2015 IL App (1st) 133666-U

SIXTH DIVISION
September 30, 2015

No. 1-13-3666

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EMMERITT ADAIR, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 13 CR 11411 Honorable James B. Linn, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's conviction for the uncharged crime of armed robbery with a dangerous weapon, a bludgeon, is vacated because it was not a lesser-included offense of the charged crime of armed robbery with a firearm. Defendant's convictions for aggravated unlawful restraint and aggravated battery are vacated pursuant to the one-act, one crime rule. The State produced sufficient evidence to establish that defendant was in constructive possession of heroin and his conviction for possession of a controlled substance is therefore affirmed.

¶ 2 Defendant Emmeritt Adair was charged in a multi-count indictment with several crimes, including armed robbery with a firearm, aggravated battery, aggravated unlawful restraint, and possession of a controlled substance. Defendant was convicted of the latter three crimes after a

bench trial. However, the trial court acquitted defendant of the armed robbery with a firearm charge because the State had failed to present evidence showing that the gun defendant wielded during the commission of the robbery was operable. Instead, the trial court convicted defendant of armed robbery while armed with a bludgeon (the gun).

¶ 3 In this appeal, defendant contends that his conviction for the uncharged crime of armed robbery with a bludgeon should be vacated because that offense is not a lesser-included offense of armed robbery with a firearm. Defendant additionally argues that his convictions for aggravated battery and aggravated unlawful restraint should be vacated pursuant to the one-act, one-crime rule. Finally, defendant contends that the State did not prove beyond a reasonable doubt that he was in constructive possession of drugs which were discovered inside a vehicle defendant was occupying at the time of his arrest. We affirm in part, vacate in part, and remand with instructions.

¶ 4 BACKGROUND

¶ 5 Defendant was charged in a multi-count indictment with one count of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)), armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), four counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), six counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(2), (3)(A), (3)(C) (West 2012)), one count of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)), one count of aggravated unlawful restraint (720 ILCS 5/10-3.1) (West 2012)), and one count of possession of a controlled substance (720 ILCS 570/402(c) (West 2012)).

¶ 6 At defendant's bench trial, Ellis Freeman testified that on May 17, 2013, he was at his sister's house on the 3700 block of West Grenshaw Street in Chicago. Around 9 a.m. while

Freeman was near the front of the house, he heard someone shout "[h]e got a gun." Freeman looked in the direction from which the voice came and saw defendant searching a woman against a gate while holding her at gunpoint.

¶ 7 Freeman called the police. During the call, defendant walked past the house Freeman was in and entered the passenger side of a vehicle. Freeman gave a description of the vehicle and its license plate number to the 9-1-1 operator. The police arrived about 30 minutes later and drove Freeman to a different area. There, the police located defendant, whom Freeman identified as the robber.

¶ 8 Officer Michael Reyes testified that on May 17, 2013, he responded to a 9-1-1 call reporting an armed robbery near 3715 West Grenshaw Street. The 9-1-1 operator traced the vehicle to an address at 1434 North Kildare Avenue, so Officer Reyes drove to that location. Once there, Officer Reyes located an SUV whose license plate matched the number Freeman gave the 9-1-1 operator. Defendant was sitting in the front passenger seat. After defendant exited the vehicle and began walking up the steps leading to 1434 North Kildare, Officer Reyes stopped and detained defendant.

¶ 9 After he detained defendant, Officer Reyes opened the SUV's front driver-side door. Inside, Officer Reyes discovered a revolver on the passenger side floor, a clear zipper-top bag containing a white powdery substance on top of the center console, and a mail envelope containing court documents bearing defendant's name. An evidence technician who arrived on scene informed Officer Reyes that the gun was loaded with six rounds of live ammunition.

¶ 10 On cross-examination, Officer Reyes testified that the arrest report he prepared stated that defendant's address was 4932 West Ohio Street. He also testified that the vehicle trace performed by the 9-1-1 dispatcher revealed that a woman owned the SUV in question.

¶ 11 The parties then stipulated to testimony from Sereta Patton, a forensic scientist employed by the Illinois State Police Crime Lab. Patton performed forensic testing on the substance found inside the zip-lock bag, which revealed that it contained .3 grams of heroin.

