2015 IL App (1st) 133215-U

FIRST DIVISION
December 7, 2015

No. 1-13-3215

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.	)	Nos. 12 CR 15216
	)	12 CR 15893
	)	
JOSEPH GORDON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's conviction on the uncharged offense of armed robbery with a dangerous weapon other than a firearm, which was not a lesser included offense of the charged offense of armed robbery with a firearm, was plain error; armed robbery with a dangerous weapon conviction reduced to robbery and matter remanded for resentencing on that offense; judgment affirmed in all other respects.

¶ 2 Following a bench trial, defendant Joseph Gordon was found guilty of armed robbery with a dangerous weapon other than a firearm, aggravated battery to a peace officer, escape from custody, and possession of a controlled substance. He was then sentenced to concurrent, respective terms of 10, 5, 3 and 1 years' imprisonment. On appeal, he contends that the trial court violated his right to due process of law when it convicted him of the uncharged offense of armed robbery with a dangerous weapon other than a firearm, where it was not a lesser included offense of the charged offense of armed robbery with a firearm.

¶ 3 As relevant to this case, defendant was charged by indictment with armed robbery with a firearm[1]. The evidence at trial showed that at 8:30 p.m. on July 19, 2012, Crystalyn Jones went to Douglas Park at 16th Street and Sawyer Avenue in Chicago with her children and her boyfriend, Jermaine Davis. While there, Jones and Davis noticed defendant riding around on a bicycle staring at everyone.

¶ 4 At one point, Jones' daughter needed to use the washroom, and since there were none in the area, Jones took her behind a nearby school to relieve herself. Defendant approached Jones there, pointed a gun to her head, and asked for her purse. She gave it to him, begged defendant not to shoot them, and he fled. Jones ran back to the park and told her boyfriend that she had been robbed, and Davis saw defendant escaping on his bicycle. Davis started to chase defendant, but Jones told him not to because he had a gun, and she called police. On July 26, 2012, Jones noticed defendant standing with his bicycle on the corner of Kedzie and Ogden Avenues and called police.

[1] We observe that the charging instrument has firearm crossed out and written, in its stead, bludgeon. However, the parties both presume that this was done after the court's ruling, especially where the statutory provision, *i.e.*, armed robbery with a firearm, remained unaltered.

¶ 5 Chicago police officer Victor Sandoval testified that he and his partner received a call from Jones on July 26, 2002, telling them that she saw defendant at 16th Street and Kedzie Avenue in Chicago. Upon arrival, the officers approached defendant and when he stood up, he dropped a small piece of electrical blue tape that had within it a plastic bag with .1 gram of cocaine. The officers then handcuffed defendant and waited for a transport car.

¶ 6 At 2:30 p.m. on July 26, 2012, Officer Bill Caro was called to assist in transferring defendant, and picked him up at 3211 West 16th Street. He placed defendant, who was handcuffed, in his vehicle. While in the car, and unknown to Officer Caro, defendant removed his left wrist from the handcuffs, and when he exited the vehicle, he struck the officer in the head with the handcuffed hand. Defendant then fled, but was eventually apprehended by police. Later that day, Jones and Davis went to the police station and separately identified defendant in a lineup.

¶ 7 At the close of evidence, the court found defendant guilty, in relevant part, of armed robbery with a dangerous weapon other than a firearm. In doing so, the court found that defendant was the person who robbed the victim, but because no gun was recovered or fired, it was unclear whether it was a real or operable gun. The court, however, found that it was clear from the record that the item was at least used as a bludgeon.

¶ 8 Defendant now appeals from that judgment, contending that the uncharged offense of armed robbery with a dangerous weapon other than a firearm is not a lesser-included offense of the charged offense of armed robbery with a firearm. He thus requests that this court reduce his conviction to robbery and remand his cause for resentencing on this conviction.

