

No. 1-13-1783

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. 12 CR 14092
)	
ANTHONY PATRICK,)	The Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for armed robbery is reduced to the lesser included offense of robbery, the sentence is vacated, and this case is remanded to the trial court for resentencing.

¶ 2 The State charged defendant Anthony Patrick with armed robbery while armed with a firearm; however, following a bench trial, the trial court found defendant guilty of the uncharged offense of armed robbery while armed with a dangerous weapon other than a firearm, and sentenced him as a Class X offender to 14 years' imprisonment. On appeal, defendant contends

that the trial court violated his right to due process by convicting him of an uncharged offense which was not a lesser included offense of the charged offense. Defendant asserts, and the State agrees, that his conviction must be reduced to the lesser included offense of robbery, and that this case must be remanded to the trial court for resentencing.

¶ 3 The record shows that the State charged defendant with a single count of armed robbery for taking a purse and jewelry from Emily Gierman while "armed with a firearm" in violation of section 18-2(a)(2) of the Criminal Code. 720 ILCS 5/18-2(a)(2) (West 2012). At trial, Emily Gierman testified that about 7 p.m. on July 9, 2012, she was walking alone through an alley at 1704 West Henderson Street, taking a shortcut to the grocery store. Gierman wore a shoulder bag across her body and was holding her phone in her hand. When she was two houses from the end of the alley, she heard someone running up behind her, and defendant then pushed her into a fence between two garbage cans. Gierman turned around, observed defendant's face, and saw him holding a thin, dark bronze gun about nine inches long, pointed towards her head. Defendant told Gierman to be quiet and repeatedly said "[g]ive me that," referring to her phone and bag. Defendant set his firearm down on top of a garbage can, removed Gierman's bag from her body, and grabbed her phone from her hand. He then picked up his handgun and pointed it at her, asked her what else she had, and ripped a diamond necklace from around her neck.

¶ 4 Gierman further testified that a woman then drove a red Dodge Charger into the alley, and defendant jumped into the front passenger seat of that automobile, which also contained a child. The woman then drove out of the alley and onto Paulina Street, side-swiping a parked vehicle. When Gierman exited the alley, she was approached by two men and a female employee from the adjacent Starbucks, who called police and handed her the phone. The men gave Gierman the license plate number from the red automobile, and she relayed that number to

police. Ten days later, Gierman identified defendant in a lineup at the police station. Her property was never returned.

¶ 5 Fermin Allen, defendant's cousin, testified that she was driving her red Dodge Charger with license plate number N693742 on the date in question. She was apartment hunting with defendant, who was in the back seat of the automobile, and her five-year-old goddaughter, who was in the front seat. Defendant said he needed to relieve himself, so she drove into an alley where he exited the vehicle and walked out of her sight. While waiting for him to return, Allen noticed a woman with blonde-brown hair walking in the alley. Allen became impatient and drove out of the alley and around a corner to wait for defendant, who then came running to the vehicle and jumped inside, holding a bag he did not have in his possession earlier. Allen assumed that the bag was garbage from the alley, told him to throw it out, and he did. As Allen drove out of the alley, she "scraped a car, a wall or something," and drove home. Allen testified that she never noticed defendant with a handgun that day.

¶ 6 Chicago police officer Morphas Bey testified that he responded to the area of 1704 Henderson shortly after the robbery and a male witness gave him a license plate number. Officer Bey also observed that a blue vehicle parked along the curb was damaged on the side of the automobile that faced the street.

¶ 7 Chicago police sergeant Ciccola testified that on July 19, 2012, he was on duty driving his police vehicle when he noticed a red Dodge Charger with the license plate number that was reportedly involved in the armed robbery. The sergeant and two detectives stopped the vehicle, which was being driven by Allen, and took defendant, Allen and Trevor Howard, Allen's boyfriend, into custody. After being advised of his *Miranda* rights, defendant informed police that he was looking for apartments with his cousin when he had to urinate. He then noticed a woman with blonde hair, ran up to her, and robbed her at knife-point, taking her purse and the

chain around her neck. A few hours later, defendant gave a typed statement to the assistant State's Attorney assigned to the case, in which he stated that while he was in the alley, he saw a woman with blonde hair, walked up to her, grabbed her around the neck, and pushed her into a gangway. Defendant further stated that he held a knife in his hand and told the woman to give him what she had. Defendant then took her purse, grabbed a necklace from her neck, and ran to his cousin's Dodge Charger. Defendant also stated that as his cousin drove away, she sideswiped another vehicle.

¶ 8 The trial court found that the State did not prove beyond a reasonable doubt that defendant was armed with a handgun, and noted that defendant claimed he had a knife. The court then found, based upon the "vast amount of evidence," that defendant was clearly proven guilty beyond a reasonable doubt of armed robbery.