¶ 12 Gloria Harris testified that shortly before 9:00 on May 17, 2013, she bought some lottery tickets at a gas station and then began walking eastbound on Grenshaw Street. As she was walking, defendant approached her and asked if she could make change for a five or ten dollar bill. Harris ignored defendant at first because she was scratching the lottery tickets she had just purchased. When she looked up, she was face-to-face with defendant, who told her to give him her money. Harris responded by telling defendant that she did not have any money; the two then began struggling with one another. During the struggle, defendant pointed a gun at Harris and told her he would shoot her if she did not give him money. After searching Harris's pockets and purse, defendant took some money from her and entered a burgundy and white SUV parked on Grenshaw Street. After the SUV drove away, a man who witnessed the robbery came to Harris and stayed with her until police arrived. When the police arrived, they took Harris to another location, where she identified defendant. On cross-examination, Harris testified that defendant did not shoot her or hit her with the gun.

¶ 13 After Harris finished testifying, the State rested its case and defendant moved for a directed verdict, which was denied. Defendant elected not to testify and presented no witnesses. In his closing argument, defendant argued that the State failed to present evidence showing that the gun defendant brandished was (1) a real gun and (2) in working condition.

¶ 14 After the State finished its rebuttal argument, the following colloquy took place between the trial court and State's Attorney:

"THE COURT: What was the evidence at the trial about the operability of the weapon?

MS. SPIZZIRRI [Assistant State's Attorney]: I believe the case law does not require the State to demonstrate operability of a firearm with these charges. Presumption is with the State. Absent some defect or some indicia in the evidence that that firearm is not operable, that is not an element that the State has to prove. So on that argument I would say that that doesn't support an acquittal.

THE COURT: Look, I'm just inquiring. I want you to refresh me if you can about the evidence if any about the operability of the weapon or if it was loaded or not.

MS. SPIZZIRRI: Judge, it was loaded. There was ammunition in the chamber. As I recall, you heard from Officer Reyes who had an opportunity to – I don't have in my notes the number of rounds in the gun at the moment. But he did testify to that, your honor."

¶ 15 After the colloquy, defense counsel responded that the State had the burden of proving that the gun was operable. The court took the matter under advisement and reconvened two days later. At that time, defense counsel again argued that the State had to prove that the firearm was operable. The trial court then announced its ruling. The court found that a robbery took place but stated that "there was some question about the operability of the weapon involved." The court noted, however, that the gun was "at the very least used as a bludgeon." The court then found defendant guilty of "armed robbery with a weapon, a bludgeon," aggravated battery, and

unlawful restraint, and possession of a controlled substance. The court stated it would "give [defendant] the benefit of the doubt as to all other charges." The court then sentenced defendant to concurrent prison terms of twelve years for armed robbery, five years for aggravated battery, five years for aggravated unlawful restraint, and three years for possession of a controlled substance. This appeal followed.

¶ 16 ANALYSIS

¶ 17 A. Lesser-Included Offense

¶ 18 We first consider whether armed robbery with a dangerous weapon other than a firearm, the crime of which defendant was convicted, is a lesser included offense of armed robbery with a firearm, the crime for which defendant was charged. "A defendant in a criminal prosecution has a fundamental due process right to notice of the charges brought against him." *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). Thus, as a general rule, a defendant "may not be convicted of an offense he has not been charged with committing." *Id.* However, a defendant may be convicted of an uncharged offense if the offense "is a lesser-included offense of a crime expressly charged in the charging instrument [citation] and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense." *Id.*

¶ 19 To determine whether an uncharged offense is a lesser included offense of a particular crime, Illinois courts use the "charging instrument approach." *Id.* at 361. "The charging instrument approach looks to the allegations in the charging instrument to see whether the description of the greater offense contains a 'broad foundation' or 'main outline' of the lesser offense." *Id.* If the court determines that a particular offense is a lesser included offense of the crime the defendant was charged with, it must then determine whether the evidence supports

convicting the defendant of the uncharged crime. *Id.* We review *de novo* whether an uncharged offense is a lesser included offense of a charged crime. *Id*.

