2015 IL App (1st) 131879-U

SIXTH DIVISION
September 30, 2015

No. 1-13-1879

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.	)	12 CR 12241
	)	
DARIUS NASH,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford concurred in the judgment.
Justice Lampkin concurred in part and dissented in part.

ORDER

¶1 *Held*: Section 5-120 of the Illinois Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-120 (West 2010)) is not unconstitutional. Defendant was properly found guilty of aggravated robbery as a lesser-included offense of the charged offense of armed robbery with a firearm. Defendant's conviction for unlawful restraint did not violate the one-act, one-crime doctrine. Pursuant to Supreme Court Rule 615(b)(1) (134 Ill. 2d R. 615), we order that defendant's mittimus be corrected and amended to reflect a conviction of unlawful restraint pursuant to section 10-3(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/10-3(a) (West

2012)) rather than a conviction of aggravated unlawful restraint pursuant to section 10-3.1(a) of the Code (720 ILCS 5/10-3.1(a) (West 2010)), as the mittimus presently reflects.

¶ 2 Defendant Darius Nash appeals from a final judgment of conviction entered in the circuit court of Cook County. Following a bench trial, defendant was found guilty of aggravated robbery as a lesser-included offense of the charged offense of armed robbery with a firearm. He was also found guilty of unlawful restraint. On appeal, defendant raises a number of arguments why we should reverse his convictions. We affirm as none of his contentions have merit. However, we correct the mittimus to accurately reflect a conviction of unlawful restraint pursuant to section 10-3(a) of the Code (720 ILCS 5/10-3(a) (West 2012)), rather than a conviction of aggravated unlawful restraint pursuant to section 10-3.1(a) of the Code (720 ILCS 5/10-3.1(a) (West 2010)), as it presently reflects.

¶ 3 BACKGROUND

¶ 4 Defendant and codefendants, Raymond LeFlore and Keith Richardson (not parties to this appeal), were each charged by indictment with one count of armed robbery with a firearm in violation of section 18-2(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/18-2(a)(2) (West 2010)) and one count of aggravated unlawful restraint for detaining Kody Zaagman while using a deadly weapon, specifically, a firearm in violation of section 10-3.1(a) of the Code (720 ILCS 5/10-3.1(a) (West 2010)). According to the criminal complaint, on March 19, 2012, defendants detained and robbed Zaagman of a laptop bag containing miscellaneous items by the use of force or by threatening the imminent use of force while armed with a firearm.

¶ 5 Defendant was tried in a bench trial along with his codefendants. Although defendant was 17 years old at the time he allegedly committed the offenses at issue, he was tried as an adult pursuant to the exclusive-jurisdiction provision in the Illinois Juvenile Court Act of 1987

(Juvenile Court Act) (705 ILCS 405/5-120 (West 2010)). He was found guilty of aggravated robbery as a lesser-included offense of the charged offense of armed robbery. He was also found guilty of "unlawful restraint."

¶ 6 The trial court denied defendant's motion for a new trial and he was subsequently sentenced to four years' imprisonment for aggravated robbery along with a concurrent prison term of three years for unlawful restraint. After the trial court denied defendant's motion to reconsider sentence, he filed a timely notice of appeal. We note that defendant has completed his prison term and is currently serving a term of mandatory supervised release.

¶ 7 ANALYSIS

¶ 8 Defendant first contends that section 5-120 of the Juvenile Court Act (the exclusive-jurisdiction provision) violates his constitutional rights because it automatically excludes from the jurisdiction of the juvenile court, all 17-year-old minors charged with felonies, without consideration of their youthfulness and its attendant circumstances.[1] Our sister court in the second district has considered and rejected these very same arguments. See *People v. Harmon*, 2013 IL App (2d) 120439, ¶¶ 45-62; see also *People v. Patterson*, 2014 IL 115102, ¶¶ 89-106 (rejecting similar challenges to the constitutionality of section 5-130 of the Juvenile Court Act

[1] Section 5-120 of the Juvenile Court Act states in relevant part:

> "Proceedings may be instituted under the provisions of this Article concerning any minor who prior to the minor's 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or State law or municipal or county ordinance, and any minor who prior to his or her 18th birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance classified as a misdemeanor offense." 705 ILCS 405/5-120 (West 2010).

