THIRD DIVISION
August 26, 2015

No. 1-13-2050

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 916
	)	
MICHAEL BRANNON,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's convictions of aggravated robbery and aggravated battery affirmed over forfeited claim that aggravated robbery is not a lesser-included offense of armed robbery with a firearm; mittimus corrected.

¶ 2 Following a bench trial, defendant Michael Brannon was found guilty of aggravated robbery and aggravated battery, then sentenced to 12 years' imprisonment on the merged counts. On appeal, Brannon contends that his conviction for aggravated robbery was improper because he was not charged with this offense, and it is not a lesser-included offense of the charged

offense of armed robbery with a firearm. Brannon also contends that his mittimus must be corrected to reflect the proper conviction.

¶ 3 The record shows that Brannon was charged in a 22-count indictment with armed robbery, armed violence, unlawful use or possession of a weapon by a felon, aggravated unlawful use of a weapon, aggravated battery, and aggravated unlawful restraint. As pertinent to this appeal, Brannon was specifically charged with three counts of armed robbery in that he "knowingly took property *** from the person or presence of [the three victims], by use of force or by threatening the use of force and *** carried on or about his person or was otherwise armed with a firearm." 720 ILCS 18-2(a)(2) (West 2000).

¶ 4 At trial, Rashawn Barnett testified that about 3:30 a.m. on December 13, 2011, he was near the Go Lo gas station in the 3700 block of West Roosevelt Road in Chicago, Illinois, with Justin Langford and De'Montae Richardson. Three men and one woman pulled up next to them in a silver sedan and the driver asked if they wanted to buy marijuana. They declined, the group drove away, and Barnett continued walking with Richardson and Langford. Soon thereafter, the four people who were in the car came up behind them on foot and one of the men pulled out a revolver. The gunman took Barnett, Richardson, and Langford between two churches and told them to get down. When Barnett did not lie down, one of the men punched him in the eye, and Barnett fell to the ground. The gunman went through Barnett's pockets and took his lighter while the other men searched Richardson and Langford and the woman stood as a lookout. While the assailants were still searching the men's pockets, police arrived and the robbers ran.

¶ 5 Richardson testified to the same series of events as Barnett leading up to the robbery in the alleyway. He further testified that he was punched when he did not lie down, and that

Brannon never went through his pockets, but the two other men did. When police arrived, the robbers scattered. Richardson identified Brannon at a show-up as one of the robbers, but testified that he was not the man with a gun.

¶ 6 In his testimony, Langford outlined the same sequence as Barnett and Richardson, then added that during the robbery he was face-to-face with Brannon while he was searching his pockets. He further testified that Brannon took items from his pockets and then searched the others at the gunman's instruction. During the search, Langford was threatened, and one of the men said, "I should shoot you." Langford further testified that after police apprehended Brannon, he identified him in a police car.

¶ 7 Chicago police officer Melendez testified that on December 13, 2011, she and her partner, Officer Caballero, were responding to a radio call of a robbery in progress. Inside an alley between two churches, she observed three individuals who were later identified as Barnett, Richardson, and Langford lying on the ground, with two men standing over them, and an individual later identified as Brannon going through their pockets. She chased Brannon and saw him drop some money before being apprehended by other officers.

¶ 8 Chicago police officer Rick Caballero testified that he was with Officer Melendez when they responded to a radio call of a robbery in progress. He searched Brannon after he was taken into custody and found a lighter, and also recovered $2 near the scene of the robbery. He also observed the gun recovered by Officer Olszewski. Chicago police officer Siler testified that he spoke with the victims after the robbery and Langford told him that Brannon asked the gunman, "which one of these guys should we pop?"

¶ 9 Chicago police officer Rosen testified that on December 13, 2011, he and his partner, Officer Mendez, received a flash radio message about two black males running near the 3900 block of Grenshaw Street. En route to that location, Officer Rosen observed two males who matched the description on the radio call standing on a porch. Brannon and the other man fled, but the officers were able to detain Brannon and transported him back to the scene of the robbery. There, Officer Rosen spoke with Officer Olszewski who had recovered a gun.

¶ 10 Chicago police detective Brian Drees testified that he was assigned to the robbery in question, and he and his partner, Detective Ross, interviewed Brannon at the Area 4 Detective Division. Brannon initially told them that he was standing on the sidewalk when police arrested him for no reason. Detective Drees told Brannon that he did not believe him, and Brannon acknowledged that he ran from police, but denied participating in the robbery. After Detective Drees spoke to the owner of the silver car, he spoke to Brannon again, and he admitted to taking the car without permission. He also acknowledged that he was present for the robbery, but would not disclose his role or identify the other individuals involved.

