THIRD DIVISION
November 9, 2016

No. 1-14-2174

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. 09 CR 2212
	)	
DWAYNE REED,	)	Honorable
	)	Stanley L. Hill,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's convictions for armed robbery and aggravated kidnaping affirmed where victim's testimony that either defendant or his co-offender had a gun was sufficient evidence to prove one of them was armed with a firearm during the commission of the offenses. We vacate one of defendant's two convictions for aggravated kidnaping under the one-act, one-crime doctrine and order his mittimus be amended accordingly.

¶ 2 Following a bench trial, defendant Dwayne Reed was found guilty of one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)) and two counts of aggravated kidnaping. 720 ILCS 5/10-2(a)(4), (6) (West 2008). The trial court subsequently sentenced him to concurrent terms of

22 years' imprisonment on each count. On appeal, defendant contends that (1) the State failed to prove beyond a reasonable doubt that either he or his co-offender was armed with a firearm, as defined by statute, during the commission of the offenses and (2) this court must vacate one of his two aggravated kidnaping convictions under the one-act, one-crime doctrine. We affirm but vacate one of defendant's convictions for aggravated kidnaping and order his mittimus be amended accordingly.

¶ 3 The State jointly charged defendant and William Baldwin, who is not a party to this appeal and had a separate trial, with one count of armed robbery and one count of aggravated kidnaping, both based on being armed with a firearm (Counts 1 and 2), one count of aggravated kidnaping based on wearing a robe, hood or mask, or otherwise concealing their identities (Count 3), and one count of aggravated unlawful restraint based on being armed with a firearm (Count 4).

¶ 4 At trial, the State presented evidence that, on March 11, 2008, Bianca Muniz was working as a teller at Cermak Currency Exchange in Broadview. The currency exchange had an interior lobby and a "cage" area separated from the lobby by a steel door and bulletproof glass. In the lobby, there were ceiling lights and neon signs. In the cage, there were fluorescent ceiling lights. According to Muniz, tellers generally stayed in the cage where the currency exchange's computers, file cabinets and safe were located. Muniz began her 12-hour shift that day around 8:30 a.m. Before the currency exchange opened, she cleaned the lobby and the cage and counted the money on hand. Muniz was the only employee working that day and stayed in the cage throughout her entire shift.

¶ 5 At around 8:30 p.m., Muniz began to close the currency exchange. She turned off the lobby's ceiling lights, but the neon signs remained lit as well as the lights in the cage. As she manually locked the lobby door from the inside, two men "jumped out from the side." They began knocking on the door, but Muniz informed them that the currency exchange was closed and began walking back toward the cage. She heard a noise behind her, turned around and observed that the men had pried open the lobby door. The men, who both were wearing dark clothing, approached Muniz. She could see one of their faces but not the other's, as he was wearing a hood. One of the men pointed "a small, black kind of gun" made of "[m]etal" at her head. The man then pressed the "cold metal" gun against her head and told her to "shut up and go to the back."

¶ 6 All three of them proceeded into the cage. There, the man with the gun told Muniz to lie down on ground facedown, which she did, and proceeded to tie her hands and ankles with duct tape. While bound, she could hear the two men talking to each other and "some rustling" of objects. One of the men asked her if there was a secret safe in the cage, but she told him there was not. Muniz also noticed a "strong scent" of cigarette smoke in the cage, which she first smelled "immediate[ly]" after the men entered the lobby. Muniz did not smoke, smoking was prohibited in the lobby of the currency exchange and she did not observe anyone smoking in the lobby earlier in the day.

¶ 7 Eventually, Muniz heard the men exit the currency exchange. After they left, she was able to free herself and subsequently called the police. While on the phone, she walked through the cage and observed money and papers on the floor, a garbage bin tossed over and a big black garbage bag by the safe that did not belong to the currency exchange. Muniz also noticed the

cash drawer to the safe was on the floor and missing a "large amount of cash," but she could not tell exactly how much.

¶ 8 Video surveillance from the currency exchange, which was played at trial, corroborated Muniz's testimony that two men entered the business through the lobby door and rushed her from behind. Although the video is grainy, it shows that, as the men forced Muniz into the cage from the lobby, a dark object was in one of their hands.

