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2015 IL App (3d) 120939-U

Order filed February 5, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-0939
DEVON W. BARKER,)	Circuit No. 10-CF-105
Defendant-Appellant.)	Honorable Clark Erickson, Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* We vacate defendant's conviction for aggravated discharge of a firearm within 1,000 feet of a school, as the conviction is in violation of the one-act, one-crime rule.
- ¶ 2 Defendant, Devon W. Barker, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)), two counts of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), aggravated discharge of a firearm within 1,000 feet of a school (720 ILCS 5/24-1.2(a)(2), (b) (West 2010)), and possession of a stolen firearm (720 ILCS 5/16-16(a) (West

2010)) following a jury trial. He was sentenced to 37 years' imprisonment for first degree murder; 21 years' imprisonment for both counts of attempted first degree murder; 15 years' imprisonment for aggravated discharge of a firearm within 1,000 feet of a school; and 5 years' imprisonment for possession of a stolen firearm. Defendant appeals his conviction for aggravated discharge of a firearm, arguing that said conviction is in violation of the one-act, one-crime doctrine. We affirm in part and vacate in part.

¶ 3

FACTS

¶ 4

On April 2, 2010, a six-count indictment was filed against defendant. The first two counts charged defendant with first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2010)), alleging that defendant shot Maria O'Connor. The third and fourth count charged defendant with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), alleging that defendant fired a handgun at Javon Saulsberry and Jesse Dorsett, respectfully. The fifth count charged defendant with aggravated discharge of a firearm within 1,000 feet of a school (720 ILCS 5/24-1.2(a)(2), (b) (West 2010)), alleging that defendant knowingly discharged a firearm "in the direction of another" within 1,000 feet of King Middle School. The sixth count charged defendant with possession of a stolen firearm (720 ILCS 5/16-16(a) (West 2010)).

¶ 5

Defendant's case went to jury trial. At trial, Ashley Rutledge, Christina Magee, and Jasmine Magee testified for the State. Each stated that they were together near King Middle School just before noon on March 2, 2010, in Kankakee, Illinois. They began walking toward Christina's boyfriend's house on Merchant Street and encountered their friend, Maria O'Connor. Maria began walking with them.

¶ 6

As they were walking, the four women saw two young men across the street. The men appeared to be Hispanic or mixed ethnicity and were wearing black hooded sweatshirts. One of

the men was carrying a pipe. A white sports utility vehicle (SUV) drove by, and several shots were fired from the passenger side of the vehicle. Christina ran behind a tree. Ashley, Jasmine, and Maria got down on the ground. After the shots ceased and the SUV drove away, Ashley, Christina, and Jasmine stood up and saw that Maria was still on the ground with blood coming from her mouth. Ashley and Jasmine called 911.

¶ 7 Emergency personnel arrived at the scene almost immediately. Maria died as a result of her injuries. A forensic pathologist testified that the cause of Maria's death was a single bullet wound, which entered one of her shoulders and penetrated her neck. The bullet struck Maria's cervical spine, jugular vein, and parts of her carotid artery before it exited through the floor of her mouth.

¶ 8 At the scene, police officers obtained a description of the vehicle involved in the incident from Ashley, Christina, and Jasmine. Multiple police officers testified that the white SUV identified by two of the female witnesses was found on a residential street close to the location of the shooting. One officer stopped the vehicle. Defendant was driving the vehicle, and a man was seated next to him in the front passenger seat. The officer removed defendant and his passenger from the car and arrested them. The police recovered a handgun from the floorboard of the backseat of the SUV. A forensic expert matched the handgun recovered from the vehicle to seven shell casings police officers recovered from the street and parkway where the shooting took place. Defendant admitted the handgun was his.

¶ 9 During a video-recorded police interview, defendant stated that on March 2, 2010, he was driving a vehicle near Merchant Street in Kankakee, Illinois. One of his friends was riding in the passenger seat. Defendant and his passenger belonged to the street gang the Harrison Gents. While he was driving, defendant saw two men who belonged to the Latin Kings, a rival gang.

