SECOND DIVISION
November 3, 2015

No. 1-13-2286

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 12224
	)	
TRACY CHAMBERS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's two armed robbery convictions violate the one-act, one-crime rule and one conviction is vacated. Defendant's conviction for the uncharged offense of armed robbery committed with a dangerous weapon other than a firearm is vacated because it was not a lesser-included offense of the charged crime. A conviction for the lesser offense of robbery is entered. The $200 DNA analysis fee is vacated.

¶ 2 Following a bench trial, the trial court found defendant Tracey Chambers guilty of armed robbery while armed with a dangerous weapon other than a firearm (720 ILCS 5/18-2(A)(1) (West 2010)) and aggravated unlawful restraint (720 ILCS 5/10-3.1(A) (West 2010)). The court

sentenced defendant to 27 years' imprisonment for armed robbery and 3 years' imprisonment for aggravated unlawful restraint, all sentences to run concurrent. On appeal, defendant contends: (1) he was denied due process of law by being convicted of the uncharged offense of armed robbery with a weapon other than a firearm because that offense was not a lesser-included offense of the charged crime; (2) his two armed robbery convictions violate the one-act, one-crime rule because they are based on the same physical act and should be merged into one count and (3) the DNA analysis fee imposed should be vacated because his DNA was already in the State's DNA database at the time of his conviction in this case. For the following reasons, we vacate one of defendant's armed robbery convictions based on the one-act, one-crime doctrine, reduce his remaining armed robbery conviction to simple robbery and vacate the $200 DNA analysis fee imposed.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on July 13, 2011, for his participation in the June 27, 2011 armed robbery of Italian Fiesta Pizzeria. Defendant was charged by way of information with two counts of armed robbery with a firearm and five counts of aggravated unlawful restraint with a deadly weapon.

¶ 5 At trial, Rodney Meeks testified that at about 6 p.m. on June 27, 2011, he was working as the manager at Italian Fiesta Pizzeria located at 1919 East 71st Street in Chicago with 15 other employees. Meeks was standing in the front of the pizzeria when he saw a man, who he later identified as defendant, climb through the pickup window separating the lobby from the back of the store. Meeks saw the defendant had a small caliber handgun. The defendant ordered everybody standing around the cash register to get down on the ground. Meeks and the other

employees in the front area complied. Defendant waived his gun around from side to side, told them not to look at him, and demanded that someone open the three operating cash registers.

¶ 6 Ashley Wood, an employee at Italian Fiesta Pizzeria, opened the cash registers and defendant removed the money. He said that it was not enough money. Defendant then ordered Wood to open the safe, but she did not know where it was or how to open it. Meeks, who was lying on the ground, offered to open the safe. He then stood up and opened the safe. Defendant removed cash and some rolled coins from the safe. Meeks lay back on the floor. Defendant told everybody to place their cell phones in front of them and everybody complied.

¶ 7 Defendant then walked into the delivery driver's room, where Meeks heard defendant ask the employees what they had in their pockets. Gregory Harris, who was in the delivery driver's room, saw defendant come into the room and observed that he was holding a gun in his hand. At some point, Meeks activated the silent alarm, and one of the employees in the phone room also called 911. Meeks testified that he heard Harris say that he had $6, and defendant yelled at Harris.

¶ 8 Meeks testified that he saw defendant leave the store and drive away in a green and brown Chevy van, however, the defendant got stuck in traffic on the same block. Meeks flagged down a marked patrol car coming down the street and pointed out the defendant's van. He estimated that the defendant was in the restaurant for a total of three to five minutes. Gregory Harris testified that defendant was in the store for 15 minutes.

¶ 9 Neither Meeks nor Harris saw defendant again until July 14, 2011, when they went to the police station and identified defendant in separate lineups. Meeks testified that there was a total of $1,000 in the safe when he opened it at defendant's request.

¶ 10 Detective William Golab testified that on the evening of June 27, 2011, he was assigned to investigate the armed robbery of the Italian Fiesta Pizzeria restaurant. He learned that after it occurred, a van was stopped near the restaurant and the investigation led to defendant. Detective Golab then watched the surveillance video that captured the robbery, which showed defendant enter the restaurant pointing a handgun at the employees, defendant ordering the employees around, the employees lying on the floor, defendant moving around the restaurant and then leaving. He testified that based on his 18 years of experience as an officer, the gun in the video was a real firearm. A gun was never recovered in connection with the robbery.

¶ 11 The court found defendant guilty of armed robbery, "with a bludgeon no firearm" and aggravated unlawful restraint with a bludgeon. The court found that because there was no gun recovered, it was unclear whether the gun was real or a "replica." However, the court found that at the very least, defendant "was menacing this thing in his hand in the nature of a weapon, at the very least as a bludgeon." The court sentenced defendant to 27 concurrent years in the Illinois Department of Corrections, for both counts of armed robbery and 3 years on each count of aggravated unlawful restraint with all counts to run concurrently. The court also ordered statutory DNA costs over defense counsel's objection. Defendant appealed.

¶ 12 ANALYSIS

¶ 13 Defendant contends, and the State concedes, that his two convictions for armed robbery while armed with a dangerous weapon other than a firearm violate the one-act, one-crime rule because they are based on the same physical act of taking U.S. currency from a restaurant. We are in agreement with both parties, and therefore vacate one of his convictions for armed robbery while armed with a dangerous weapon other than a firearm. *People v. Mack*, 105 Ill. 2d 103,

134-35 (1984) (vacated on other grounds); *People v. Magee*, 374 Ill. App. 3d 1024 (2007).