(the excluded-jurisdiction provision) which excludes from the jurisdiction of the juvenile court, minors 15 years old or older, charged with certain offenses). After reviewing *Harmon* and *Patterson*, we find no reason to depart from the analysis provided by the reviewing courts in those cases.

¶ 9 Defendant next contends the trial court improperly convicted him of the uncharged offense of aggravated robbery. Defendant concedes he failed to properly preserve this issue for appeal. He requests, however, that we consider the issue under the plain error exception to the waiver rule. The plain error exception to the waiver rule is applied in criminal cases under two limited circumstances: (1) where the evidence is closely balanced and the error might have significantly affected the outcome of the case; or (2) where the error is so fundamental and of such magnitude that the accused was denied a fair trial and remedying the error is necessary to preserve the integrity of the judicial process. *People v. Young*, 128 Ill. 2d 1, 47 (1989); *People v. Sanders*, 99 Ill. 2d 262, 273 (1983); See 134 Ill. 2d R. 615(a)[2].

¶ 10 Our court has recognized that permitting unauthorized convictions to stand challenges the integrity of the judicial process and as a result, the issue is reviewable under the second prong of the plain-error doctrine. *People v. Clarke*, 2014 IL App (1st) 123494, ¶¶ 36-42. We first consider whether the trial court erred by convicting defendant of the uncharged offense of aggravated robbery.

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[2] Supreme Court Rule 615(a) provides:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." 134 Ill. 2d R. 615(a).

¶ 11 A criminal defendant has a fundamental due process right to notice of the charges brought against him and therefore generally may not be convicted of an offense he has not been charged with committing. *People v. Kolton*, 219 Ill. 2d 353, 359-60 (2006). However, a defendant can be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence supports a conviction on the lesser-included offense and an acquittal on the charged offense. *Id.* at 360. In this case, defendant argues that contrary to the trial court's finding, aggravated robbery was not a lesser-included offense of the charged offense of armed robbery with a firearm. We disagree.

¶ 12 Whether an offense is a lesser-included offense of a charged crime is a matter of law we review *de novo*. *People v. Kennebrew*, 2013 IL 113998, ¶ 18. In determining whether an uncharged offense is a lesser-included offense of a charged crime, our supreme court has adopted what it calls the "charging instrument approach" as set forth in *People v. Novak*, 163 Ill. 2d 93, 111-13 (1994), abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364. Under this approach, a "lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367. Such a determination is made on a case-by-case basis, in light of the factual description of the charged offense in the indictment. *Id*.

¶ 13 Once a determination has been made that the uncharged offense is a lesser-included offense of the charged crime, the trial court must next examine the evidence adduced at trial to determine if it would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit him of the greater offense. *People v. Ceja*, 204 Ill. 2d 332, 360 (2003). "This evidentiary requirement 'is usually satisfied by the presentation of conflicting testimony on the

element that distinguishes the greater offense from the lesser offense. However, where the testimony is not conflicting, this requirement may be satisfied if the conclusion as to the lesser offense may fairly be inferred from the evidence presented.' " *People v. Garcia*, 188 Ill. 2d 265, 284 (1999) (quoting *Novak*, 163 Ill. 2d at 108, abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364).

¶ 14 In order to support defendant's aggravated robbery conviction, the facts alleged in the indictment must contain a broad foundation or main outline of this offense. A defendant commits aggravated robbery when he takes property from another, by the use of force or threatening the imminent use of force, while indicating verbally or by his actions to the victim that he is presently armed with a firearm or other dangerous weapon, regardless of whether he is actually armed. 720 ILCS 5/18-5(a) (West 2010); *People v. Gray*, 346 Ill. App. 3d 989, 994 (2004). In this case, the indictment alleged that on March 19, 2012, defendants committed the offense of armed robbery in that they "knowingly took property, to wit: laptop bag containing misc. items, from the person or presence of Kody Zaagman, by the use of force or by threatening the imminent use of force and defendants carried on or about their person or was otherwise armed with a firearm."