The two men performed gang signals with their hands indicating that they were members of the Latin Kings. Defendant and his passenger drove by two more times. The Latin Kings shot at defendant's vehicle. Defendant's passenger grabbed defendant's handgun from under the seat of the SUV and fired back at the Latin Kings, emptying the eight-bullet magazine. In addition to the Latin Kings, defendant saw several girls in the area at the time of the shooting.

¶ 10 Dorsett testified that he was not a gang member in March 2010, but he associated with members of the Latin Kings. Saulsberry testified that he was a member of the Latin Kings in March 2010. The Latin Kings were often in conflict with the Harrison Gents. On March 2, 2010, Dorsett and Saulsberry were walking to the bus stop together. They saw that the bus was not coming for a while and began walking toward Dorsett's house. Saulsberry and Dorsett walked down an alley that intersected with Orchard Street. Saulsberry saw a group of three or four women nearby. A "white truck" drove by, and Saulsberry and Dorsett heard multiple shots being fired in succession. They believed that the bullets came very close to where they were standing.

¶ 11 During opening statements, the prosecutor stated the evidence would show that Maria, Ashley, Christina, and Jasmine were all in the line of fire and multiple gunshots were fired:

"Maria and her friends were positioned in the line of fire. They were defenseless. There was nothing they could do about what was about to happen. Without warning, without any provocation on behalf of Maria or any of her friends, the street was lit up with gunfire. An arm extended from the passenger side window of that SUV and shot after shot after shot after shot after shot was fired. That gun was fired until it was empty."

The prosecutor reiterated this in closing argument: "There were six people in the line of fire, Maria and her three friends and the two other gang guys. [Defendant and his passenger] just didn't care. Shot after shot they emptied the gun. *** It could have been a massacre."

¶ 12 The jury entered guilty verdicts on each of the offenses defendant was charged with. He was sentenced to 37 years' imprisonment for first degree murder; 21 years' imprisonment on both counts of attempted first degree murder, one of which was to run consecutively with the first degree murder sentence and one of which was to run concurrently; 15 years' imprisonment for aggravated discharge of a firearm within 1,000 feet of a school, which was to run concurrently with the other sentences; and 5 years' imprisonment for possession of a stolen firearm, which was to run concurrently with the other sentences. Defendant appeals.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that his conviction for aggravated discharge of a firearm within 1,000 feet of a school violates the one-act, one-crime rule because it is based on the same conduct as his convictions for first degree murder and attempted first degree murder. We review *de novo* the question of whether defendant's convictions violate the one-act, one-crime rule. *People v. Curtis*, 367 Ill. App. 3d 143, 147 (2006).

¶ 15 Defendant concedes that the issue was forfeited because it was not raised below but asks that we review it under the plain error doctrine. "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). We apply the plain error doctrine when a clear or obvious error occurred and either (1) "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) the "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). The defendant has the burden of persuasion in plain error review. *Thompson*, 238 Ill. 2d at 613. "[I]t is well established that a one-act, one-crime violation affects the integrity of the judicial process, thus satisfying the second prong of the plain-error test." *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009).

¶ 16 The first step in plain error review is to determine whether a "clear or obvious error" occurred at all. *Thompson*, 238 Ill. 2d at 613. The one-act, one-crime rule is violated when a defendant is convicted of more than one offense and (1) the offenses are carved from the same physical act, or (2) some of the offenses are, by definition, lesser included offenses. *People v. King*, 66 Ill. 2d 551, 566 (1977). The one-act, one-crime rule only applies to multiple convictions for acts against a single victim; multiple convictions are proper if there are multiple victims. *Id.*; see also *People v. Pryor*, 372 Ill. App. 3d 422, 434 (2007), citing *People v. Thomas*, 67 Ill. 2d 388, 389-90 (1977).