¶ 11 The State introduced a certified copy of Illinois State Police Department records indicating that Brannon did not possess a Firearm Owner's Identification Card. At that point, the court granted Brannon's motion for a directed finding on the counts of unlawful use of a weapon by a felon and aggravated unlawful use of a weapon.

¶ 12 Following closing arguments, the court found that the State proved beyond a reasonable doubt that Brannon was on the scene, and that the victims were robbed, but had doubts about whether the gun recovered was the one used in the robbery. Therefore, the court found Brannon

guilty of aggravated battery and aggravated robbery, but not armed robbery, and sentenced him to 12 years' imprisonment on the merged counts.

¶ 13 In this appeal from that judgment, Brannon does not challenge the sufficiency of the evidence to sustain his convictions, but contends that the trial court improperly convicted him of aggravated robbery, which was an uncharged offense, and not a lesser-included offense of the charged offense of armed robbery with a firearm. Alternatively, he contends that his conviction should be reduced to simple robbery, which is a lesser-included offense of armed robbery.

¶ 14 Brannon acknowledges his forfeiture of this claim by failing to object or raise it in a posttrial motion, but claims that it may be reviewed under the second prong of the plain error rule, or, alternatively, as ineffective assistance based on trial counsel's failure to object. The State responds that Brannon is unable to establish plain error under the second prong where there was no structural error, and, because there was no error, counsel's performance cannot be considered ineffective.

¶ 15 The plain error rule allows a reviewing court to consider unpreserved claims of error regardless of forfeiture. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Plain error applies when there is a clear or obvious error and the evidence is so closely balanced that the error would change the outcome of the case, or when there is a clear or obvious error that is so serious that it affected the fairness of defendant's trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first consideration in addressing defendant's plain error argument is determining whether an error occurred, which requires a "substantive look" at the issue. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 16 Generally, a defendant cannot be convicted of an offense that he has not been charged with committing. *People v. Baldwin*, 199 Ill. 2d 1, 6 (2002) (citing *People v. Jones*, 149 Ill. 2d 288, 292 (1992)). A defendant may be convicted of an uncharged offense, however, if it is a lesser-included offense of a crime expressly charged in the charging instrument, and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). A lesser-included offense is one that is established by proof of the same or less than all of the facts than that which is required to establish the commission of the offense charged. 720 ILCS 5/2-9(a) (West 2012); *Kolton*, 219 Ill. 2d at 360. Whether an offense is a lesser-included offense of a charged offense is an issue of law that we review *de novo*. *People v. Kennebrew*, 2013 IL 113998, ¶ 18.

¶ 17 Under the charging instrument approach adopted by the supreme court, the lesser-included offense need not be a necessary part of the greater offense, but the facts alleged in the charging instrument must contain a "broad foundation" or "main outline" of the lesser offense. *Id.* ¶ 30. If an element is not explicitly alleged in the charging instrument, it must be reasonably inferable from the allegations contained therein. *Id*. (citing *People v. Miller*, 238 Ill. 2d 161, 166-67 (2010)).

¶ 18 Here, Brannon was charged with armed robbery, in that he committed a robbery while carrying or otherwise armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2000)), but was convicted of aggravated robbery, which requires proof that he committed a robbery while indicating verbally or by actions to the victim that he was presently armed with a firearm or other dangerous weapon, even if it is later determined that he had no firearm or dangerous weapon (720 ILCS 5/18-5(a) (West Supp. 2011)). We initially observe that the first two elements of these

offenses—the taking of property from the person or presence of another by the use of, or threatening the use of, force—are the same, and that it is the third element which informs the debate in this case.

¶ 19 Brannon contends that aggravated robbery is not a lesser-included offense of armed robbery because the State did not allege in the indictment that he *indicated* to Barnett, Richardson, or Langford that he was armed with a firearm, nor is that element reasonably inferable from the allegations that were contained in the indictment. The State responds that under the armed robbery statute with which Brannon was charged (720 ILCS 5/18-2(a)(2) (West 2000)), a reasonable inference may be drawn that he was armed with a firearm and used force to take the victim's property, and verbally, or by his actions, indicated that he was armed with a firearm and threatened the victim.

