SECOND DIVISION
October 13, 2015

No. 1-13-3216

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 15536
	)	
SHAWN TURNER,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for the uncharged offense of armed robbery with a dangerous weapon other than a firearm should be vacated where that crime was not a lesser-included offense of the charged crime of armed robbery with a firearm.

¶ 2 Defendant Shawn Turner was charged with armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)) and aggravated unlawful restraint while using a firearm. Following a bench trial, the court convicted defendant of armed robbery while armed with a dangerous

weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2010)). Defendant was sentenced to 15 years in prison. On appeal, defendant contends the trial court erred in convicting him of an uncharged offense that was not a lesser-included offense of a charged crime. Because we conclude that conviction constituted plain error, defendant's armed robbery conviction is vacated, a conviction on the lesser-included offense of robbery is entered, and this case is remanded for resentencing. In addition, we modify the fines and fees order entered by the trial court.

¶ 3 At defendant's bench trial in 2013, Melvin Lawrey testified he was a former correctional officer with the Illinois Department of Corrections and security officer and had carried a gun in those capacities. At about 7 p.m. on May 22, 2012, Lawrey had gone to a currency exchange and was walking on Halsted toward his house at 7247 South Peoria. Lawrey testified he had about $100 in his wallet along with a debit card, other bank cards and identification. As he walked north on Halsted, a black van traveling south on Halsted "turned at an angle and the driver jumped out with a gun and another guy jumped out." Lawrey identified defendant in court as the driver of the van. Lawrey testified he knew defendant as "Smiley" and had previously seen defendant "[o]n a lot of occasions" selling cigarettes at 74th and Halsted. Defendant also had worked on a car belonging to the daughter of Lawrey's girlfriend.

¶ 4 Lawrey testified defendant and a passenger emerged from the van and ran towards him. Defendant held a dark-colored semiautomatic pistol, which Lawrey identified as a "40-caliber Glock" based on his familiarity with weapons. Lawrey said defendant "got up right up close to me, had the gun in my face and told me to up the loot." When Lawrey shouted for help and tried to run away, the second man blocked his path, and defendant struck Lawrey twice with the gun

while taking Lawrey's wallet from his back pocket. Lawrey said he was struck on top of his head and near his eye.

¶ 5 On August 9, 2012, Lawrey saw defendant working at a beauty supply store at 7325 South Halsted and asked that his wallet be returned. Defendant said he no longer had the wallet. Lawrey notified police, who picked up defendant at the store, and identified defendant to police as the person who had robbed him. Chicago police officer Ismael Mendez offered testimony consistent with Lawrey's account of identifying defendant to police.

¶ 6 For the defense, Chicago police detective Dennis Pagan testified that in his written report of the incident, Lawrey could not describe the men who attacked him but said he recognized the main offender.

¶ 7 Defendant testified he knew Lawrey "from the neighborhood." Defendant worked in the stockroom and as "security" at the beauty supply store but did not carry a weapon. He acknowledged seeing Lawrey at the store on August 9, 2012, but denied they had a conversation. Defendant denied carrying a weapon or confronting Lawrey on May 22, 2012, and testified he was at a friend's house until 11 p.m. that night.

¶ 8 After closing arguments, the trial court found defendant emerged from a vehicle carrying "what Mr. Lawrey believed to be a 40-caliber Glock handgun" and demanding money from Lawrey. The court then stated:

> "While Mr. Lawrey has indicated that he recognized the item in the defendant's hand to be a Glock, [a] firearm was not discharged, certainly there are replica guns, fake guns out there that are heavy, but may not be an exact – actually a handgun or a firearm.

> There is a finding of guilty of armed robbery with a bludgeon other than a firearm, the item – it certainly could be used as that. That's 720 ILCS 5/18-2(a)(1)."

The court sentenced defendant to 15 years in prison.

¶ 9 On appeal, defendant contends his conviction for armed robbery while armed with a dangerous weapon other than a firearm violated his right to due process. Citing several recent decisions of this court, defendant claims he was convicted of an uncharged offense that is not a lesser-included offense of the charged crime of armed robbery with a firearm. Defendant acknowledges he did not object to his conviction at trial or raise the issue in a post-trial motion but asks this court to consider the issue either under the second prong of the plain error doctrine or as a claim of ineffective assistance of trial counsel.