¶ 15 Reviewing the allegations in the indictment, it is apparent that the description of the offense of armed robbery contains a broad foundation or main outline of the lesser offense of aggravated robbery. It could be reasonably inferred from the language of the indictment that the defendants, by committing the crime by force or threat of force while armed with a firearm, indicated to Zaagman, either verbally or by their actions, that they were armed with a firearm and threatened him with the firearm. Therefore, we find that in this case, aggravated robbery is a lesser-included offense of armed robbery as alleged in the indictment. Accordingly, the trial

court did not err, much less commit plain error, in finding defendant guilty of aggravated robbery as a lesser-included offense of the charged offense of armed robbery with a firearm.

¶ 16 The two cases cited by defendant (*People v. Jones*, 293 Ill. App. 3d 119 (1997) and *People v. Kelley*, 328 Ill. App. 3d 227 (2002)), in support of his argument that aggravated robbery is not a lesser-included offense of armed robbery, rely on a charging instrument approach subsequently deemed too narrow in its application by our supreme court in *Kolton*, 219 Ill. 2d at 367. Under the charging instrument approach adopted in *Novak*, courts look at the facts alleged in the charging instrument, and an offense is identified as a lesser included offense if the instrument charging the greater offense sets out, at a minimum, the main outline of the included offense. *People v. McLaurin*, 184 Ill. 2d 58, 104-05 (1998).

¶ 17 In *Kolton*, the supreme court "reinforced the decision in *Novak* to apply the charging instrument approach when determining whether an uncharged offense is a lesser-included offense of a charged offense." *Kennebrew*, 2013 IL 113998, ¶ 34. However, the *Kolton* court also determined that the *Novak* court's application of the charging instrument approach had been "eroded" and could "no longer be sustained" where the court determined that the indictment in that case did not contain the broad foundation or main outline of aggravated criminal sexual abuse, even though the indictment alleged an act that came within the purview of sexual conduct. *Kolton*, 219 Ill. 2d at 364. The *Kolton* court held that the *Novak* court failed to consider whether the statutory element of "sexual penetration" could be inferred from the allegations in the indictment. *Id*. at 363-65.

¶ 18 The *Kolton* court determined that a review of its decisions since *Novak* revealed that "the absence of a statutory element will not prevent us from finding that a charging instrument's description contains a 'broad foundation' or 'main outline' of the lesser offense." *Kolton*, 219 Ill.

2d at 364-65 (quoting *People v. Jones*, 207 Ill. 2d 122, 143-44 (2003) (Fitzgerald, J., specially concurring)). The *Kolton* court held that "under the charging instrument approach, an offense may be deemed a lesser-included offense even though every element of the lesser-included offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred." Id. at 364-65. In this case, the defendant's reliance on *People v. Jones*, 293 Ill. App. 3d 119 (1997) and *People v. Kelley*, 328 Ill. App. 3d 227 (2002), is misplaced because the reviewing courts in those cases never considered whether the elements of aggravated robbery could be reasonably inferred from the allegations in the respective indictments.

¶ 19 Moreover, the defendants in *Jones* and *Kelley* were charged under a pre-amended version of the armed robbery statute. 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 2010)), and armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)). P.A. 91-404, § 5 (eff. Jan.1, 2000). Defendants were charged under the statute as amended in that it was alleged they took property from the victim by the use of force or by threatening the imminent use of force while they carried on or about their person or were otherwise armed with a firearm. The decisions in *Jones* and *Kelley* involved the pre-amended version of the armed robbery statute and therefore they have no bearing in this case.

¶ 20 Our review of the record also shows that the evidence presented at trial supported a finding that defendant was guilty of the lesser-included offense of aggravated robbery. At trial, Zaagman testified that on March 19, 2012, at around 9:30 p.m., he was riding westbound on the CTA Green Line train. Defendant and his two codefendants, who were originally standing, sat down diagonally across from Zaagman. Zaagman testified that defendants were looking over at

him and talking to each other. He said they "seemed up to something." One of the defendants got off the train at one stop and another defendant got off the train at the next stop. When the train stopped at the Cicero station, the two defendants who had left the train returned to Zaagman's train car from an adjoining car and all three defendants approached Zaagman.