¶ 9 At the subsequent sentencing hearing, defense counsel pointed out that the presentence investigation report (PSI) erroneously indicated that defendant had been convicted of armed robbery while armed with a firearm. Counsel asserted that "[w]hile that was the original charge, that's not what he was found guilty of," and requested the court to amend the PSI. The trial court stated that it did not find defendant guilty of possessing a firearm, amended the PSI, and sentenced defendant to 14 years' imprisonment.

¶ 10 On appeal, defendant first contends that the trial court violated his right to due process by convicting him of the offense of armed robbery while armed with a dangerous weapon other than a firearm because that offense was not charged in the information, and it is not a lesser included offense of armed robbery with a firearm, which was the only offense charged. Defendant acknowledges that he failed to preserve this issue for review, but claims that it should be considered under the second prong of the plain error doctrine because it affects the integrity of the judicial process. Alternatively, defendant argues that his trial counsel rendered ineffective

assistance because she failed to object to the trial court's improper guilty finding on the uncharged offense. Defendant asserts that his conviction must be reduced to simple robbery, and his case remanded to the trial court for resentencing.

¶ 11 The State responds that defendant forfeited review of this issue because he failed to object to the trial court's guilty finding and did not raise the issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988). The State further argues that the issue should not be reviewed for plain error because, although the court erred when it found defendant guilty of the uncharged offense, that error does not constitute a structural error, and thus, the second prong of the plain error doctrine cannot be applied. *People v. Thompson*, 238 Ill. 2d 598, 609 (2010).

¶ 12 The State acknowledges, however, that the offense of armed robbery while armed with a dangerous weapon other than a firearm is not a lesser included offense of armed robbery with a firearm, the only offense charged in this case. The State further acknowledges that trial counsel's failure to object to the trial court's entry of judgment on an uncharged offense which was not a lesser included offense prejudiced defendant, and therefore, defendant received ineffective assistance from counsel. *People v. Spencer*, 2014 IL App (1st) 130020, ¶¶ 48-51. Accordingly, the State agrees with defendant that his conviction must be reduced to the offense of robbery, and this case must be remanded to the trial court for a new sentencing hearing.

¶ 13 The armed robbery statute was amended in 2000, separating the offense into distinct charges based upon the weapon used – armed robbery while armed with a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2012)), and armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)). P.A. 91-404, § 5 (eff. Jan. 1, 2000). In this case, defendant was charged with a single count of committing armed robbery while armed with a firearm. This court has repeatedly held that the offense of armed robbery while armed with a dangerous weapon other than a firearm is not a lesser included offense of armed robbery with a

firearm. *People v. Clark*, 2014 IL App (1st) 123494, ¶ 32, *appeal allowed*, No. 118845 (Mar. 25, 2015); *Spencer*, 2014 IL App (1st) 130020, ¶¶ 39-43; *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38. Consequently, the trial court erred when it considered *sua sponte* whether defendant committed armed robbery with a dangerous weapon other than a firearm, and entered judgment on that finding. *Spencer*, 2014 IL App (1st) 130020, ¶ 43.

¶ 14 Although this court has issued divergent opinions as to whether the error constitutes plain error under the second prong of that doctrine (*Spencer*, 2014 IL App (1st) 130020, ¶ 46; *Clark*, 2014 IL App (1st) 123494, ¶ 42), we need not further address the issue in this case because the same result applies based on trial counsel's ineffective assistance. In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness, and that, without those errors, there was a reasonable probability his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382, 434 (1984) (citing *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984)). If counsel had objected to the improper finding, the result of the trial would have been different because defendant would not have been convicted of the uncharged armed robbery offense, but instead, would have been found guilty of the actual lesser included offense of robbery. *Spencer*, 2014 IL App (1st) 130020, ¶ 50. In addition, the trial attorney's actions in failing to object to the uncharged armed robbery offense constituted an error that was so serious that it fell below an objective standard of reasonableness. Thus, the error requires that defendant's conviction of armed robbery be vacated. *Id.*

¶ 15 Accordingly, we agree with the remedy agreed to by the parties and vacate defendant's conviction for armed robbery, reduce his conviction to the lesser included offense of robbery (720 ILCS 5/18-1(a) (West 2012)), and remand this case to the trial court for a new sentencing hearing. *Spencer*, 2014 IL App (1st) 130020, ¶ 51.

¶ 16 Based on our decision, we need not consider the alternative arguments defendant raised in his opening brief challenging the sufficiency of the evidence to support the conviction, claiming a fatal variance between the charging document and the evidence produced at trial, and his request to correct the offense stated on the mittimus. As defendant asserts in his reply brief, in light of the State's agreement with the disposition of this case, the additional arguments need not be addressed.

¶ 17 For these reasons, pursuant to our authority (Ill. S. Ct. R. 615(b)(3) (eff. Aug. 27, 1999)), we reduce defendant's conviction to the lesser included offense of robbery (720 ILCS 5/18-1(a) (West 2012)), and remand this case to the trial court for resentencing.

¶ 18 Conviction vacated; conviction for robbery entered; cause remanded for resentencing.