¶ 20 In support of his argument, Brannon relies on *People v. Kelley*, 328 Ill. App. 3d 227, 232 (2002), where this court held that aggravated robbery was not a lesser-included offense of armed robbery because the charging instrument did not allege that the gun was ever displayed to the victims or that defendant indicated to the victims that he had a gun. In *Kelley*, defendant was charged with committing a robbery "by use of force or by threatening the imminent use of force while armed with a dangerous weapon, to wit: a gun[.]" *Id.* at 230-31. In finding that the charging instrument failed to sufficiently allege the elements of aggravated robbery, this court cited *People v. Jones*, 293 Ill. App. 3d 119, 128-29 (1997), which relied on the supreme court's decision in *People v. Novak*, 163 Ill. 2d 93, 114 (1994), in finding that the missing element, *i.e.*, that defendant displayed the gun to the victim or implied his possession of a gun, could not be inferred from the remaining allegations of the indictment. *Kelley*, 328 Ill. App. 3d at 231-32.

¶ 21 The State responds that neither *Jones* nor *Kelley* applies here, pointing out that in both cases, defendants were charged under a pre-amended version of the armed robbery statute, whereas here, Brannon was charged under the statute as amended in that he committed the robbery while he carried, on or about his person, or was otherwise armed with, a firearm. 720 ILCS 5/18-2(a)(2) (West 2000). In addition, the *Jones* court analyzed the issue pursuant to *Novak* (*Jones*, 293 Ill. App. 3d at 127-29) and the reviewing court in *Kelley* did likewise in finding that the indictment did not allege the "foundation" or "main outline" of the offense of aggravated robbery (*Kelley*, 328 Ill. App. 3d at 232).

¶ 22 In *Kolton*, 219 Ill. 2d at 364, the supreme court held that its decision in *Novak* could no longer be sustained, and found that "[i]t is now well settled that, under the charging instrument approach, an offense may be deemed a lesser-included offense even though every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred." Applying that approach here, we find that the facts alleged in the charging instrument for armed robbery describe in a broad manner the conduct necessary for the commission of the lesser offense of aggravated robbery, and any element not explicitly set forth can be reasonably inferred. *Id*. at 367.

¶ 23 As noted, Brannon was charged with taking property of the victims by force or threat thereof, and was armed with a firearm. From the allegations that Brannon was armed and used force in the taking, it was reasonably inferable that he indicated to Barnett, Richardson, or Langford either verbally or by his actions that he was presently armed with a firearm. *Kolton*, 219 Ill. 2d at 364. Thus, we find that aggravated robbery is a lesser-included offense of armed robbery as charged in the indictment. *Id*. at 371.

¶ 24 We also find that the evidence adduced at trial, viewed in a light most favorable to the prosecution, supports Brannon's conviction for aggravated robbery beyond a reasonable doubt. *Kolton*, 219 Ill. 2d at 371; *People v. Jordan*, 218 Ill. 2d 255, 270 (2006). The record shows that Brannon took property from the person or presence of another in the alleyway when he participated in removing property from the pockets of Barnett, Richardson, and Langford. In addition, Officer Siler testified that Langford heard Brannon say to the gunman "which one of these guys should we pop?" from which a reasonable trier of fact could find a threatening statement to the victims indicating that he was presently armed with a firearm.

¶ 25 We thus find no error warranting plain error review, and honor Brannon's forfeiture of this issue. Since we have found that Brannon's conviction of aggravated robbery was not improper, we need not address his further contentions that his conviction should be reduced to simple robbery, or that his trial counsel was ineffective for failing to object to his conviction for aggravated robbery.

¶ 26 Brannon next contends that his mittimus should be corrected to reflect that he was convicted of aggravated robbery. The trial court found Brannon not guilty of armed robbery and guilty of aggravated robbery and aggravated battery, then merged the two convictions and sentenced him to 12 years' imprisonment for aggravated robbery. Brannon's mittimus, however, reflects that he was convicted of armed robbery with a firearm. We agree that Brannon is entitled to a corrected mittimus reflecting his conviction for aggravated robbery pursuant to section 18-5 of the Criminal Code of 1963 (720 ILCS 5/18-5(a) (West Supp. 2011)), and order the clerk of the circuit court of Cook County to correct it in that manner (*People v. Harper*, 387 Ill. App. 3d 240, 244 (2008)).

¶ 27 Accordingly, we order that the mittimus be corrected, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 28 Affirmed; mittimus corrected.