¶ 21 Codefendant LeFlore drew a handgun and pointed it at Zaagman's face. Defendant and codefendant Richardson stood on either side of codefendant LeFlore, and all three demanded that Zaagman give them his things. Zaagman testified "They were telling me, give me your fucking shit. If you don't, you know what will happen to you. I'll pull the trigger." Defendant grabbed two bags from Zaagman, one containing his lunch and the other containing his laptop computer, textbooks, iPhone, iPod, wallet, credit cards and house keys. Zaagman testified that when defendant took his bags, he ducked his head down and covered his face because he was scared. When Zaagman ducked his head down, codefendant LeFlore struck him across the back of his head with the gun. Zaagman sustained a head wound from the attack. Defendants ran off the train at the next stop.

¶ 22 There was also testimony that, following defendant's arrest on June 6, 2012, he provided a statement in which he admitted to certain of the acts of criminal conduct for which he was later charged and convicted. Assistant State's Attorney Ramon Moore testified that he interviewed defendant after defendant waived his *Miranda* rights. The interview was reduced to a type-written statement that defendant signed.

¶ 23 In the type-written statement, defendant stated that on March 19, 2010, at around 9:30 p.m., he and codefendants were riding on the Green Line near the Cicero stop when they noticed a "skinny, white, young man sitting by himself." Codefendant LeFlore got up, pulled out a BB gun and pointed it at the man's face, yelling "give me your bag." Defendant knew that

codefendant LeFlore was robbing the man. Defendant and codefendant Richardson got up and "rushed" the man. When the man refused to give up his bags, codefendant LeFlore hit him on the head with the BB gun. Defendant took the laptop bag and codefendant Richardson took the other bag. Defendant and codefendants ran off the train. Defendant received about $100 for helping codefendants rob the man.

¶ 24 We find the foregoing evidence would permit a jury to rationally find defendant guilty of aggravated robbery, but acquit him of armed robbery with a firearm, where no shots were fired, a firearm was never recovered, and a BB gun is excluded from the definition of firearm for purposes of the Code. See 720 ILCS 5/2-7.5 (West 2010); 430 ILCS 65/1.1 (West 2010). Accordingly, we affirm defendant's conviction for aggravated robbery.

¶ 25 Defendant next contends that pursuant to the one-act, one-crime doctrine, we should vacate his conviction for unlawful restraint because the conviction stemmed from the same physical act as his conviction for aggravated robbery. Again, we must disagree.

¶ 26 We review this issue *de novo*. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 46. Under the one-act, one-crime doctrine, a criminal defendant cannot be convicted of more than one offense arising out of the same physical act. *People v. Temple*, 2014 IL App (1st) 111653, ¶ 93. For purposes of the doctrine, an "act" is defined as "any overt or outward manifestation that will support a separate conviction." *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 27 The one-act, one-crime doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). The first step is to determine whether the defendant's conduct involved multiple acts or a single act. *Id*. If the defendant's conduct consisted of a single act, then multiple convictions are improper. If the defendant's conduct involved multiple acts, the second step is to

determine if any of the offenses are lesser-included offenses. *Id.* If an offense is a lesser-included offense, then multiple convictions are improper. *Miller*, 238 Ill. 2d at 165.

¶ 28 In this case, defendant does not contend that either conviction is a lesser included offense, so we need not address the second step. As previously mentioned, a person commits aggravated robbery when he takes property from another, by the use of force or threatening the imminent use of force, while indicating verbally or by his actions to the victim that he is presently armed with a firearm or other dangerous weapon, regardless of whether he is actually armed. 720 ILCS 5/18-5(a) (West 2010).