¶ 9 The State contends that defendant invited the error by acquiescing below, and, therefore, is estopped from raising the issue here. Under the doctrine of invited error, defendant may not

request to proceed in one manner and then later contend on appeal that the course of action was in error; however, for the doctrine to apply, defendant must affirmatively request or agree to proceed in a certain way. *People v. Spencer*, 2014 IL App (1st) 130020, ¶26. Although defense counsel failed to object to the trial court's ruling, counsel did not affirmatively request or accept the conviction for the uncharged offense, but, rather, argued for a general acquittal. *Spencer*, 2014 IL App (1st) 130020, ¶27. Thus, counsel's failure to object is forfeiture, and not invited error. *Id.*

¶ 10 Defendant acknowledges that he waived this issue by not objecting to it below (*People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988)), but maintains that we may review it for plain error under the second prong. The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a waived error where the evidence was closely balanced or where the error was so egregious that defendant was deprived a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The burden of persuasion remains with defendant, and the first step in plain error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 11 It is well-settled that defendant may not be convicted of an offense with which he was not charged, unless it is a lesser-included offense of the charged crime. *People v. Booker*, 2015 IL App (1st) 131872, ¶53. As pertinent to this case, we note that reviewing courts have repeatedly held that armed robbery with a dangerous weapon other than a firearm is not a lesser-included offense of armed robbery with a firearm. *Spencer*, 2014 IL App (1st) 130020, ¶39; *People v. Clark*, 2014 IL App (1st) 123494, ¶32, *appeal allowed*, No. 118845 (Mar. 25, 2015); *People v. Barnett*, 2011 IL App (3d) 090721, ¶38. We find no reason to find otherwise here.

¶ 12 In *Barnett*, 2011 IL App (3d) 090721, ¶38, the Third District considered the language of the armed robbery statute, and found that a violation of section 18-2(a)(1) and a violation under section 18-2(a)(2) are mutually exclusive of each other. *Barnett*, 2011 IL App (3d) 090721, ¶38. Thus, if an offender is charged with a violation of the armed robbery statute based on using a dangerous weapon of any kind, other than a firearm, that weapon cannot be a firearm; and the converse is true where defendant is charged with armed robbery predicated on a firearm. *Barnett*, 2011 IL App (3d) 090721, ¶38. The court thus concluded that armed robbery with a dangerous weapon other than a firearm under section 18-2(a)(1) of the Criminal Code of 2012 (Code) (720 ILCS 5/18-2(a)(1) (West 2012)) was not a lesser-included offense of armed robbery with a firearm under section 18-2(a)(2) of the Code (720 ILCS 5/18-2-(a)(2) (West 2012)).

¶ 13 The State contends, however, that *Barnett*, upon which *Spencer* and *Clark* rely, is not sound because it erroneously applied the abstract elements approach, by focusing solely on the fact that armed robbery with a dangerous weapon other than a firearm contained the additional element of dangerousness, not required by section 18-2(a)(2) of the Code. We find no indication in *Barnett* that the reviewing court used the abstract elements approach. Rather, the *Barnett* decision was based on the court's consideration of the plain language of the armed robbery statute from which it concluded that a statutory violation of section 18-2(a)(1) does not qualify as a lesser-included offense when compared to a violation of section 18-2(a)(2). The reasoning expressed therein comports with the charging instrument approach set forth in *People v. Kolton*, 219 Ill. 2d 353, 367 (2006), that 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.

¶ 14 Notwithstanding, the State contends that under the charging instrument approach "dangerous" weapon can be inferred where "firearm" is alleged in the indictment. In support of its contention, the State cites *Kolton*, in which the supreme court held that the charge of aggravated sexual abuse was a lesser included offense of predatory criminal sexual assault even though the indictment did not contain the element of sexual gratification because that element could be reasonably inferred where sexual penetration was alleged. *Kolton*, 219 Ill. 2d at 364, 370. This court has previously addressed this issue and decided it adversely to the State (*Spencer*, 2014 IL App (1st) 130020, ¶¶38-40), and we find no reason to hold differently here.

