FOURTH DIVISION
December 17, 2015

No. 1-13-3654

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 1754
	)	
PERRY WALKER,	)	Honorable
	)	William G. Lacy
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Trial court's finding of guilty 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; defendant barred from challenging charge of aggravated unlawful restraint where no judgment was entered on it; exclusive jurisdiction provision of Illinois Juvenile Court Act constitutional; defendant entitled to one day of presentence custody credit.

¶ 2 Following a bench trial, defendant Perry Walker was found guilty of armed robbery with a dangerous weapon other than a firearm and aggravated unlawful restraint. The trial court merged the unlawful restraint conviction into the armed robbery offense, and sentenced defendant to seven years' imprisonment on the armed robbery conviction and ordered it to run consecutive to the sentence of three years' imprisonment imposed in a separate, unrelated case. On appeal, defendant 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. He also contends that his conviction for aggravated unlawful restraint should be vacated because it violates the one-act one-crime rule in that it was based on the same physical act as the armed robbery conviction, that the exclusive jurisdiction provision in the Illinois Juvenile Court Act (Act) (705 ILCS 405/5-120 (West 2012)) is unconstitutional, and that his mittimus should be corrected to reflect an additional day of presentence custody credit.

¶ 3 Defendant, who was 17 years of age at the time of the offense, and codefendant Jeremiah Dixon, who is not a party to this appeal, were charged with, in relevant part, armed robbery with a firearm, and aggravated unlawful restraint based on the robbery of the victim Anthony Demias the morning of January 10, 2011, near 1951 West Birchwood Avenue in Chicago.

¶ 4 At a severed, but simultaneous, bench trial, the victim, Anthony Demias, testified that at 10:30 a.m. on January 10, 2011, he was in the area of 1951 West Birchwood Avenue when one tall man, codefendant, and a shorter man, defendant, approached him. Codefendant placed a gun to his head, and ripped off the gold chain around his neck. Codefendant was wearing either a blue or black jacket, and a hat. Defendant was wearing a jacket with "Chicago" written on the

back of it, and removed a wallet from Demias' pocket. Codefendant then told the victim to leave, but before he had taken 10 steps, codefendant returned, again pointed the gun at his head, asked for his phone, and found $300 in his pocket. Defendant and codefendant then fled, and the victim immediately went to the police station to report the incident. Two days later, he was called to the police station to view a lineup, but was unable to identify anyone because he was really scared. While at the police station, he was also shown a gun which he said looked like the one codefendant had used, but that it was hard to tell because it was pressed against his forehead.

¶ 5 Chicago police officer Johnny Santiago testified that he was part of a robbery/burglary team, and on January 12, 2011, he received information that an armed robbery had taken place two days before in the area of 1951 West Birchwood Avenue at 10:30 a.m. He learned that the offenders were two male blacks, the taller of whom was wearing a dark jacket, and had a gun, and the shorter one was wearing a jacket with "Chicago" written on the back of it.

¶ 6 Officer Santiago further testified that at 11:43 a.m. on January 12, 2011, he and his partner Officer Quadri were driving in a marked vehicle and canvassing the area where the robbery occurred for possible leads. While driving down the 1900 block of Birchwood Avenue, they noticed defendant and codefendant walking in the middle of the street looking into several cars, which raised Officer Santiago's suspicion of potential criminal activity. The officers also noticed that defendant matched the descriptions given by the victim based on his wearing a jacket with "Chicago" on the back of it, and the fact that he was considerably shorter than codefendant. The officers approached the men, performed protective pat-downs of them, and found a stainless steel handgun on codefendant which had one round in the chamber. The officers then took the two men into custody. Officer Santiago noted in his police report that

defendant was 5'4" tall and codefendant was 5'9" tall. Officer Santiago further testified that he showed the recovered gun to the victim, who indicated that it looked like the gun used during the incident, but he could not be sure because it was pressed against his forehead.

¶ 7 Detective Alonso Jackson testified that he advised defendant of his rights, and defendant agreed to speak with him. Defendant told him that he and codefendant were outside, that he started to go back to his house because he needed something there, then saw the victim approach codefendant and heard him ask for some marijuana, which codefendant sold to the victim. Defendant then noticed that the victim "got real scared" and "guessed" that was when codefendant started to rob him. He saw codefendant with a gun and also saw the victim hand him his wallet. Defendant then "just walked on his way."

