SECOND DIVISION
February 16, 2016

No. 1-13-2045

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 5470
	)	
ABEL DELEON,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held:* (1) Defendant's conviction for attempted first degree murder is affirmed where the evidence showed that he beat the victim and threatened to kill her; (2) defendant's conviction for aggravated unlawful restraint is affirmed where the evidence showed that he detained the victim using a deadly weapon; (3) the conviction for aggravated unlawful restraint violated the one-act, one-crime rule; (4) defendant's DNA analysis fee is vacated.

¶ 2 Following a bench trial, defendant Abel Deleon was convicted of attempted first degree murder and aggravated unlawful restraint and sentenced to concurrent prison terms of nine years and five years, respectively. On appeal, defendant contends the State failed to prove beyond a

reasonable doubt that he acted with the specific intent to kill the victim or that he detained the victim using a deadly weapon. Defendant also contends that his conviction for aggravated unlawful restraint violates the one-act, one-crime rule because it arose from the same physical act as his conviction for attempted first degree murder, and further argues the court erroneously imposed a $200 DNA analysis fee. We affirm defendant's convictions for both attempted first degree murder and aggravated unlawful restraint but find the conviction for aggravated unlawful restraint must be vacated for violating the one-act, one-crime rule. Defendant's $200 DNA analysis fee is vacated.

¶ 3 At trial, Angela Lamperson, the victim, testified that she used cocaine about 10 or 11 a.m. on February 23, 2011. Later that day, she met up with her friend Johnny Gonzalez on the south side of Chicago and used cocaine again. While she was getting high, Louie Long, a friend, called Lamperson and told her that someone at his house wanted to buy cocaine, so about midnight, she and Gonzalez went to Long's house. Lamperson walked past a fence and up the walkway to Long's door. As she approached the door, defendant walked outside with another man. Lamperson had known defendant for three or four months and had gotten high with him six or seven times. Defendant pointed a black pistol with a wooden handle at Lamperson’s face and she raised her hands. Defendant said, "I'm going to ruin your [life] like you ruined mine, and by the time I'm done, you're going to be dead, bitch." He snatched Lamperson's phone and she urinated due to fear. The other man pointed a gun at Gonzalez's head and told him "not to move and to watch [Lamperson] die." Defendant beat Lamperson's head with the gun until the gun shattered and continued beating her as she moved backward across the yard. Lamperson fell into the fetal position near the fence and defendant kicked her ribs and side at least 20 times. She begged him to stop and said her sugar daddy would give him money, but defendant said she would "pay for

ruining his life." Lamperson went in and out of consciousness but heard somebody say the word "crack." She gave defendant some rock cocaine that was in her bra, and he told the other man, "[L]et's just go, we'll come back and finish her later." The men fled into an alley and Lamperson passed out inside Long's house. When she woke, Gonzalez brought her to another person's house and someone called 911. Lamperson testified that she was hospitalized about a week, received 52 staples in her head, and lost her teeth, some of which were removed in shards from her mouth. Three-fourths of her spleen was lacerated and she was left with one lung. She also sustained extensive scarring on her head and nose and experienced residual pain. Lamperson denied that her drug use affected her ability to recall what occurred during the attack.

¶ 4 On cross-examination, Lamperson testified that she went to the police station on March 10, 2011, and spoke with Detective Delahanty and Assistant State's Attorney Matt Medina. Initially, she testified that she did not recall whether she told Delahanty and Medina that defendant snatched her cell phone, or that she told defendant she would call her sugar daddy to "take care of this." Subsequently, Lamperson testified that she did mention that information at some point, and further, mentioned that Deleon told her that she ruined his life and he would ruin her life. She did not recall telling Delahanty that she took crack cocaine from her bra and gave it to defendant, but said she told Delahanty and Medina that defendant threatened to return and "finish [her] off." Lamperson reviewed and signed a written report after the interview, but stated that "I really don't recall anything that was said and some of the things that were said in the statement," because she was heavily medicated during the interview.