¶ 9 Broadview police commander Kevin Eugling went to the currency exchange in response to Muniz's call. In the cage, Eugling recovered used duct tape, a cash drawer, a partially burnt cigarette and a plastic garbage bag. Eugling developed fingerprints from the evidence and sent them to the Illinois State Police for further analysis. Additionally, the partially burnt cigarette was sent to the Illinois State Police. Forensic scientists tested and analyzed the cigarette for DNA, which resulted in a single male profile. The unknown profile was uploaded into a DNA database and matched defendant's profile.

¶ 10 On December 2, 2008, Eugling arrested defendant and later obtained a buccal swab from him. An Illinois State Police forensic scientist compared defendant's DNA obtained from the buccal swab against the DNA obtained from the cigarette and determined both DNA profiles matched. At trial, the parties stipulated that a fingerprint found on the garbage bag matched Baldwin.

¶ 11 The defense did not present any evidence.

¶ 12 The trial court found defendant guilty of all four counts, concluding that the forensic evidence proved defendant was one of the offenders and noting that his DNA was the only DNA found on the cigarette. Concerning the alleged firearm used, the court simply stated that "a

firearm was used" in the commission of Counts 1, 2 and 4. Defendant filed an unsuccessful motion for new trial, arguing, *inter alia*, that the State did not present sufficient evidence that a firearm was used in the commission of the offenses.

¶ 13 The trial court subsequently sentenced defendant to concurrent sentences of 25 years' imprisonment on all four counts. Following a motion to reconsider, the court merged defendant's conviction for aggravated unlawful restraint (Count 4) into his conviction for aggravated kidnaping based on being armed with a firearm (Count 2) as a lesser-included offense. It also reduced his sentences for the remaining three convictions to 22 years' imprisonment, still to be served concurrently. This appeal followed.

¶ 14 Defendant first contends that his convictions for armed robbery and aggravated kidnaping while armed with a firearm must be reduced to robbery and kidnapping because the State failed to prove beyond a reasonable doubt that either he or his co-offender was armed with a firearm, as defined by statute, during the commission of the offenses.[1]

¶ 15 When a defendant challenges his convictions based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crimes proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State.

[1] Although defendant argues that his conviction for aggravated kidnaping based on being armed with a firearm must be reduced to kidnapping, he does not argue the evidence failed to prove he committed an aggravated kidnaping based on wearing a hood, robe or mask, or otherwise concealing his identity. See 720 ILCS 5/10-2(a)(4) (West 2008). He therefore has forfeited any contention that this aggravated kidnaping conviction must also be reduced to kidnapping. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

People v. Lloyd, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, we must give proper deference to the trier of fact who observed the witnesses testify (*Brown*, 2013 IL 114196, ¶ 48), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 16 As charged in this case, to prove defendant committed armed robbery, the State must have established that he took property from the presence of Muniz by the use of force or by threatening the imminent use of force while armed with a firearm. 720 ILCS 5/18-1(a), 18-2(a)(2) (West 2008). To prove defendant committed aggravated kidnaping, the State must have established that he knowingly and secretly confined Muniz against her will while being armed with a firearm. 720 ILCS 5/10-1(a)(1), 10-2(a)(6) (West 2008). On appeal, defendant only contests whether the evidence sufficiently established he or his co-offender was armed with a firearm during the commission of the offenses, thereby conceding there was sufficient evidence to establish the other elements of the offenses.

¶ 17 Under the Criminal Code of 1961 (Criminal Code), the term "firearm" has the meaning ascribed to it by the Firearm Owners Identification Card Act (FOID Card Act). 720 ILCS 5/2-7.5 (West 2008). Relevant here, the FOID Card Act defines "firearm" as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2008). Excluded from this definition are, *inter alia*, pneumatic guns, spring guns, paint ball guns, certain BB guns and signal guns. *Id.*

¶ 18 The State did not have to prove that defendant or his co-offender possessed a firearm as defined by the FOID Card Act by "direct or physical evidence" (*People v. Wright*, 2015 IL App

(1st) 123496, ¶ 74, *appeal allowed*, No. 119561 (Nov. 25, 2015)), because the "eyewitness testimony that [a] offender possessed a firearm, combined with circumstances under which the witness was able to view the weapon, is sufficient to allow a reasonable inference that the weapon was actually a firearm." *People v. Jackson*, 2016 IL App (1st) 141448, ¶ 15. Other decisions by our supreme court and this court have echoed this statement. See *People v. Washington*, 2012 IL 107993, ¶ 36 ("[G]iven [the victim's] unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a real gun."); see also *People v. Hunter*, 2016 IL App (1st) 141904, ¶¶ 16-20; *People v. Clark*, 2015 IL App (3d) 140036, ¶¶ 20-29; *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 40-52.