¶ 20 Defendant's armed robbery indictment charged that he "[k]nowingly took property, to wit: United States currency, from the person or presence of Gloria Harris, by the use of force or by threatening the imminent use of force and he carried on or about his person or was otherwise armed with a firearm." That language is strikingly similar to that of the indictment at issue in *People v. Spencer*, 2014 IL App (1st) 130020. There, the defendant, also charged with armed robbery with a firearm, was alleged to have taken property from her victim "by the use of force or by threatening the imminent use of force and she carried on or about her person or was otherwise armed with a firearm." *Id*. ¶ 5. The defendant was acquitted of armed robbery with a firearm and was instead convicted of armed robbery with a dangerous weapon. *Id*. ¶ 21.

¶ 21 On appeal, the appellate court vacated the defendant's conviction for armed robbery with a dangerous weapon. *Id*. ¶ 2. In doing so, the court rejected the State's argument that armed robbery with a dangerous weapon is a lesser-included offense of armed robbery with a firearm, explaining:

> "[t]he State's argument that Spencer was adequately apprised of the charge against her when she was charged with armed robbery with a firearm under section 18–2(a)(2) of the statute, but convicted of armed robbery with a dangerous weapon other than a firearm under section 18–2(a)(1), is unpersuasive. The information charging Spencer referred only to armed robbery with a firearm. A dangerous weapon other than a firearm cannot be reasonably inferred from the information. Hence, the trial court improperly

> considered *sua sponte* whether Spencer committed armed robbery with a dangerous weapon other than a firearm." *Id.*¶ 43.

¶ 22 We agree with the reasoning of *Spencer*, and thus likewise hold that armed robbery with a dangerous weapon is not a lesser-included offense of armed robbery with a firearm. As with the indictment in *Spencer*, defendant's armed robbery indictment made no reference to a dangerous weapon other than a firearm, nor did it allege that he used the gun as a bludgeon. Thus, defendant could not have reasonably inferred from the indictment the charge that he committed armed robbery while armed with a dangerous weapon other than a firearm. *Id.* ¶ 40; *cf. People v. Clark*, 2014 IL App (1st) 123494, ¶ 32 (holding that armed robbery with dangerous weapon and aggravated vehicular hijacking with dangerous weapon are not lesser included offenses of armed robbery with a firearm and aggravated vehicular hijacking with a firearm where the defendant's indictment did not charge that he possessed a weapon other than a firearm or that he used a firearm as a bludgeon).

¶ 23 Our conclusion that defendant could not have anticipated the need to defend against a charge that he wielded a dangerous weapon other than a firearm is reinforced by considering defendant's armed robbery indictment alongside the indictments for the remaining crimes he was charged with. In addition to the armed robbery charge, defendant was charged with five crimes predicated on his possession or use of a firearm: armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(2), (3)(A), (3)(C) (West 2012)), aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)), and aggravated unlawful restraint (720 ILCS 5/10-3.1) (West 2012)). As all of the indictments for these crimes alleged

that defendant used or possessed a firearm, we do not believe that defendant could have possibly inferred the allegation that he was armed with a dangerous weapon other than a firearm.

¶ 24 The State's arguments to the contrary fall under scrutiny. Citing *People v. Washington*, 2012 IL 107933 and *People v. Skelton*, 83 Ill. 2d 58 (1980), the State contends that firearms can also be a dangerous weapons because they may be wielded as bludgeons. But *Washington* and *Skelton* were based on a prior version of the armed robbery statute, (see *Washington*, 2012 IL 107933, ¶¶ 5-7; *Skelton*, 83 Ill. 2d at 60-61), which drew no distinction between firearms and other dangerous weapons (*Clark*, 2014 IL App (1st), ¶ 33). Unlike the armed robbery statute analyzed in those cases, the statute under which defendant was convicted creates a perfect disjunction between armed robbery with a firearm and armed robbery with a dangerous weapon:

> "§ 18-2. Armed robbery.
>
> (a) A person commits armed robbery when he or she violates Section 18-1; and
>
> (1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm; *or*
>
> (2) he or she carries on or about his or her person or is otherwise armed with a firearm." (Emphasis added.) 720 ILCS 5/18-2(a)(1), (a)(2) (West 2012).

Thus, while it is no doubt true that a firearm *could* be used as a bludgeon, as a statutory matter, an indictment pursuant to section 18-2(a)(2) alleging only that the defendant used or possessed a firearm during the commission of a robbery cannot be interpreted as simultaneously alleging that

the defendant used or possessed a dangerous weapon other than a firearm during the commission of the same robbery. See *People v. Barnett,* 2011 IL App (3d) 090721, ¶¶ 37-38.