¶ 5 Johnny Gonzalez testified that he used cocaine about 10 or 11 a.m. on February 22, 2011, and, later that day, used more cocaine with Lamperson. Eventually, Lamperson received a call from Louie Long, and Gonzalez went with her to Long's house. As they approached the door, a

man he did not know came out of the house, pointed a ".45 automatic black" gun at Gonzalez, and said "step the f--- [*sic*] back *** [i]t's got nothing to do with you." Another man Gonzalez did not know came out of the house, also pointing a gun at Gonzalez. The first man hit Lamperson a couple times and she fell against the gate. He beat her head and face with the gun well over 15 to 20 times, and said, "You ruined my life. Where's my money?" Lamperson told the man that her sugar daddy would pay him back, but the man continued beating her until the gun broke. Then, he hollered at his companion, who kicked Lamperson's face a few times, and the men walked away through an alley. Lamperson got up in a daze. Blood squirted from her head and covered her face, and she passed out inside Long's house for at least an hour. Afterwards, Gonzalez took Lamperson to another house. When police officers arrived, Gonzalez told them defendant's gun had fallen apart by Long's fence. On March 10, 2011, Gonzalez provided a written statement to detectives but did not mention that the attacker told Lamperson "you ruined my life."

¶ 6 Dr. David McElmeel testified that he treated Lamperson on February 23, 2011, at Christ Hospital in Oak Lawn, where another hospital had transferred her to receive trauma care. Lamperson tested positive for cocaine and opiates, but was alert, oriented, and could answer questions. Her injuries included four rib fractures, a bruised lung, and lacerations to her head, which required staples and would leave scars. She also suffered a life-threatening laceration to her spleen, which required her to be placed in intensive care for about 24 hours. A few days later, against the advice of her doctors, Lamperson checked herself out of the hospital. Her medical records indicated that she had only one tooth when she arrived at Christ Hospital, but did not specify whether any teeth were removed in the course of treatment or whether she had been referred to a dentist. According to McElmeel, Lamperson's medical records would have

indicated whether any teeth were removed at the hospital. McElmeel also stated that if a patient was missing teeth from trauma and the situation was not life-threatening, the patient could be referred to a dentist and the referral would not be indicated in the medical records.

¶ 7 Assistant State's Attorney Krystyn Dilillo testified that on March 10, 2011, she met with defendant, who was in custody. She recited the *Miranda* rights and defendant agreed to discuss what occurred on February 23, 2011. Dilillo typed and printed defendant's statement, which he reviewed and signed. This statement was admitted into evidence and published. Defendant stated that on February 7 or 8, he and Lamperson were hanging out at the home of a "white guy," waiting to smoke. Lamperson made a phone call and two "black guys" arrived at the house with a gun. They took defendant's wallet and car and left with Lamperson. During the next few weeks, defendant became more and more bothered because he believed Lamperson set him up. Eventually, defendant went with a friend to "Lou's" house and asked him to call Lamperson, who arrived with a man defendant did not know. Defendant's friend detained the man while defendant yelled at Angela and questioned her about the robbery. He held a plastic gun which might have appeared real because it was dark outside. He slapped Lamperson with the gun and it broke, then hit her multiple times on the face and body with an open hand and closed fist, and may have kneed her. Lamperson squatted on the ground and covered herself while defendant continued hitting her. Afterwards, he walked to a bar with his friend. Defendant denied saying anything to Lamperson while he hit her, and denied that his friend did anything to Lamperson or her friend.

¶ 8 The defense proceeded by stipulation. The parties stipulated that Detective Delahanty would testify that Lamperson never told him that defendant took her cell phone or that she told defendant that she would call her sugar daddy "to correct the situation." Delahanty would also testify that Lamperson never told him that she took crack cocaine from her bra and gave it to

defendant, or that defendant told her "I'll come back and finish you off." However, Delahanty would testify that Lamperson told him that defendant told her that "she had ruined his life [and] now he would ruin her life," although Delahanty did not include this statement in his written reports. The parties also stipulated that Assistant State's Attorney Matt Medina would testify that he took a written statement from Lamperson on March 10, 2011. The statement did not mention that defendant took Lamperson's phone or that she told defendant that she would call her sugar daddy "to correct the situation." The statement also did not mention that defendant told her that she had ruined his life and now he would ruin her life, or that defendant threatened to "come back and finish [her] off." Following these stipulations, the defense rested.