¶ 15 The State also maintains that *People v. Washington*, 2012 IL 107993, ¶¶36-37, 41, is instructive in this matter and provides that a jury may find defendant guilty of armed robbery with a dangerous weapon if he commits an armed robbery with a gun and that a firearm may be used as a bludgeon, and, in that capacity, may be considered a dangerous weapon. *Washington*, 2012 IL 107993, ¶¶5-9, however, relied on an earlier version of the armed robbery statute, which required the State to only prove that defendant carried a dangerous weapon. In fact, the court in *Washington*, 2012 IL 107993, ¶6, recognized that the amended version of the statutes altered the scheme by "creating substantively distinct offenses" based on whether the offenses were committed with a dangerous weapon other than a firearm or committed with a firearm.

¶ 16 We also find the State's reliance on *People v. Garcia*, 188 Ill. 2d 265 (1999), misplaced. This court previously noted that in *Garcia* there was no dispute that possession of a controlled substance was a lesser-included offense of possession with intent to deliver. *Booker*, 2015 IL App (1st) 131872, ¶61. Here, on the other hand, armed robbery with a dangerous weapon other than a firearm is not a lesser-included offense of armed robbery with a firearm, and thus, *Garcia* is inapplicable to the case at bar. *Id.*

¶ 17 The State next contends that the legislative history behind the armed robbery statute supports its position. We, however, will not consider the State's arguments concerning the legislative history behind the armed robbery statute because the language of the statute is plain and unambiguous. *People v. Collins*, 214 Ill. 2d 206, 214 (2005).

¶ 18 In light of the foregoing, we find that the trial court erred in finding defendant guilty of armed robbery with a dangerous weapon other than a firearm as it is not a lesser-included offense of armed robbery with a firearm. That said, we observe that there are differing opinions on whether this amounts to plain error. In *Spencer*, 2014 IL App (1st) 130020, ¶¶45-46, this court found that this error was not plain error because it was not a structural error which has only been recognized in cases involving a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of the grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.

¶ 19 However, in *Clark*, 2014 IL App (1st) 123494, ¶¶41-42, this court found that the error amounted to plain error because allowing unauthorized convictions to stand challenges the integrity of the judicial process. In support of this conclusion, *Clark* noted that the supreme court has found that second-prong plain error applies to errors other than the six previously enumerated, citing *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (failure to apply the one-act, one-crime rule constituted plain error under the second prong) and *People v. Walker*, 232 Ill. 2d 113, 131 (2009) (failure to exercise discretion in denying a request for a continuance constituted second-prong plain error). This court further observed in *Clark*, 2014 IL App (1st) 123494, ¶41, that the supreme court previously held in *Kolton*, 219 Ill. 2d at 359-60, that convicting a defendant of an uncharged offense that is not a lesser-included of a charged offense violates defendant's fundamental due process right to notice of the charges brought against him.

Booker, 2015 IL App (1st) 131872, ¶65, relying on *Clark*, also found that the error amounted to plain error, and that plain error is not limited to the six types of error recognized by the Supreme Court.

¶ 20 We find the reasoning in *Clark* and *Booker* sound and supported by the cited decisions of the supreme court, and thus agree that the conviction of an uncharged offense that is not a lesser-included offense of the charged offense is plain error. We, therefore, conclude that the error in this case amounted to structural error under the second prong of plain error review, and accordingly, vacate defendant's conviction for armed robbery with a dangerous weapon other than a firearm, and reduce it to robbery (720 ILCS 5/18-1(a) (West 2012)), a lesser-included offense of the charged offense, and remand the cause for a new sentencing hearing on that offense. *Clark*, 2014 IL App (1st) 123494, ¶43-45.

¶ 21 Vacated in part; conviction on lesser-included offense of robbery remanded for resentencing; judgment affirmed in all other respects.