¶ 10 The plain-error doctrine allows review of unpreserved claims of error where clear error has occurred and either: (1) the evidence is closely balanced such that the error may have resulted in the defendant's conviction, regardless of the seriousness of the error; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Eppinger*, 2013 IL 114121, ¶ 18. The first step in a plain error analysis to determine whether any error occurred. *Id.* ¶ 19.

¶ 11 A defendant in a criminal prosecution has a fundamental due process right to notice of the charges brought against him, and as such, a defendant may not be convicted of an offense with which he was not charged with committing. *People v. Kennebrew*, 2013 IL 113998, ¶ 27, citing *People v. Kolton*, 219 Ill. 2d 353, 359-60 (2006). The Illinois armed robbery statute separates that offense into two distinct methods based upon the weapon used. 720 ILCS 5/18-

2(a)(1), (a)(2) (West 2010). A person commits armed robbery when he or she commits the offense of robbery while carrying or being armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1) (West 2010). A person also can commit armed robbery when committing robbery while carrying or being armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). In the case at bar, defendant was charged with armed robbery while carrying a firearm under section 18-2(a)(2). However, defendant was convicted of armed robbery while carrying a weapon other than a firearm under section 18-2(a)(1), as explicitly stated by the trial court. Thus, defendant was convicted of an uncharged offense.

¶ 12 A defendant may be convicted of an uncharged offense if it is a lesser-included offense of a charged crime. *Kennebrew*, 2013 IL 113998, ¶ 27. That determination is made using the charging instrument approach, in which the court ascertains whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense and, if so, whether the evidence rationally supports a conviction on the lesser offense. *Id*. ¶ 30, citing *Kolton*, 219 Ill. 2d at 361.

¶ 13 This court has applied that analysis to the crimes at issue here and has concluded that armed robbery with a dangerous weapon other than a firearm is not a lesser-included offense of armed robbery with a firearm. See *People v. Clark*, 2014 IL App (1st) 123494, ¶ 13, *appeal allowed*, No. 118845 (March 25, 2015); *People v. Spencer*, 2014 IL App (1st) 130020, ¶ 43. In *Clark*, the defendant was charged with armed robbery while armed with a firearm and was convicted of the uncharged offense that did not involve possession of a firearm. *Clark*, 2014 IL App (1st) 123494, ¶ 13. In making its ruling after the defendant's bench trial, the trial court found the weapon was used "in the manner of a bludgeon." *Id*.

¶ 14 On appeal, this court held the "allegation that defendant was armed with a firearm necessarily excluded an allegation that the defendant was armed with a dangerous weapon other than a firearm." *Id.* ¶ 32. The court found the charged crime left no means to infer an allegation that defendant carried a dangerous weapon other than a firearm. *Id.*, citing *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38 (noting that the element of possession of a firearm either is or is not included in each statutory section). See also generally *People v. Booker*, 2015 IL App (1st) 131872, ¶ 59 (under the same reasoning, home invasion with a dangerous weapon other than a firearm is not a lesser-included offense of the charged crime of home invasion with a firearm). Here, as in *Clark*, the victim testified the defendant displayed a gun and then struck him with it. *Clark*, 2014 IL App (1st) 123494, ¶¶ 5-6. As the *Clark* court noted, the State did not allege that the defendant used the firearm as a bludgeon or a dangerous weapon. *Id*. ¶ 32.

¶ 15 The lesser-included offense doctrine does not apply where the two offenses at issue in a particular case involved the same issues of disputed fact. *People v. Meor*, 233 Ill. 2d 465, 471 (2009). It is logically impossible for the offense of armed robbery with a dangerous weapon other than a firearm to be a lesser-included offense of armed robbery with a firearm.