¶ 17 Defendant contends that the trial court erred in entering a conviction against him for aggravated discharge of a firearm because that conviction was based on the same act as his convictions for first degree murder and attempted first degree murder. Defendant cites the holding of *People v. Crespo*, 203 Ill. 2d 335 (2003), in support of his position. In *Crespo*, the defendant was convicted of armed violence and aggravated battery. *Id.* at 336. The evidence at trial established that the defendant stabbed the victim three times. *Id.* at 339. The defendant argued that his aggravated battery conviction violated the one-act, one-crime rule because it stemmed from the same physical act as his armed violence conviction. *Id.* at 340. The court vacated the defendant's aggravated battery conviction, reasoning that the indictment did not

differentiate between the various stab wounds but rather charged the defendant with the same conduct under different theories of criminal culpability. *Id.* at 342. The State could have charged each wound as a separate offense, but it did not. *Id.* The court reasoned that it would be profoundly unfair to the defendant to apportion the crimes among the various stab wounds for the first time on appeal. *Id.* at 343. Further, the court noted that the State argued at trial that the three stab wounds constituted great bodily harm; the State never argued that one stab wound alone would be sufficient to constitute great bodily harm. *Id.* at 344.

¶ 18 Defendant also cites *People v. Green*, 339 Ill. App. 3d 443 (2003), and *People v. Amaya*, 321 Ill. App. 3d 923 (2001), in support of his position. In *Green*, the defendant fired four to five gunshots in the direction of four undercover police officers from the window of a moving car. *Green*, 339 Ill. App. 3d at 446-47. The defendant was convicted of two counts of attempted first degree murder and one count of aggravated discharge of a firearm. *Id.* at 446. On appeal, the court reversed the defendant's conviction for aggravated discharge of a firearm, reasoning that multiple convictions could not be sustained because the State did not treat the defendant's conduct as multiple acts. *Id.* at 459. The defendant committed a series of closely related but separate acts when he fired four or five shots with a pistol, but the State did not apportion the gunshots in the charging instrument. *Id.* Rather, the information stated that the defendant "discharged a firearm" as the basis for both the attempted murder and aggravated discharge of a firearm charges. *Id.*

¶ 19 In *Amaya*, the defendant approached a crowd of people standing outside of an apartment building and fired several gunshots. *Amaya*, 321 Ill. App. 3d at 924-26. The gunshots struck three victims, injuring two and killing one. *Id.* at 924-28. The defendant was convicted of one count of first degree murder, two counts of attempted murder, and one count of aggravated

discharge of a firearm. *Id.* at 928. The court vacated the defendant's conviction for aggravated discharge of a firearm. *Id.* at 931. The court reasoned that the charging instrument indicated the State intended to treat the defendant's conduct as a conglomerate of three gunshots, as the indictment did not differentiate between the gunshots that struck the victims and the other gunshots that were fired. *Id.* at 930. The aggravated discharge count charged the defendant with the same conduct as the other counts under a different theory of culpability. *Id.* Further, the prosecutor presented the case as involving a conglomerate of three gunshots and only discussed the three gunshots that actually struck the victims. *Id.*

¶ 20 Defendant argues that, as in *Crespo*, *Green*, and *Amaya*, the State failed to apportion the gunshots among the various charges in the indictment. Therefore, the same conduct on which defendant's first degree murder and attempted first degree murder convictions are based also serves as the basis for defendant's aggravated discharge of a firearm conviction. We agree.

¶ 21 In this case, the indictment alleged as the basis for defendant's first degree murder and attempted murder convictions that defendant shot Maria with a handgun and fired a handgun in the direction of Dorsett and Saulsberry. As the basis for the aggravated discharge of a firearm count, the indictment alleged that defendant discharged a firearm in the direction of another. The indictment did not distinguish between the various gunshots, but merely alleges that defendant shot, fired, or discharged a handgun. As in *Crespo*, *Green*, and *Amaya*, the indictment in this case charged defendant with the same conduct under different theories of culpability without distinguishing between the separate, but closely related, gunshots. Because the gunshots were not apportioned between the various charges in the indictment, we will not allow the State to apportion the gunshots for the first time on appeal. See *Crespo*, 203 Ill. 2d at 343.

