "Is he a police officer?" and the officers then separated Wallace and defendant and spoke to them individually.

¶ 10 Wallace testified that he was intimidated by defendant, and did not believe that he could refuse his orders. He began to think that defendant "was not who he said he was" at the time he asked for money, but believed that if he did not give defendant the money he requested, he could have been "shot," "beaten up," or have his driver's license taken.

¶ 11 Chicago police officers Peter Carroll and Anthony Ostrowski testified that they were on duty and driving in a marked police vehicle about 1:30 p.m., on February 7, 2011. At that time,

they saw defendant and Wallace standing at an ATM at the intersection of Lake and Wells. Officer Carroll testified that his attention was drawn to defendant because he was standing "unusually close" to, and within "[a] matter of inches" of, a person using the ATM, "leaning over to his side and looking down at the computer screen[.]" Officer Ostrowski testified that the proximity of defendant to Wallace made him believe that a "crime was being committed" and that defendant was "looking right over his shoulder, literally touching him." The officers then saw Wallace turn and hand money to defendant, exchange words, and turn back to use the ATM again.

¶ 12 At that point, the officers exited their vehicle, identified themselves as police officers, and asked what was going on. After about five seconds of silence, defendant stated that there was nothing going on, and that Wallace was his friend and was giving him money for rent. Wallace asked, "Excuse me, this person is not a police officer?" The officers then separated the two men, and Officer Carroll spoke to Wallace while Officer Ostrowski spoke to defendant. Officer Ostrowski retrieved a wallet containing a badge from defendant's sweater, and asked defendant if he was a police officer. Defendant stated he was not. The officer then placed defendant under arrest, and recovered five \$20 bills from his person.

¶ 13 At the conclusion of evidence and argument, the court found defendant guilty of aggravated false personation of a police officer, robbery and theft, determining that the witnesses corroborated each others' testimony and were "very credible."

¶ 14 In this appeal, defendant first contends that he clearly and unequivocally waived his right to counsel and invoked his right to proceed *pro se*, and that the trial court's denial of his request to represent himself was an abuse of discretion. The State responds that defendant has forfeited this claim because he failed to raise the issue in his post-trial motion. The State acknowledges

that the alleged error has been recognized as among a limited class of structural errors requiring reversal (*People v. Thompson*, 238 Ill. 2d 598, 609 (2010)), but maintains that no error occurred where defendant's request was not unequivocal and was made for the purpose of delaying the proceedings. We agree.

¶ 15 For a defendant to invoke the right of self-representation, he must knowingly and intelligently relinquish the right to counsel, and the waiver of counsel must be clear and unequivocal, not ambiguous. *People v. Burton*, 184 Ill. 2d 1, 21 (1998). In determining whether defendant's statement is clear and unequivocal, a court must determine whether he "truly desires to represent himself and has definitively invoked his right of self-representation." *People v. Baez*, 241 Ill. 2d 44, 116 (2011). Courts must indulge in every reasonable presumption against waiver of the right to counsel (*Burton*, 184 Ill. 2d at 23), and, on review, the trial court's decision on a defendant's election to represent himself will be reversed only if the court abused its discretion (*People v. Span*, 2011 IL App (1st) 083037, ¶ 55).

¶ 16 Our review of the record shows that defendant first mentioned his desire to proceed *pro se* after his request for more time to consider a plea offer that had been on the table for months was denied and the State withdrew the offer. The court then allowed defendant to consult with defense counsel, and, when the case was recalled, defendant did not persist in his request to represent himself, and instead, counsel indicated to the court that defendant was asking for more time to consider the plea offer. When that request was denied, defendant again requested to represent himself.

¶ 17 The court then questioned defendant about his understanding of the nature or the charges against him, the potential penalties he faced if convicted, and his prior legal experience. When the court ultimately asked defendant if he was willing to "put [his] future in [his] hands with no

legal experience[.]" defendant did not affirm his desire to represent himself, and instead explained that he was hoping for a more favorable plea offer, asserting that he asked defense counsel to "see if I could have got six years" and that if he could, he "was willing to go." Under these circumstances, we find that defendant's statements regarding self-representation were not clear and unequivocal, evidencing a true desire to represent himself (*Baez*, 241 Ill. 2d at 116), but rather, they show that defendant was seeking to secure a continuance for the purpose of considering a plea offer and to allow counsel to negotiate the offer to more favorable terms. As such, we find no abuse of discretion by the trial court in denying his request, which reflected a desire to further delay the proceedings rather than to definitively invoke his right of self-representation.

¶ 18 Defendant next contends that his robbery conviction must be vacated because there was insufficient evidence that he used or threatened force during the incident, and also because his convictions for robbery and theft violate the one-act one-crime doctrine. The State responds that, the evidence viewed in the light most favorable to the prosecution would permit a rational factfinder to conclude that defendant's actions threatened the imminent use of force, but concedes that both convictions violate the one-act one-crime doctrine and should be vacated. In setting forth the latter argument, the State acknowledges that defendant's theft conviction should be vacated because it was "the predicate felony for the offense of aggravated false personation of a police officer," and that his robbery conviction should be vacated because it was based on "precisely the same act" where defendant's "personation of a police officer was the act that constituted the threat of imminent force of robbery." We agree that the lesser offenses must be vacated, and thus we need not reach defendant's claim regarding the sufficiency of the evidence to prove his robbery conviction.

¶ 19 Under the one-act, one-crime rule, defendant may be convicted of one crime resulting from a single act. *People v. Jimerson*, 404 Ill. App. 3d 621, 635 (2010). Where a violation occurs, sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). In determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense. *Artis*, 232 Ill. 2d at 170. If the degree of the offenses and their sentencing classifications are identical, we may consider which of the convictions has the more culpable mental state. *Artis*, 232 Ill. 2d at 170-71.

¶ 20 In announcing its sentencing decision, the trial court noted that defendant's theft and robbery convictions merged into his aggravated false personation of a police officer conviction; however, the court then entered sentences on each count and the mittimus reflects this ruling. We agree with the parties that, under the circumstances of this case, defendant's convictions of robbery and theft must be vacated, and that his aggravated false personation of a police officer conviction should stand as the more serious offense, given that it is a Class 2 felony with a specific *mens rea* requirement. 720 ILCS 5/32-5.1 (West 2010). We thus vacate defendant's convictions of robbery and theft as the less serious offenses, and, pursuant to Illinois Supreme Court Rule 615(b), direct the clerk of the circuit court to correct the mittimus to reflect a single conviction for aggravated false personation of a police officer and sentence of seven years' imprisonment.

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