¶ 16 The State contends that no due process violation occurred because defendant was on notice that the weapon used in this offense could qualify as a dangerous weapon other than a firearm. The State contends that a gun is a dangerous weapon when it is "used or capable of being used as a club or a bludgeon." The State's position ignores the composition of the current armed robbery statute, which bifurcated the crime of armed robbery into distinct offenses based on the weapon used, as illustrated in the amendment of the statute in 2000. See 720 ILCS 5/18-2(a)(1), (a)(2) (West 2010); P.A. 91-404, § 5 (eff. Jan. 1, 2000). Prior to 2000, the statute

provided that armed robbery was committed when a defendant carried or was armed with a dangerous weapon. 720 ILCS 5/18-2(a) (West 1998). The statute in its current iteration acknowledges that armed robbery can be committed with an object other than a firearm but created "two distinct categories of armed robbery: armed robberies committed without a firearm and armed robberies committed with a firearm." *People v. Wright*, 2013 IL App (3d) 100522, ¶ 32. The fact that the weapon in this case was not fired but was instead used by defendant to strike the victim does not transform the weapon into a "dangerous weapon other than a firearm" under the statute.

¶ 17 In conclusion on this point, in finding defendant guilty of armed robbery with a dangerous weapon other than a firearm, the trial court convicted defendant of an uncharged offense that was not a lesser-included offense of the charged crime. Therefore, defendant's conviction on the offense of armed robbery with a dangerous weapon other than a firearm constituted error.

¶ 18 We next consider whether plain error occurred. The cases set out above found error in the defendants' convictions but reached differing conclusions as to the applicability of the second prong of the plain-error doctrine. *Spencer* held the defendant's conviction of an uncharged offense did not constitute second-prong plain error because the error was not one of the six types of structural error recognized by the United States Supreme Court. *Spencer*, 2014 IL App (1st) 130020, ¶¶ 44-46; see *Washington v. Recuenco*, 548 U.S. 212, 218 n. 2 (2006) (such structural errors include a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective instruction as to reasonable doubt). Instead, *Spencer* vacated the defendant's conviction

based on the ineffectiveness of defense counsel for failing to object to the improper finding of guilt. *Spencer*, 2014 IL App (1st) 130020, ¶¶ 48-51.

¶ 19 We find the plain-error analysis in *Clark* to be more persuasive. *Clark* found second-prong plain error in the entry of a conviction on an uncharged offense because the defendant was deprived of the fundamental due process right to notice of the charges brought against him. *Clark*, 2014 IL App (1st) 123494, ¶¶ 41-42. The *Clark* court noted the Illinois Supreme Court has extended second-prong plain error beyond the six acknowledged types of structural error. *Id.* ¶ 39-40, citing *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (second-prong plain error found when trial court entered a conviction for a lesser-included offense in violation of the one-act, one-crime doctrine), and *People v. Walker*, 232 Ill. 2d 113, 131 (2009) (such error occurred when trial court failed to exercise discretion in denying a request for a continuance).

¶ 20 Here, as in *Clark*, defendant's due process rights were violated by his conviction for an uncharged offense that was not a lesser-included offense. That unauthorized conviction challenged the integrity of the judicial process, thus constituting plain error. See *Clark*, 2014 IL App (1st) 123494, ¶ 42. Accordingly, defendant's conviction for armed robbery with a firearm is reduced to a conviction for the lesser-included offense of robbery (720 ILCS 5/18-1(a)(West 2010)). Defendant's sentence for armed robbery is vacated, and this case is remanded to the trial court for a new sentencing hearing on that offense. Because we have reduced defendant's conviction on that theory, we need not address defendant's alternative claim of ineffectiveness of his trial counsel.

¶ 21 Defendant's remaining contentions on appeal involve the imposition of various fines and fees, as well as the credit he should receive for the days he spent in custody prior to sentencing.

Questions regarding the appropriateness of fines, fees and costs imposed by a sentencing court are reviewed *de novo*. *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 22 Defendant was assessed a total of $444 in fines and fees. We first address defendant's contention that two charges should be vacated. He asserts, and the State rightly agrees, that the $5 Electronic Citation fee (705 ILCS 105/27.3e (West 2010)) should be vacated because defendant was not convicted in a traffic, misdemeanor, municipal ordinance or conservation case. See *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115. Accordingly, that $5 charge is vacated.

¶ 23 Defendant also contends he was improperly assessed the $25 Court Services fee (55 ILCS 5/5-1103 (West 2010)) because he was not convicted of any of the enumerated offenses in the statute. The State responds, and we agree, that fee is properly assessed upon the entry of a judgment of conviction against defendant. See *People v. Akins*, 2014 IL (1st) 093418-B, ¶ 24. Therefore, the assessment of that fee is affirmed.