¶ 14 Defendant next contends that the trial court violated his right to due process by entering convictions for 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 the charged offense of armed robbery with a firearm.

¶ 15 The State argues, and defendant acknowledges, that he 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). Defendant claims that this issue should nevertheless be considered under the second prong of the plain error doctrine because it affects the integrity of the judicial process. The State responds that the plain error doctrine does not apply in this case because no error occurred where armed robbery with a dangerous weapon that is not a firearm is a lesser-included offense of armed robbery with a firearm. The State also argues that, if any error occurred, it was not 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). Defendant makes no argument under the first or closely balanced evidence prong. Before we make a determination as to whether the alleged error in this case is structural, we must determine whether error occurred. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 16 A defendant in a criminal prosecution has a fundamental due process right to notice of the charges brought against him. *People v. Kennebrew*, 2013 IL 113998. "For this reason, a defendant may not be convicted of an offense he has not been charged with committing." *Kennebrew*, 2013 IL 113998 (citing *People v. Kolton*, 219 Ill. 2d 353, 359-60 (2006)). A

defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument. *Kennebrew*, 2013 IL 113998.

¶ 17 A person commits armed robbery when he or she commits the offense of robbery and carries or is armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1)(West 2010). A person can also commit armed robbery when he or she commits the offense of robbery and carries or is armed with a firearm. 720 ILCS 5/18-2(a)(2)(West 2010). Although defendant was charged with armed robbery while carrying a firearm under section 18-2(a)(2), he was convicted of armed robbery without a firearm under section 18-2(a)(1). Therefore, defendant was convicted of an uncharged offense.

¶ 18 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 (Ill. Mar. 25, 2015); *People v. Spencer*, 2014 IL App (1st) 130020, ¶¶ 39-43; *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38; see also *People v. Booker*, 2015 IL App (1st) 131872, ¶ 59 (following the reasoning of *Clark* and holding that the offense of home invasion while armed with a dangerous weapon other than a firearm is not a lesser-included offense of home invasion while armed with a firearm). This court has found that the offense of armed robbery pursuant to section 18-2(a)(1) and section 18-2(a)(2) are "mutually exclusive of each other," and therefore, a violation of section 18-2(a)(1) does not qualify as a lesser-included offense of other section. *People v. Barnett*, 2011 IL App (3d) 090721 (noting the element of possession of a firearm either is or is not in each statutory section).

¶ 19 Consistent with our previous decisions, we find that the trial court erred in this case 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, ¶¶ 39-43.

¶ 20 The parties disagree, however, as to whether this error satisfies the second prong of the plain error doctrine because the error is not structural. An error is reversible under the second prong of the plain error doctrine only when the error is "structural, i.e., a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 613-14. A determination that a true structural error exists is rare and has only been recognized in cases involving "a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Id*. at 609. Although the trial court erred in this case by considering *sua sponte* whether defendant committed armed robbery with a dangerous weapon other than a firearm, and entered judgment on that finding, the error is not reversible under the second prong of the plain error doctrine.

¶ 21 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.

¶ 22 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice,

defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Id.* at 694.

¶ 23 We find that defendant was substantially prejudiced by trial counsel's failure to object to his conviction on the uncharged offense. The State chose not to charge defendant with armed robbery with a dangerous weapon other than a firearm. If the State had done so, a conviction for that offense would have been proper, if proven beyond a reasonable doubt. Given that the State elected to only charge defendant with armed robbery with a firearm, the trial court's only options were to find defendant guilty or not guilty of the offense as charged or to find defendant guilty of the lesser-included offense of simple robbery. Trial counsel's failure to object when the trial court found defendant guilty of an uncharged offense was in no way reasonable. 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, a Class X felony, but instead, would have been found guilty of the actual lesser-included offense of robbery, a Class 2 felony. *Spencer*, 2014 IL App (1st) 130020. Accordingly, we vacate defendant's remaining conviction for armed robbery with a dangerous weapon other than a firearm, enter a conviction for the lesser-included offense of robbery (720 ILCS 5/18-1(a) (West 2012)) (Ill. S. Ct. R. 615(b)(3) (eff. Aug. 27, 1999))), and remand this case to the trial court for a new sentencing hearing. *Spencer*, 2014 IL App (1st) 130020.

¶ 24 Defendant's remaining contention on appeal involves the imposition fees and fines. Specifically, defendant contends the $200 DNA analysis fee imposed by the court must be vacated because the defendant’s DNA was already in the State’s DNA database at the time of his conviction. The purpose of the $200 charge is to recover the costs associated with collecting,

analyzing, and storing the DNA sample in the database. However, the State agrees that defendant's DNA was obtained on November 13, 2003, and is already on file with the Illinois State police. Therefore, the $200 DNA analysis fee assessed against the defendant is vacated.

¶ 25 CONCLUSION

¶ 26 In conclusion, we vacate one of defendant's armed robbery while armed with a dangerous weapon other than a firearm convictions based on the one-act, one-crime doctrine, vacate defendant's remaining conviction for armed robbery with a weapon other than a firearm and enter a conviction for the lesser-included offense of robbery, and remand for sentencing on that offense. We also vacate the $200 DNA analysis fee imposed.

¶ 27 Convictions for armed robbery vacated; conviction for robbery entered; $200 DNA analysis fee vacated; cause remanded for resentencing.