¶ 9 The court found defendant guilty of attempted first degree murder, three counts of aggravated battery, and aggravated unlawful restraint, and acquitted defendant of armed robbery. In its findings, the court noted that "the defense has certainly inflicted some impeachment on Ms. Lamberson [*sic*]" regarding both "pertinent [and] collateral issues." The court stated:

> "[T]he victim was in fact corroborated by Mr. Gonzalez as to the defendant's actions and to his statement regarding ruining her life—that she ruined his life. Also, it was corroborated by *** Detective Delhanty [*sic*] even though he did not place that in his police report. The victim is also corroborated in part by the defendant's own statements to the Assistant State's Attorney about his overriding anger and frustration about the robbery set up that he believed the victim had done to him. Also in his statement about striking her with a toy gun and possibly kneeing her during the course of the beating that he put upon Ms. Lamberson [*sic*]. The victim is also corroborated by the doctor's testimony as to the *** horrific injuries that were inflicted upon Ms. Lamberson [*sic*].
>
> ***

> [T]he Court finds that the defendant's words and his actions used during the beating of Angela Lamberson [*sic*], his statement to the Assistant State's Attorney, the corroboration of Johnny Gonzalez, the corroboration of the doctor's testimony of the victim's extreme injuries, all put together, the Court believes that creates a mountain of evidence as to the defendant's intent to kill Angela Lamberson [*sic*]."

¶ 10 Defendant's motion for new trial was denied. The court merged the counts for aggravated battery and attempted first degree murder, and sentenced defendant to concurrent prison terms of nine years for attempted first degree murder and five years for aggravated unlawful restraint.

¶ 11 On appeal, defendant first contends that the State failed to prove his guilt of first degree murder beyond a reasonable doubt where he lacked the intent to kill Lamperson, as he had the opportunity to kill her but stopped of his own volition after she gave him cocaine. According to defendant, neither his statements during the attack nor his use of a plastic toy gun evidenced the intent to kill. Defendant also observes that the trial court found problems with Lamperson's credibility, and that while Gonzalez corroborated Lamperson's testimony that defendant demanded money and accused her of ruining his life, he did not corroborate her testimony that defendant threatened to kill her.

¶ 12 The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Belknap*, 2014 IL 117094, ¶ 67. The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving conflicts in the testimony, the credibility of witnesses, or the weight of the evidence. *People v. Brown*, 2013 IL 114196, ¶ 48; *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Circumstantial evidence is sufficient to sustain a conviction, and the trier

of fact is not required to disregard inferences that flow normally from the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). To sustain a conviction, "[i]t is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *Id*. A defendant's conviction will be reversed only if the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Belknap*, 2014 IL 117094, ¶ 67.

¶ 13 A person commits attempted first degree murder when, acting with the intent to kill, he completes an act which constitutes a substantial step toward the commission of first degree murder. 720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010). In this case, defendant challenges only the element of intent.

¶ 14 Proof of intent to kill may be inferred from surrounding circumstances, including the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 59. Intent to kill may also be inferred where the defendant commits a willful act, the "direct and natural tendency" of which is to destroy another's life. *Id*. It is the function of the trier of fact to determine the existence of the intent to kill, and that determination will not be disturbed on review unless it clearly appears there is a reasonable doubt on the issue. *People v. Green*, 339 Ill. App. 3d 443, 451 (2003).

¶ 15 Viewing the evidence in the light most favorable to the State, we find the evidence was sufficient to establish that defendant intended to kill Lamperson. Lamperson testified that defendant threatened to kill her, beat her head with a pistol until it shattered, and kicked her at least 20 times. She begged defendant to stop and said that her sugar daddy would give him money, but defendant told Lamperson she would "pay for ruining his life." The attack ended when Lamperson offered defendant cocaine, at which point defendant took the drugs, fled, and

left her on the ground. However, abandonment is not a defense to attempted murder. *People v. Parker*, 311 Ill. App. 3d 80, 90 (1999). The trial court found that parts of Lamperson's testimony were impeached, but noted that corroborating evidence from other witnesses supported the finding that defendant had the intent to kill. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67 (trier of fact may accept or reject as much or as little of a witness's testimony as it pleases); *People v. Rincon*, 387 Ill. App. 3d 708, 723 (2008) (complainant's testimony requires no corroboration and need not be unequivocal). Delahanty's stipulated testimony indicated that Lamperson told him that defendant said "she had ruined his life [and] now he would ruin her life." Gonzalez testified that defendant accused Lamperson of ruining his life and beat her with the gun until it broke. Defendant admitted he was upset at Lamperson and arranged to meet her at Long's house, where he slapped her with a plastic gun, hit her with his hand and fist, and possibly kneed her. Dr. McElmeel testified that Lamperson sustained four rib fractures, a bruised lung, and lacerations to her head, which needed staples and would leave scars. She also suffered a life-threatening laceration to her spleen, requiring intensive care. In view of the testimony regarding the violent character of defendant's conduct, as well as the nature and extent of the injuries he caused, a rational trier of fact could find that defendant intended to kill Lamperson. *People v. Smado*, 322 Ill. App. 3d 329, 332, 339 (2001) (defendant stated intent to kill victim, beat and kicked her, and caused injuries necessitating intensive care); *People v. Scott*, 271 Ill. App. 3d 307, 312 (1994) ("extreme and extended beating" evidenced intent to kill).