¶ 24 Defendant next contends that several of the charges assessed him are fines that should be offset by presentence incarceration credit. A defendant is entitled to a $5-per-day credit against his fines for time served prior to sentencing. 725 ILCS 5/110-14(a) (West 2010). The State agrees that defendant was incarcerated for 411 days before being sentenced in this case. Therefore, defendant has $2,055 of credit to be applied against his fines. *Id*.; see also *People v. Jones*, 397 Ill. App. 3d 651, 663 (2009) (presentencing credit applies only to fines and not to those charges that are considered fees).

¶ 25 Despite being labeled as fees, certain assessments imposed pursuant to a conviction are actually fines. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A charge is considered a "fine" if it

is pecuniary and part of the punishment imposed as part of a sentence. *People v. Jones*, 223 Ill. 2d 569, 581 (2006). In contrast, a "fee" reimburses the State for expenses related to the defendant's prosecution. *Id*. at 600.

¶ 26 Defendant asserts, and the State rightly concedes, that several of the charges against him are fines and should be offset by that credit, namely the $5 drug court fine (55 ILCS 5/5-1101(f) (West 2010)), the $15 State Police operations fee (705 ILCS/27.3a-1.5 (West 2010)), the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2010)), and the $50 Court System charge (55 ILCS 5/5-1101(c) (West 2010)). See *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 42 (drug court charge is a fine); *People v. Millsap*, 2012 IL App (4th) 110668 ¶ 31 (State Police operations fee is a fine); *People v. Butler*, 2013 IL App (1st) 110282, ¶ 4 (Children's Advocacy Center charge is a fine); *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30 (Court Systems fee is a fine). Accordingly, those charges, which total $100, are subject to offset by a portion of defendant's presentencing credit.

¶ 27 Defendant and the State, however, disagree as to the classification of three additional charges. Defendant contends the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2010)) and the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2010)) are, in fact, fines. However, this court has held the latter charge is a fee because it "is intended to reimburse the State's Attorneys for their expenses related to automated record-keeping systems." *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30; see also *People v. Mister*, 2015 IL App (4th) 130180, ¶ 111 (and cases cited therein). Using the same reasoning employed in *Rogers*, we find that the Public Defender records automation charge is a fee because the language creating that fee is identical to that of the counterpart statute establishing the State's

Attorney records automation charge. Compare 55 ILCS 5/3-4012 and 55 ILCS 5/4-2002.1(c). Therefore, each of those $2 charges will stand and because they are fees, they are not offset by defendant's presentencing incarceration credit. See *Jones*, 397 Ill. App. 3d at 663.

¶ 28 Defendant also contends the $10 Probation and Court Services Operations fee (705 ILCS 105/27.3a (1.1) (West 2010)) is a fine because it is not related to the costs of his prosecution. Citing *Rogers*, the State responds that the charge is compensatory in nature, and is therefore a fee, because the trial court ordered the probation department to prepare a pre-sentence investigation (PSI) report, and the $10 charge reimbursed the State for those costs incurred. See *Rogers*, 2014 IL App (4th) 121088, ¶¶ 36-38; see also *People v. Bradford*, 2014 IL App (4th) 130288, ¶ 40, *appeal allowed*, No. 118674 (March 25, 2015). The record in the instant case establishes that the trial court ordered a PSI report be prepared for defendant and that such a report was prepared. Accordingly, this $10 charge was a fee that is not subject to offset.

¶ 29 In conclusion on defendant's contentions relating to fines and fees, the $5 Electronic Citation fee is vacated and defendant is awarded $100 in presentencing credit toward the fines discussed above. Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the circuit court to correct defendant's fines and fees order to reflect a total amount due of $339.

¶ 30 In summary, for all the reasons stated above, defendant's armed robbery conviction is reduced to robbery and this case is remanded for resentencing. In addition, the $5 Electronic Citation fee assessed against defendant is vacated and the circuit court clerk is ordered to modify the fines and fees order as stated here.

¶ 31 Armed robbery conviction reduced to robbery and armed robbery sentence vacated; remanded for resentencing; fees to be vacated; fines and fees order to be modified.