¶ 25 Our determination that armed robbery with a dangerous weapon is not a lesser-included offense of armed robbery with a firearm does not, however, automatically entitle defendant to relief. Defendant did not object in the proceedings below when the trial court convicted him of armed robbery with a dangerous weapon. Defendant suggests two avenues by which we may nonetheless grant him the relief he seeks: first, he contends that the trial court's action constituted second-prong plain error. Second, he argues that his trial counsel's failure to object when the court announced its judgment constituted ineffective assistance of counsel.

¶ 26 The plain error doctrine permits review of errors not objected to at trial or in a post-trial motion when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is 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. Piatkowski,* 225 Ill. 2d 551, 565 (2007); see Ill. S. Ct. R. 615(a). The second prong of the plain error doctrine has been equated with structural error, (*People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)), and structural error, in turn, has been described as "a systemic error" whose debilitating affect on the fairness of the proceeding below is so severe as to warrant automatic reversal (*Id.*; see *People v. Downs*, 2014 IL App (2d) 121156, ¶ 31).

¶ 27 Structural error has only been recognized in a narrow subset of cases, namely those involving the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial,

and where the trial court propounds a defective reasonable doubt instruction. *Downs*, 2014 IL App (2d) 121156, ¶ 31. Thus, the State argues, because convicting a defendant for an uncharged offense does not fall into one of those categories, such errors cannot be second-prong plain error.

¶ 28 The State's argument has no merit. Although the Illinois Supreme Court has equated second-prong plain error with structural error, the court has not *limited* second-prong error to the category of errors considered structural. For example, in *In re Samantha V.*, the court held that a violation of the one-act, one-crime doctrine constituted second-prong plain error. 234 Ill. 2d 359, 378-79 (2009). Indeed, the appellate court has held in numerous cases that convicting a defendant of an uncharged offense that is not a lesser-included offense constitutes second-prong plain error. See, *e.g.*, *People v. Booker*, 2015 IL App (1st) 131872, ¶ 65; *Clark*, 2014 IL App (1st) 123494, ¶ 42; *People v. McDonald*, 321 Ill. App. 3d 470, 474 (2000). We agree with these decisions. When defendant was convicted of the uncharged offense, he was denied his "fundamental due process right to notice of the charges brought against him," which results in plain error. *Kolton*, 219 Ill. 2d 353, 359 (2006); see *Booker*, 2015 IL App (1st) 131872, ¶ 65; *Clark*, 2014 IL App (1st) 123494, ¶ 41.

¶ 29 Defendant requests that we remedy this error by reducing his conviction for armed robbery with a dangerous weapon to robbery. Under Illinois Supreme Court Rule 615(b)(3), this court has the power to "reduce the degree of the offense of which the appellant was convicted." Ill. S. Ct. R. 615(b)(3). Accordingly, we reduce defendant's conviction for armed robbery to robbery (720 ILCS 5/18-1(a) (West 2012)), vacate his sentence for armed robbery, and remand to the trial court for resentencing on defendant's robbery conviction.

¶ 30 B. One-Act, One-Crime Rule

¶ 31 We next consider whether defendant's convictions for aggravated battery and aggravated unlawful restraint must be vacated pursuant to the one-act, one-crime doctrine. Initially, we note that defendant did not raise this issue in the court below, and therefore forfeiture applies. However, as the State correctly concedes, one-act, one-crime violations are subject to second-prong plain error review, and so we will review defendant's claims for error. See *Samantha V.*, 234 Ill. 2d at 378-79. Challenges to a conviction pursuant to the one-act, one crime rule present a question of law which we review *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 47. Under the rule, a defendant cannot be convicted of multiple offenses predicated on the same physical act. *Id.* However, a defendant may be convicted of multiple offenses and receive concurrent sentences in cases where the defendant has committed several discrete acts, even if they are interrelated. *Id*. As used in this context, the word "act" means "any overt or outward manifestation that will support a separate conviction." *Id*.