¶ 29 The physical restraint that occurred in this case is not a necessary element of the crime of aggravated robbery. The same offense could be committed against an unrestrained victim. Indeed, aggravated robbery may be committed in many different ways and it need not involve the sort of pistol whipping that occurred in this case. When defendant grabbed the bags from Zaagman's hands, the physical act comprising the aggravated robbery was complete. After the aggravated robbery was completed and Zaagman had ducked his head down and covered his face, defendant and codefendants kept him restrained for a second physical act of hitting him on the back of his head with a pistol.

¶ 30 In determining whether a defendant committed a separate physical act of unlawful restraint, our courts have looked at whether the restraint: was independent of the physical act underlying the other offense; went further than the restraint inherent in the other offense; or occurred simultaneously. *Daniel*, 2014 IL App (1st) 121171, ¶ 51. Restraining Zaagman while pistol whipping him on the back of his head was an additional physical act unnecessary to complete the aggravated robbery. Accordingly, we affirm defendant's conviction for unlawful restraint.

¶ 31 Finally, defendant contends and the State agrees that his mittmus should be corrected to reflect a conviction of unlawful restraint pursuant to section 10-3(a) of the Code (720 ILCS 5/10-3(a) (West 2012)), rather than a conviction of aggravated unlawful restraint pursuant to section 10-3.1(a) of the Code (720 ILCS 5/10-3.1(a) (West 2010)), as it presently reflects. We agree. Therefore, pursuant to Supreme Court Rule 615(b)(1) (134 Ill. 2d R. 615), we order that defendant's mittimus be corrected and amended to reflect a conviction of unlawful restraint pursuant to section 10-3(a) of the Code. 720 ILCS 5/10-3(a) (West 2012).

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court and order the clerk of the court to correct and amend the mittimus to properly reflect a conviction of unlawful restraint pursuant to section 10-3(a) of the Code. 720 ILCS 5/10-3(a) (West 2012) and that the conviction of aggravated unlawful restraint be removed.

¶ 33 Affirm; mittimus corrected and amended.

¶ 34 JUSTICE LAMPKIN, concurring in part and dissenting in part:

¶ 35 I disagree with the majority's conclusion that the missing element of the lesser-included offense of aggravated robbery—*i.e.*, that defendant and the codefendants indicated to the victim, either verbally or by their actions, that they were armed with a firearm—could be reasonably inferred from the description of the greater offense of armed robbery as alleged in the indictment in this case. Accordingly, I would conclude that, based on the indictment in this case, aggravated robbery was not a lesser-included offense of armed robbery.

¶ 36 Significant differences exist between the crimes of armed robbery and aggravated robbery. To convict defendant of the offense of armed robbery, a Class X offense, the State had to prove that he (1) took property from the victim; (2) by the use of force or by threatening the imminent use of force; and (3) did so *while armed with a dangerous weapon*. 720 ILCS 5/18-2(a)(2) (West 2010). In contrast, defendant could be convicted of aggravated robbery, a less-serious Class 1 offense, if the evidence established that he (1) took property from the victim; (2) by the use of force or by threatening the imminent use of force; and (3) *while indicating verbally or otherwise to the victim that he was armed with a firearm or other dangerous weapon*, including a knife, club, ax, or bludgeon. 720 ILCS 5/18-5(a) (West 2010). The first two elements of the offenses of armed robbery and aggravated robbery are identical, but the third elements are quite distinct. Whereas the defendant need not threaten the victim with the weapon for armed robbery to exist (see *Jones*, 293 Ill. App. 3d at 128 ("the victim need not even realize that the defendant has a weapon, so long as the State can show the victim was otherwise forced or threatened with imminent force to turn over property")), the offense of aggravated robbery requires that the defendant state or imply to the victim that he has a firearm or other dangerous weapon.

¶ 37 Following the charging instrument analysis, this court must compare the indictment, which charged defendant, *inter alia*, with armed robbery with a firearm, to the alleged lesser-included offense of aggravated robbery to see whether the indictment sufficiently described the foundation or main outline of aggravated robbery. See *Kolton*, 219 Ill. 2d at 364. Even if the indictment does not explicitly contain every element of the lesser offense, that offense may be deemed a lesser-included offense as long as the missing element can be reasonably inferred. *Id*.