¶ 16 We note that after defendant filed his brief on appeal, this court granted defendant's motion to cite *People v. Brown*, 2015 IL App (1st) 131873, as additional authority for the proposition that he lacked the intent to kill Lamperson. For the following reasons, we find *Brown* inapposite. In *Brown*, the defendant stabbed the victim in the back four times when she ordered

him to move out of her apartment. *Id*. ¶ 3. The victim testified that she felt "punching" on her back, and drove to a police station when she realized she was injured. *Id*. ¶ 3. The treating physician testified that the victim's injuries were superficial, but could have been life-threatening due to their location on her body. *Id.* ¶ 5. Based on this testimony, and the fact the defendant did not pursue the victim or threaten to kill her, we determined the evidence did not justify an inference of intent to kill. ¶ 16. In the present case, however, defendant threatened to kill Lamperson, repeatedly struck her with a gun, and continued beating her even after the gun broke. Lamperson lost consciousness following the attack, required stitches to her head, and was hospitalized with life-threatening injuries to her spleen. The character of defendant's actions, and the injuries he caused, are thus distinguishable from *Brown* and support the inference that he intended to kill Lamperson.

¶ 17 Defendant further argues the State failed to prove his guilt of aggravated unlawful restraint where he did not detain Lamperson with a deadly weapon, but rather, a plastic toy gun. Defendant observes that the gun shattered when he used it to beat Lamperson, and that the State presented no physical evidence, photographs, or testimony suggesting the gun was unusually hard or heavy.

¶ 18 A person commits aggravated unlawful restraint by knowingly detaining another while using a deadly weapon. 720 ILCS 5/10-3, 10-3.1 (West 2010). Defendant challenges only whether he used a "deadly weapon," defined as "an instrument that is used or may be used for the purpose of an offense and is capable of producing death." *People v. Blanks*, 361 Ill. App. 3d 400, 411 (2005). Some weapons are deadly *per se*, but others, owing to the manner in which they are used, may become deadly. *Id*. (guns, pistols, and daggers are *per se* deadly, while small pocket knives, canes, riding whips, clubs, and baseball bats may be used in a deadly manner). The

nature of a weapon and its potential for doing harm are questions for the trier of fact. *People v. Perea*, 347 Ill. App. 3d 26, 44 (2004).

¶ 19 We cannot say the evidence was insufficient to establish that defendant's gun was a deadly weapon. Although defendant concludes on appeal that the gun was plastic, the only evidence supporting this claim is his own statement to the assistant State's Attorney. *People v. Fuller*, 91 Ill. App. 3d 922, 930 (1980) (trier of fact need not accept exculpatory claims in defendant's statement to police, but may "weigh the veracity of each portion of a statement"). In contrast, Lamperson testified that defendant had a pistol with a wooden handle and Gonzalez testified that defendant had a ".45 automatic." According to Lamperson, the gun broke only after defendant used it to beat her head multiple times, and Gonzalez testified that defendant struck Lamperson with the gun over 15 to 20 times. The testimony did not indicate which of Lamperson's injuries were caused by the gun, although the attack left her face and head covered in blood and she eventually lost consciousness. The conflicting descriptions of the gun, along with the lack of physical evidence from the gun, made the issue of the gun's construction dependent on the trier of fact's credibility determinations. Here, the trier of fact heard all the evidence and was free to accept Lamperson and Gonzalez's description of the gun and to reject the description of the gun that defendant gave in his statement to police. *Brown*, 2013 IL 114196, ¶ 48 (trier of fact resolves conflicts in the testimony); *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007) (trier of fact is best equipped to judge witnesses' credibility, having heard and saw the witnesses). Based on Lamperson and Gonzalez's description of the gun, as well as the manner in which defendant used it to strike Lamperson and the injuries it caused, a rational trier of fact could conclude the gun was a deadly weapon. *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 70 (club was not *per se* deadly but became deadly when used to repeatedly and forcefully beat

victim); *Blanks*, 361 Ill. App. 3d at 411-12 (when character of weapon is doubtful, trier of fact must determine whether weapon is deadly based on its description, manner of use, and circumstances of case).