¶ 8 Detective Jackson further testified that separate lineups were conducted of the defendants, but the victim was unable to identify them. The detective called an Assistant State's Attorney, who met with defendant and the detective. Defendant then provided a written statement in which he related that he and codefendant were walking to the red line train station, and saw the victim. Defendant asked the victim if he wanted to buy some marijuana, and when the victim did not understand, defendant pretended to smoke, and told codefendant to provide the victim with some marijuana. They both walked up to the victim, and while he was three feet away, codefendant pulled out a gun, and pointed it at the victim's neck, and told the victim to give him everything. The victim was scared and shaking and pulled out his wallet, which he dropped on the ground. Codefendant told defendant to grab the wallet, which he did, and they fled. As they were running towards the train, codefendant told him he needed to get the victim's phone so he will not call police. Codefendant ran back to the victim while defendant waited and

then returned to the train, and gave him $20 from the money they got from the victim. Defendant gave the wallet to codefendant who threw it on the train tracks. Defendant further stated that he knew codefendant had a gun when they left his house, and identified a gun in a photograph the detective showed him as the one codefendant had used.

¶ 9 Based on the evidence presented, the court found defendant guilty of armed robbery with a dangerous weapon other than a firearm and aggravated unlawful restraint. The court subsequently merged the aggravated unlawful restraint conviction into the offense of armed robbery with a dangerous weapon other than a firearm, and sentenced defendant to seven years' imprisonment on that offense. The court also ordered the sentence to run consecutively to a sentence imposed in a separate, unrelated case.

¶ 10 On appeal, defendant first contends that the trial court violated his right to due process of law by convicting him of the uncharged offense of armed robbery with a dangerous weapon other than a firearm, since it is not a lesser-included offense of the charged offense of armed robbery with a firearm. Defendant thus requests that this court reduce his conviction to robbery and to remand his cause for resentencing on this conviction.

¶ 11 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. *Id.* ¶27. Thus, counsel's failure to object is forfeiture, and not invited error. *Id.*

¶ 12 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 second prong plain error. The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that defendant was deprived of 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).

¶ 13 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 agree and find no reason to depart from these holdings in this case.

¶ 14 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 in *Barnett*, 2011 IL App (3d) 090721, ¶38, 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)).

¶ 15 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 decision in *Barnett*, 2011 IL App (3d) 090721, ¶38, 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.

¶ 16 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 adversely to the State that it is not reasonable to infer that a defendant charged with possession of a firearm, should have anticipated that the State could prove the opposite, that the item was a dangerous weapon other than a firearm. *Spencer*, 2014 IL App (1st) 130020, ¶¶38-40. We find no reason to hold differently here.

¶ 17 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 only required the State to prove that defendant carried a dangerous weapon. In fact, the court in *Washington*, 2012 IL 107993, ¶6, recognized that the amended version of the statute 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. Thus, the State's reliance on *Washington* is misplaced.

¶ 18 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.*

¶ 19 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).

¶ 20 The State also contends that the fact that the trial court could not conclude that the weapon used was a firearm does not preclude it from finding that it was a dangerous weapon capable of being used as a bludgeon. The State maintains that defendant committed armed robbery and that to conclude otherwise and vacate defendant's conviction would be to ignore the crime actually committed. The State, however, ignores the fact that the trial court cannot find defendant guilty of an uncharged offense that is not a lesser included offense. *Booker*, 2015 IL App (1st) 131872, ¶53.

¶ 21 In light of the foregoing, we conclude that the trial court erred in finding defendant guilty of the uncharged offense of armed robbery with a dangerous weapon other than a firearm as it is not a lesser-included offense of the charged offense, 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.

¶ 22 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.

¶ 23 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 defendant's conviction of armed robbery with a dangerous weapon other than a firearm constituted plain error (*Clark*, 2014 IL App (1st) 123494, ¶42), 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).