¶ 38 In *People v. Baldwin*, 199 Ill. 2d 1 (2002), our supreme court provided insight into what it means to say that a charged offense contains a "broad foundation" or "main outline" of a lesser offense. *Kolton*, 219 Ill. 2d at 367. In *Baldwin*, the court considered whether aggravated unlawful restraint, which required that the accused detain another using a deadly weapon, was a lesser-included offense of home invasion where the indictment alleged that the defendant used force on the victim while armed with a butcher knife. *Id*. at 9. The court concluded that because "force" was not further described, it was not reasonable to infer from the indictment that the force the defendant used was for the purpose of detaining the victim; if the indictment had stated, for example, that the defendant had used force by dragging the victim through the house, then the failure to explicitly allege the detaining of the victim would not have precluded a finding that unlawful restraint was a lesser-included offense. *Id*. at 10-11.

¶ 39 Here, the indictment alleged, in pertinent part, that defendant and the codefendants took the victim's property by the "use of force" or by threatening the "imminent use of force" and they carried or were otherwise armed with a firearm. Although the trial testimony clearly established defendant and the codefendants displayed the gun to the victim, told him that they would pull the trigger if he did not turn over his possessions, and even struck the victim across the back of his head with the gun, none of this conduct was described or alleged in the

indictment. Because the alleged force used was not further described in the indictment, it is not reasonable to infer from this indictment that the force defendant and codefendants used included their stating or implying to the victim that they had a firearm.

¶ 40 Applying the precedent of *Kolton* and *Baldwin*, I cannot conclude that the missing element of stating or implying to the victim that defendant and codefendants possessed a firearm could be inferred from the allegations of the indictment in this case. Furthermore, this court previously held in 2002 in *Kelley*, 328 Ill. App. 3d at 232, and in 1997 in *Jones*, 293 Ill. App. 3d at 129, that the aggravated robbery missing element of stating or implying to the victim that the defendant had a gun could not be inferred from indictments that charged the defendants with armed robbery and alleged that they used force or threatened the imminent use of force while armed with a gun. The indictments in *Kelley* and *Jones* were similar to the indictment in this case.

¶ 41 The majority, however, criticizes *Kelley* and *Jones* for relying "on a charging instrument approach subsequently deemed too narrow in its application by our supreme court in *Kolton*." *Supra*, ¶ 16. The majority's criticism of *Kelley* and *Jones*, however, is not accurate. In 2006, the court in *Kolton* criticized its 1994 decision in *Novak*, 163 Ill. 2d 93, for the manner in which the *Novak* majority had applied the charging instrument approach. Specifically, the *Novak* majority had failed to infer the lesser-included offense's missing element of sexual gratification even though the indictment had alleged an act, *i.e.*, touching by the victim's mouth of a sex organ of the accused, from which that missing element could have been inferred. *Kolton*, 219 Ill. 2d at 364. Although *Kelley* and *Jones* cited *Novak*, which remains valid authority for the adoption of the charging instrument approach for deciding whether an offense is a lesser-included offense of another (see *Kolton*, 219 Ill. 2d at 364), *Kolton*'s criticism of the *Novak* majority for the manner

in which it applied the charging instrument approach does not extend to either *Kelley* or *Jones*. Unlike in *Novak*, the indictments in *Kelley* and *Jones* did not allege an act from which the missing element of the lesser-included offense could have been inferred.

¶ 42 The majority also posits that *Kelley* and *Jones* have no bearing on this case because those decisions involved the pre-amended version of the armed robbery statute. This supposition, however, amounts to a distinction without a difference. The statutory amendment distinguishing between armed robbery offenses involving either a dangerous weapon or a firearm has no bearing on the charging instrument approach, which looks to the allegations in the indictment to determine whether a lesser-included offense may be inferred from the greater charged offense.

¶ 43 For the foregoing reasons, I respectfully dissent from the portion of the majority's judgment holding that defendant was properly found guilty of aggravated robbery as a lesser-included offense of armed robbery. Furthermore, I believe that publication of this issue as an opinion and review by our supreme court would be appropriate to provide guidance to the trial courts.