

No. 1-13-2678

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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 15165
)	
MAURICE FOREST,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris 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 Following a bench trial, the trial court found defendant Maurice Forest guilty of armed robbery while armed with a dangerous weapon other than a firearm, and sentenced him to a term of nine years' imprisonment for this Class X offense. 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, armed robbery while armed with a firearm. Defendant thus asserts 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 two counts of armed robbery for taking keys and wallets from Reginald Guy and Charde Moore 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 2010).

Immediately before trial, the State amended those two counts by adding a Google tablet to the items taken from Guy, and a purse to the items taken from Moore. Defendant was also charged with two counts of aggravated unlawful restraint for detaining Guy and Moore while using a firearm. 720 ILCS 5/10-3.1 (West 2010).

¶ 4 At trial, Reginald Guy testified that about 3 a.m. on August 26, 2011, he and his girlfriend, Charde Moore, arrived in separate cars at her apartment in the 6900 block of South Shore Drive. Guy parked his rental car, a silver Dodge Charger, then sat with Moore inside her car while she finished a cigarette. Guy then observed three men walking back and forth on the street, and became very concerned for his safety and that of Moore. When the men were out of sight, Guy and Moore exited her car to walk towards her apartment, but within seconds, they were confronted by the three men, one of whom was defendant.

¶ 5 Defendant pointed a silver revolver at Guy's heart, said "[y]ou know what time it is," and asked "what do you have?" Guy gave defendant his keys, his debit card, his phone and \$30, and defendant then asked "where's the rest of it at?" Guy told defendant that there was more money inside his car and electronics in the trunk, including a camera and Google tablet that belonged to his sister, Jasmine. Defendant then told Guy and Moore to lie on the ground face down and count to 1000. When Moore did not comply immediately, defendant kicked her and told her to shut up and lie on the ground like Guy. After defendant and the men walked away, Guy and Moore got up, ran towards her apartment, and saw the men get in Guy's car and speed away. As the car passed them, Guy and Moore ducked because they knew defendant had a gun and thought he

might shoot at them. Guy and Moore called police and Guy emailed his sister to notify her of the robbery. Later that night, Guy identified defendant in a lineup, the Google tablet and his phone, and also identified a firearm as the same gun defendant used during the robbery.

¶ 6 Charde Moore testified substantially the same as Guy regarding their arrival near her apartment, then stated that when she got out of her car and walked to the sidewalk, defendant was already standing in front of Guy pointing a long silver revolver at him. Defendant also pointed the gun at Moore and told them to give him their money, and to throw all of their personal items on the ground in front of them. Moore placed her purse on the ground, which contained her wallet, her phone and \$30. Defendant then told them to lie face down on the grass, and as they did, Moore repeatedly looked up, and defendant tapped her leg with his foot and told her not to move. When a passerby asked if they were okay, Moore and Guy got up and walked towards her apartment, and she saw Guy's car speeding away down the street. Later that night, Moore identified defendant in a lineup, recovered her phone from police, and identified a firearm as the same gun defendant used during the robbery.

¶ 7 Chicago police officer Paul Gentile testified that about 4 a.m. on August 26, 2011, he was on patrol when he saw a black 1991 Pontiac Grand Prix that police were searching for in relation to an unrelated armed robbery. Officer Gentile and his partner stopped that vehicle and found defendant inside the car with three other people. During a search of the vehicle, police recovered a Google tablet and two cell phones, and under the hood of the car, they recovered a silver .38 caliber revolver loaded with five live rounds.

¶ 8 Chicago police detective Raymond Verta testified that during separate lineups, both Guy and Moore identified defendant, and they also identified the gun recovered from the Pontiac as the gun defendant used when he robbed them. Guy also identified the Google tablet, a camera,

his cell phone and keys, and Moore identified her cell phone, all of which were recovered from the black Pontiac. Guy's rental car was subsequently recovered on September 2, 2011.

¶ 9 The trial court stated that, because silver revolvers are not unusual, it could not find beyond a reasonable doubt that the gun recovered from the Pontiac was connected to defendant. The court further stated that, although the descriptions of the gun by Guy and Moore were not incredible, "[i]t's just that I don't know they would know this particularly beyond a reasonable doubt." Consequently, the trial court found *sua sponte* that defendant was proved guilty beyond a reasonable doubt of two counts of armed robbery with a dangerous weapon other than a firearm, that being a bludgeon that looked like a firearm. As to the charges of aggravated unlawful restraint, the court found defendant guilty of two counts of the lesser-included offense of unlawful restraint. At sentencing, the trial court merged the two unlawful restraint convictions into the armed robbery convictions and sentenced defendant to concurrent terms of nine 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 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.

¶ 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 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). In addition, the State asserts that trial counsel did not render ineffective assistance because defendant was not prejudiced by counsel's failure to object where the outcome would have been the same, and moreover, that defendant benefitted from counsel's oversight because he did not receive the 15-year sentencing enhancement for being armed with a firearm.

¶ 12 A criminal defendant has a fundamental due process right to notice of the charges brought against him, and he cannot be convicted of an offense with which he was not charged. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). "A defendant may, however, 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 adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense." (Internal citations omitted.) *Id.* at 360.

¶ 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 two counts 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 (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). 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, ¶ 43.

¶ 14 The parties disagree, however, as to whether this court may review this error under the second prong of the plain error doctrine. 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.

¶ 15 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). 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. *Graham*, 206 Ill. 2d at 476.

¶ 16 Here, we find that defendant was substantially prejudiced by trial counsel's failure to object to his conviction on the uncharged offense. 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, ¶ 50. Thus, defendant received ineffective assistance of counsel and the error requires that his convictions of armed robbery with a dangerous weapon other than a firearm be vacated. *Id.*

¶ 17 In accordance with our prior holdings, we vacate defendant's convictions for two counts of armed robbery, reduce them to two counts of 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.

¶ 18 Based on our decision, we need not consider defendant's alternative argument that the State failed to prove him guilty of armed robbery with a dangerous weapon other than a firearm. Moreover, defendant acknowledges that the evidence was sufficient to support a simple robbery conviction.

¶ 19 Finally, defendant contends that his convictions for two counts of unlawful restraint must be vacated because they violate the one-act, one-crime principle where they were based on the same physical act of detaining the victims as the armed robbery convictions. The State responds that, because the trial court merged the unlawful restraint convictions into the armed robbery

convictions and did not impose sentences on the lesser convictions, no appeal can be taken from those convictions.

¶ 20 "Absent a sentence, a conviction is not a final and appealable judgment." *People v. Baldwin*, 199 Ill. 2d 1, 5 (2002), citing *People v. Flores*, 128 Ill. 2d 66, 95 (1989). Where a sentence is not imposed on a specific conviction, it does not follow that the conviction must be vacated, but rather, that there simply cannot be an appeal of it. *Flores*, 128 Ill. 2d at 95.

¶ 21 In this case, because the trial court merged the unlawful restraint convictions into the armed robbery convictions and sentenced defendant only on the armed robbery convictions, there was no final judgment of conviction for unlawful restraint. *People v. Kraus*, 318 Ill. App. 3d 774, 789 (2000). Accordingly, defendant cannot appeal the unlawful restraint convictions, and those convictions need not be vacated. *People v. Johnson*, 392 Ill. App. 3d 127, 132 (2009).

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

¶ 23 Convictions vacated; convictions for robbery entered; cause remanded for resentencing.