¶ 32 The rule requires a two-step analysis. First, the court must determine "whether a defendant's conduct consisted of separate acts or a single physical act." *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). "In determining whether a defendant committed a separate physical act of unlawful restraint, Illinois courts have looked at whether the restraint was 'independent' of the physical act underlying the other offense [citations]; went 'further than' the restraint inherent in the other offense [citations]; or occurred simultaneously [citations]." *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 51. Similarly, in considering whether a defendant committed a separate act of battery, Illinois courts have examined whether the battery was predicated on the same physical act constituting the other crime. See, *e.g.*, *People v. Isunza*, 396 Ill. App. 3d 127, 134 (2009). If the defendant's conduct consisted of a single act, then multiple convictions based on

that act are improper. *Rodriguez*, 169 Ill. 2d at 186. If the defendant engaged in separate discrete acts, however, the court then proceeds to the second step of the analysis, which requires that the court determine whether any of the separate offenses are lesser-included offenses. *Id.* If so, then the defendant cannot receive multiple convictions. *Id.*

¶ 33 Defendant argues, and the State concedes, that defendant's conviction for aggravated unlawful restraint should be vacated. We agree. Defendant's armed robbery indictment was predicated on the allegation that he took money from Harris by using or threatening to use force and that he was armed with a firearm at the time. Our analysis of this issue is not affected by the fact that we have reduced defendant's armed robbery conviction to simple robbery, because analysis under the one-act, one-crime rule hinges on a consideration of what actions the defendant undertook. See *Almond*, 2015 IL 113817, ¶ 47.

¶ 34 The indictment for aggravated unlawful restraint was predicated on the allegation that defendant detained Harris "while using *** a firearm." Harris testified that defendant pointed a gun at her and threatened to shoot her if she did not give him money. Her testimony was corroborated by Freeman, who testified that he saw defendant searching a woman while holding her at gunpoint after hearing someone say "[h]e got a gun."

¶ 35 "Nearly every offense against the person necessarily involves a degree of restraint." *People v. Kuykendall*, 108 Ill. App. 3d 708, 710 (1982). In order to commit the offense of simple robbery, defendant had to take property "from the person or presence of [Harris] by the use of force or by threatening the imminent use of force." of Harris. 720 ILCS 5/18-1(a) (West 2012). That, in turn, required that defendant maintain close proximity to Harris, for if defendant was not close to Harris, he would not have been able to take property from her "person or presence." To maintain that proximity, and thus ensure that he could accomplish the robbery (or at the very

least, search Harris to discover something worth taking), defendant had to ensure that Harris did not flee. To ensure that Harris remained where she was, defendant held Harris at gunpoint. By training the gun on Harris, defendant unlawfully restrained her because she could have reasonably inferred that any attempt to flee would have caused defendant to shoot her. However, while brandishing the gun, defendant threatened to shoot Harris if she did not give him money. Thus, by brandishing the gun, defendant both detained Harris and threatened the use of force in furtherance of the robbery. See *Daniel*, 2014 IL App (1st), ¶¶ 54-55. Accordingly, defendant's conviction for aggravated unlawful restraint violates the one-act, one-crime rule.

¶ 36 Defendant next argues that his conviction for aggravated battery violates the one-act, one-crime rule because the force he allegedly used to support the battery conviction was the same force he used to commit the robbery. The State, citing *People v. Span*, 2011 IL App (1st) 083037 and *People v. Pearson*, 331 Ill. App. 3d 312 (2002), contends that defendant's aggravated battery conviction is proper because it was predicated on the allegation, and evidence adduced at trial that defendant held Harris against a gate while brandishing a firearm *while on a public way*.

¶ 37 There is scant evidence in the record showing that defendant actually touched Harris, other than to search her. Freeman testified that defendant "had the lady back up against the gate," but he went on to explain, after being asked what he saw when Harris was against the gate, that "[s]he was being searched. He had the gun in one hand, he was searching her with the other hand, and I was trying to call the police." Harris, for her part, testified only that defendant reached for her purse and searched her pockets while pointing a gun at her. And although she testified that she was "tussling" and "resisting," she never testified that defendant physically held her up against a gate.