¶ 20 Defendant next contends, and the State correctly concedes, that his conviction for aggravated unlawful restraint violates the one-act, one-crime rule because it is based on the same physical act as his conviction for attempted first degree murder. Initially, we note that defendant did not raise this issue in his motion for new trial, and therefore, forfeiture applies. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). However, one-act, one-crime violations are subject to plain error review, and so we may review defendant's claim for error. *Id*. at 389. 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.

¶ 21 Under the one-act, one-crime rule, a defendant cannot be convicted of multiple offenses predicated on the same physical act, but may be convicted of multiple offenses arising from discrete acts, even if they are interrelated. *Id*. An "act" is defined as any overt or outward manifestation that will support a separate conviction. *Id*. In determining whether a defendant committed a separate physical act of unlawful restraint, we consider whether the restraint was independent of the physical act underlying the other offense, went further than the restraint inherent in the other offense, or occurred simultaneously to the other offense. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 51. If the defendant engaged in separate discrete acts, the court then considers whether any of the offenses are lesser-included offenses, in which case multiple convictions are improper. *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 22 In the present case, defendant's conviction for aggravated unlawful restraint violated the one-act, one-crime rule because it was based on the same physical act as his conviction for attempted first degree murder. The aggravated unlawful restraint count alleged the following:

> "Abel Tomas Deleon committed the offense of AGGRAVATED UNLAWFUL RESTRAINT in that HE, KNOWINGLY WITHOUT LEGAL AUTHORITY DETAINED ANGELA LAMBERSON [*sic*], WHILE USING A DEADLY WEAPON, TO WIT: A BLUDGEON ***."

The attempted first degree murder count alleged the following:

> "Abel Tomas Deleon committed the offense of ATTEMPT FIRST DEGREE MURDER in that HE WITHOUT LAWFUL JUSTIFICATION, WITH INTENT TO KILL, DID AN ACT, TO WIT: STRUCK ANGELA LAMBERSON [*sic*] ABOUT THE HEAD AND BODY ***."

Lamperson testified that defendant pointed a pistol at her face and used the pistol to beat her. Here, defendant's convictions for aggravated unlawful restraint and attempted first degree murder arose out of the same physical act and therefore violate the one-act, one-crime rule. *Daniel*, 2014 IL App (1st) 121171, ¶¶ 54-55 (vacating conviction for aggravated unlawful restraint where defendant detained victim with gun and beat him in the course of an armed robbery). We therefore hold that defendant's aggravated unlawful restraint conviction must be vacated.

¶ 23 Finally, defendant contends, and the State correctly concedes, that the $200 state DNA identification system fee was improperly assessed and should be vacated. Defendant did not contest this fee in the trial court, but the parties contend that a fine that does not conform to statutory requirements is void and may be challenged at any time. See, *e.g.*, *People v. Rigsby*,

405 Ill. App. 3d 916, 920 (2010). This rule no longer applies in view of *People v. Castleberry*, 2015 IL 116916, ¶ 19, but a reviewing court may modify the fines and fees order without remand. Ill. S.Ct. R 615(b)(1) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may * * * modify the judgment or order from which the appeal is taken"); *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 68 (ordering clerk of circuit to correct fines and fees order). We review the propriety of a trial court's imposition of fines and fees *de novo*. *Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 24 The DNA identification system fee is authorized only where a defendant is not currently registered in the state DNA database. 730 ILCS 5/5-4-3(j) (West 2012); *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). To vacate the DNA charge, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. In this case, the record on appeal shows that defendant was convicted of felony possession of a controlled substance in 2008. Accordingly, we vacate defendant's $200 state DNA identification system fee and order the clerk of the circuit court to correct the fines and fees order accordingly.

¶ 25 For all the foregoing reasons, we affirm defendant's convictions for attempted first degree murder and aggravated unlawful restraint but find the conviction for aggravated unlawful restraint must be vacated for violating the one-act, one-crime rule. Defendant's $200 DNA analysis fee is vacated.

¶ 26 Affirmed as modified; fines and fees order corrected.