¶ 22 The State argues that the one-act, one-crime doctrine does not apply in this case because Ashley, Christina, and Jasmine were additional victims who were in the line of fire of the gunshots fired by defendant's passenger. Because there were more than three victims, it was proper for the trial court to enter four convictions even if the State treated the gunshots as one act. In support of its position, the State cites *People v. Leach*, 2011 IL App (1st) 090339. In *Leach*, the defendant killed Nicole White by shooting her in the chest two times. *Id.* ¶¶ 3-7. The defendant fired a third gunshot in the direction of Anthony White and a group of onlookers. *Id.* The defendant was charged with first degree murder for Nicole and with attempted first degree murder and aggravated discharge of a firearm for Anthony. *Id.* ¶ 8. With regard to the aggravated discharge of a firearm charge, the jury was instructed that the State must prove "the defendant discharged [a] firearm in the direction of Anthony White." *Id.* During deliberations, the jury asked whether the aggravated discharge of a firearm charge applied only to shooting in the direction of Anthony. *Id.* ¶ 9. In response, the trial court replaced the words "Anthony White" in the jury instruction with the words "another person." *Id.* The defendant was acquitted of attempted first degree murder for Anthony but was convicted of second degree murder for Nicole and aggravated discharge of a firearm. *Id.*

¶ 23 On appeal, defendant argued that his conviction for aggravated discharge of a firearm violated the one-act, one-crime rule because the revised jury instruction allowed the jury to find that he shot in the direction of Nicole, the victim of his second degree murder conviction. *Id.* ¶ 28. The court held that the aggravated discharge of a firearm conviction was proper, reasoning that the one-act, one-crime rule was inapplicable because, even if the three gunshots constituted a single act, the evidence showed that the defendant committed a criminal act against at least two different victims. *Id.* ¶¶ 33-34. The evidence showed that at least three rounds were fired by the

defendant, two of which struck Nicole and one of which traveled in the direction of Anthony; the State used the round that did not strike Nicole to support the aggravated discharge of a firearm conviction. *Id.* ¶ 32.

¶ 24 In *Leach*, unlike the instant case, the aggravated discharge of a firearm count was not based on a different theory of culpability for the conduct that was charged in the count for the first degree murder of Nicole. Rather, the aggravated discharge of a firearm count was originally charged on an alternate theory of culpability for the attempted murder of Anthony. The State's theory of the case was that two bullets struck Nicole and a third bullet travelled in the direction of Anthony and a group of onlookers. The third bullet was used to support the attempted murder and aggravated discharge counts. The indictment in *Leach* put the defendant on notice that the State was seeking multiple convictions: (1) first degree murder for Nicole, and (2) attempted murder or aggravated discharge of a firearm for Anthony.

¶ 25 Here, the State argued that Ashley, Christina, and Jasmine were in the line of gunfire in addition to Maria, Dorsett, and Saulsberry. The indictment, however, did not apportion the gunshots such that defendant was on notice that the State was seeking an additional conviction for the aggravated discharge count rather than using the aggravated discharge count to charge the same conduct as the murder and attempted murder counts under a different theory of culpability. In *Green* and *Amaya*, as in this case, there were other potential victims in the line of fire that could have been injured as a result of the defendants' conduct. However, aggravated discharge convictions were not upheld in those cases because the State charged aggravated discharge as an alternate theory of culpability for the same conduct as the other charges. We hold that the State in this case did not give the defendant notice that it was seeking multiple convictions rather than

using the aggravated discharge count to charge the same conduct under different theories of culpability.

¶ 26 Thus, defendant's conviction for aggravated discharge of a firearm within 1,000 feet of a school is in violation of the one-act, one-crime rule because it is based on the same act as defendant's murder and attempted murder convictions. As defendant has established a violation of the one-act, one-crime rule, defendant has established plain error. See *Samantha V.*, 234 Ill. 2d at 378-79. Consequently, we vacate defendant's conviction for aggravated discharge of a firearm within 1,000 feet of a school.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Kankakee County is affirmed in part and vacated in part.

¶ 29 Affirmed in part and vacated in part.