¶ 38 Thus, the record shows that the only physical touching of Harris on the part of defendant was when defendant physically searched Harris at gunpoint under the threat of violence and took money from her, which is the same conduct supporting defendant's robbery conviction. "The gist of robbery is force." *People v. Taylor*, 129 Ill. 2d 80, (1989). Thus, the mere fact that defendant touched Harris in order to rob her does not mean that the evidence supports separate convictions for defendant's acts of (1) touching Harris to search her while at gunpoint (battery) and (2) taking her money after searching her at gunpoint (robbery).

¶ 39 The cases cited by the State prove the point. In *People v. Span*, the defendant was convicted of aggravated battery and armed robbery. 2011 IL App (1st) 083037, ¶ 1. The evidence showed that the defendant walked into a convenience store and asked the store clerk for liquor. *Id*. ¶ 4. After the clerk walked to the liquor section and stood with his back facing the defendant, the defendant struck the clerk in the back of the head. *Id*. When the clerk tried to stand up, the defendant hit him in the face. *Id*. The defendant then attempted to open the cash register. *Id*. After the attempt to open the register failed, the defendant struck the clerk a third time and left the store. *Id.*

¶ 40 On appeal, the defendant argued that his aggravated battery conviction violated the one-act, one-crime rule. The appellate court disagreed, explaining that the evidence showed that the defendant "committed multiple acts" by striking the clerk twice, then trying to open the register, and then striking the clerk a third time before fleeing. *Id*. ¶ 84. Here, however, there is no evidence that defendant touched Harris (1) before forming the intent to rob her or (2) after his previously formed intent to rob her dissipated. See *Id*. ¶¶ 87-88. To the contrary, and unlike *Span*, the evidence here shows that defendant touched Harris only in order to follow through on his intent to rob her.

¶ 41 *People v. Pearson* is likewise inapposite. In *Pearson*, the defendant was convicted of aggravated battery and robbery. 331 Ill. App. 3d at 314. The evidence showed that the defendant grabbed the victim's purse and then knocked her to the ground in the ensuing struggle. *Id.* On appeal, the appellate court held that defendant's separate convictions were proper because, although close in time, the defendant's "act of taking the purse and the act of pushing the victim to the ground were overt outward manifestations that support the offenses of robbery and aggravated battery." *Id*. at 322. Unlike in *Pearson*, when the defendant touched Harris in order to search her, the robbery was not yet over because he had not yet obtained her property. Thus, it cannot be said, as was the case in *Pearson*, that defendant's acts of (1) physically searching Harris at gunpoint and (2) taking her money constitute separate "outward manifestations." *Id*.

¶ 42 The physical acts underlying defendant's separate convictions for aggravated unlawful restraint and aggravated battery overlap with the physical acts underlying his simple robbery conviction and therefore violate the one-act, one crime rule. Accordingly, we vacate defendant's convictions for aggravated unlawful restraint and aggravated battery.

¶ 43 C. Sufficiency of the Evidence

¶ 44 Defendant next challenges his conviction for unlawful possession of a controlled substance on the basis that the State did not produce sufficient evidence to prove that he was in constructive possession of the drugs. The State argues in response that the officer Reyes's testimony in conjunction with the stipulations defendant agreed to provided the court with sufficient evidence to find that he constructively possessed the drugs.

¶ 45 Due process requires that the State, in order to convict a defendant of a crime, prove each element of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278

(2004). When a defendant challenges the sufficiency of the evidence to convict, " 'the critical inquiry *** [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.' " *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). In making that determination, we are bound to consider the evidence in the light most favorable to the State. *Id.* at 114. Thus, we may only reverse a conviction on the grounds that the evidence was not sufficient to prove the defendant guilty beyond a reasonable doubt when "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Id.* at 115.

¶ 46 "In reviewing a conviction for possession of a controlled substance, the deciding question is whether defendant had knowledge and possession of the drugs." *People v. Givens*, 237 Ill. 2d 311, 334-35 (2010); see 720 ILCS 570/402 (West 2012). To satisfy the element of knowledge, the State must prove beyond a reasonable doubt that the substance in question is a controlled substance (*People v. Johnson*, 361 Ill. App. 3d 430, 437 (2005)) and that the defendant "knew of the existence of the narcotics at the place they were found (*People v. Alexander*, 202 Ill. App. 3d 20, 24 (1990)). The defendant's presence in a vehicle where contraband was discovered is not, standing alone, sufficient to prove that the defendant was aware of the contraband. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Instead, the State must produce "evidence of acts, declarations or conduct of the accused from which an inference of knowledge may fairly be drawn." *People v. Peyton*, 25 Ill. 2d 392, 395 (1962). Other relevant considerations include: "(1) the visibility of the contraband from the defendant's location within the car; (2) the amount of time that the defendant had to observe the contraband; (3) any gestures or movements made by the defendant that would suggest that the defendant was attempting to retrieve or conceal the contraband; and (4) the size of the contraband." *Love*, 404 Ill. App. 3d at 788.