¶ 24 Defendant next contends and the State agrees that his aggravated unlawful restraint conviction violates the one-act one-crime rule and must be vacated because it was based on the same physical act as his armed robbery conviction. We, however, need not accept the State's concession or the argument of the parties (*In re T.A.*, 359 Ill. App. 3d 953, 957 (2005)), given the record before us.

¶ 25 We observe that the trial court merged the aggravated unlawful restraint conviction into the armed robbery offense and imposed no sentence on it. Since no judgment of conviction was entered or sentence imposed on the aggravated unlawful restraint offense, defendant is barred from challenging any aspect of that charge on appeal (*People v. Sandefur*, 378 Ill. App. 3d 133, 142-43 (2007); *People v. Gwinn*, 366 Ill. App. 3d 501, 521 (2006)), and no further discussion is warranted.

¶ 26 Defendant next contends that the exclusive jurisdiction provision of the Juvenile Court Act (705 ILCS 405/5-120 (West 2012)), which excluded 17-year-old minors from the juvenile court's jurisdiction violates his constitutional rights because it automatically treats all 17-year-old minors as adults during prosecution and sentencing without consideration of their youthfulness and attendant characteristics. Defendant contends that this provision violates his eighth amendment right against cruel and unusual punishment, and his substantive and procedural due process rights. The State responds that the arguments made by defendant have already been rejected in *People v. Harmon*, 2013 IL App (2d) 120439, and that a similar provision of the Act,

the automatic transfer provision, was upheld as constitutional in *People v. Patterson*, 2014 IL 115102.

¶ 27 In *Harmon*, 2013 IL App (2d) 120439, ¶54, the reviewing court noted that *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. - , 132 S. Ct. 2455 (2012), stand for the proposition that a sentencing body must have the chance to take into account mitigating circumstances, *i.e.*, the youth of a juvenile and the attendant characteristics, before sentencing a juvenile to the harshest possible penalty, which was either the death penalty or life imprisonment without the possibility of parole; neither of which were imposed in *Harmon* or here. The reviewing court further held that the eighth amendment prohibits cruel and unusual *punishments*, and that the exclusive jurisdiction provision does not impose punishment, but rather, specifies the forum in which defendant's guilt may be adjudicated, so it is not subject to the eighth amendment. (Emphasis in original.) *Harmon*, 2013 IL App (2d) 120439, ¶55.

¶ 28 We further observe that since the parties filed their briefs in this case, our supreme court has held that adjudication in a juvenile court is not a matter of a constitutional right. *People v. Fiveash*, 2015 IL 117669, ¶21. In that case, the supreme court noted that it had recognized the need to consider juveniles' unique characteristics in the eighth amendment context in *People v. Miller*, 202 Ill. 2d 328, 341-42, and that the Supreme Court had done so in *Roper, Graham,* and *Miller v. Alabama*. However, neither the U.S. Supreme Court or our supreme court have held that the failure to address the inherent differences between teen and adult offenders creates a due process violation when the teen is potentially subjected to a prison sentence involving a term of years rather than the death penalty or natural life in prison. *Fiveash*, 2015 IL 117669, ¶45, citing

Patterson, 2014 IL 115102, ¶¶97-98. Thus, we find no due process violation here, especially where the trial court was able to consider defendant's youth and its attendant circumstances when sentencing him. *Harmon,* 2013 IL App (2d) 120439, ¶62. Accordingly, we conclude that the exclusive jurisdiction provision of the Act does not violate the eighth amendment or defendant's right to due process. *Id.* ¶¶56, 62.

¶ 29 Defendant next contends, the State concedes and we agree that he is entitled to an additional day of presentence custody credit. We, accordingly, order that the mittimus be amended to reflect an additional day of credit. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 30 In sum, we reduce defendant's conviction of armed robbery with a dangerous weapon other than a firearm to robbery, and remand for resentencing. We also find that defendant is barred from raising a challenge to the charged offense of aggravated unlawful restraint, that the exclusive jurisdiction provision of the Act is constitutional, and that defendant is entitled to an additional day of presentence custody credit.

¶ 31 Vacated; conviction on lesser-included offense of robbery remanded for resentencing; mittimus amended.