¶ 47 To satisfy the element of possession, the State must prove beyond a reasonable doubt that the defendant was in actual or constructive possession of the drugs. *Givens*, 237 Ill. 2d at 335. "Actual possession is proved by testimony which shows defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it or throwing it away." *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). Constructive possession, by contrast, exists where the defendant has "an intent and capability to maintain control and dominion" over the contraband. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). One way the State may prove constructive possession is by demonstrating that the defendant "had immediate and exclusive control over the area where the contraband was found." *Love*, 404 Ill. App. 3d 784, 788 (2010).

¶ 48 In the present case, the parties stipulated that the substance found in the bag tested positive for .3 grams of heroin. Thus, the State proved beyond a reasonable doubt that the substance in question was a controlled substance. The evidence also supported a finding that defendant knew that the bag contained heroin. First, the bag was discovered resting on top of an envelope containing documents belonging to defendant. Second, the bag was clear and thus the drugs were clearly visible from within the bag. The record contains a photograph of the bag. The bag, which is no more than 2 inches wide in either direction, clearly contains a white powder. Judging the bag only on its appearance, it is of course *possible* that the bag contained sugar, flour, cream of tartar or some other innocuous white substance. But in assessing whether defendant, by looking at the bag, could have perceived it as containing drugs, the trial judge was not required to abandon basic human intuition. Small plastic bags of the sort are routinely used to store drugs. See *People v. Washington*, 238 Ill. App. 3d 371, 375 (1992) (removal of small transparent plastic bag from waistband of the defendant's pants permissible under plain view doctrine where police officer testified that cocaine was frequently packaged in small transparent

plastic bags). Thus, the defendant's knowledge that the bag contained drugs could be readily inferred from the bag's size, visibility and contents.

¶ 49 The State also proved beyond a reasonable doubt that defendant was in constructive possession of the drugs. The evidence showed that the drugs were discovered in the center console of the SUV, which defendant freely had access too. Moreover, the drugs were found on top of defendant's property. Thus, a reasonable trier of fact could have found that defendant exercised such dominion and control over the center console so as to support a finding that the defendant was in constructive possession of the drugs.

¶ 50 The fact that defendant was not the only person occupying the SUV is immaterial to our analysis, for as the Illinois Supreme Court explained in *People v. Schmalz,* "if two or more persons share immediate and exclusive control or share the intention and power to exercise control, then each has possession." 194 Ill. 2d 75, 82 (2000). We likewise find defendant's reliance on *People v. Gore,* 115 Ill. App. 3d 1054 (1983), unpersuasive. In *Gore,* the driver of a car containing two other occupants was charged and convicted of possession of cannabis after police officers discovered cannabis in a brown grocery bag underneath the passenger seat of the car. *Id*. at 1055, 1058. On appeal, the appellate court reversed the conviction, explaining "[w]here, as in this case, there is a lack of evidence the defendant was in exclusive control of the area under the passenger seat in which the cannabis was concealed and thereafter discovered, evidence is lacking the defendant was any more in possession of the contraband than the passengers in the car or for that matter the owner of the car." *Id*. at 1058. But unlike in *Gore*, the drugs in the present case were in plain view of defendant in an area to which he had easy access and were located directly on top of property attributable to defendant. Accordingly, we

find that the State produced sufficient evidence to convict defendant of possession of a controlled substance.

¶ 51 CONCLUSION

¶ 52 We vacate defendant's conviction for armed robbery with a dangerous weapon and reduce his conviction to simple robbery. In addition, we vacate defendant's convictions for aggravated unlawful restraint and aggravated battery. We affirm defendant's conviction for possession of a controlled substance. Finally, we remand the case to the trial court for resentencing consistent with this order.

¶ 53 Affirmed in part; vacated in part; remanded with instructions.