¶ 19 In light of our precedent and viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that defendant committed the offenses while armed with a firearm. Muniz testified that, while she was closing the currency exchange, two men pried the lobby door open. One of the men came up to her and pointed "a small, black kind of gun" made of "[m]etal" at her head. He then pressed the gun against Muniz's head, which she described as cold metal. Although Muniz only had a brief period of time in which to observe the gun, she never vacillated in her testimony that the man was armed with one. Furthermore, as demonstrated from Muniz's testimony and the surveillance video, the lobby was illuminated by the currency exchange's neon signs, and, although the ceiling lights had been turned off in the lobby, the lights in the cage remained on. While it is unclear if defendant was the offender holding the gun, forensic testing of the cigarette left in the cage established he was one of the offenders.

¶ 20 The circumstances revealed a sufficient opportunity for Muniz to observe the gun and she was unequivocal at trial that it was a gun. Therefore, there was sufficient evidence to establish that either defendant or his co-offender had a firearm to support defendant's convictions for armed robbery and aggravated kidnaping based on being armed with a firearm. See *Jackson*, 2016 IL App (1st) 141448, ¶¶ 16-18; *Hunter*, 2016 IL App (1st) 141904, ¶¶ 16-20. Additionally, the man with the gun told Muniz to "shut up and go to the back," forcing her into the cage of the currency exchange before tying her up. Although he never explicitly threatened to shoot or kill Muniz, the trial court could have found that the man implicitly threatened her (see *Jackson*, 2016 IL App (1st) 141448, ¶ 16), providing circumstantial evidence that the man had a firearm. See *People v. Toy*, 407 Ill. App. 3d 272, 289 (2011) (finding a victim's testimony that the defendant threatened to kill her provided circumstantial evidence that he was armed with a firearm).

¶ 21 Defendant, however, argues that Muniz's testimony was insufficient to prove either he or his co-offender had a firearm because the alleged firearm was "never fired or recovered." However, as discussed, this court has found that sufficient evidence of a firearm can exist based solely on a victim's testimony, even if the weapon was never recovered (see *Jackson*, 2016 IL App (1st) 141448, ¶¶ 16, 18) or no evidence was presented at trial that the firearm could have been fired. See *Hunter*, 2016 IL App (1st) 141904, ¶¶ 14, 17.

¶ 22 Defendant also argues that Muniz's testimony was too "sparse" in describing the alleged firearm. While this court has "upheld findings that defendants had firearms where more detail was provided [about the firearm], those cases do not establish a minimum requirement for showing a defendant possessed a firearm." *Jackson*, 2016 IL App (1st) 141448, ¶ 17 (citing *Wright*, 2015 IL App (1st) 123496, ¶¶ 7, 9; *Malone*, 2012 IL App (1st) 110517, ¶¶ 4, 52).

Muniz's testimony that one of the men had "a small, black kind of gun" made of "[m]etal" that was cold upon being pressed against her head was sufficient to prove that either defendant or his co-offender had a firearm.

¶ 23 Defendant also includes photographs in his brief of a pellet gun to show how "closely" it "can resemble" a real firearm and of a BB gun to show that, even if a gun is metal, it "does not mean that it met the statutory definition of firearm." He also cites to various decisions from federal and state courts where police officers confused fake guns for real guns. However, we cannot consider this evidence on appeal, as it was not submitted to the trial court first. See *Hunter*, 2016 IL App (1st) 141904, ¶ 20 (to consider photographs of a pellet gun and air pistol not submitted to the trial court " 'would amount to a trial *de novo* on an essential element of the charges' ") (quoting *People v. Williams*, 200 Ill. App. 3d 503, 513 (1990)); *Clark*, 2015 IL App (3d) 140036, ¶ 24 (rejecting the defendant's request to consider "federal and [state] cases in which police officers mistook fake guns for real guns" and "a photograph of an air rifle that would not be considered a 'firearm' under the statutory definition" because they were not submitted as evidence at trial and considered by the trier of fact).

¶ 24 Additionally, defendant relies on *People v. Ross*, 229 Ill. 2d 255 (2008) and *People v. Crowder*, 323 Ill. App. 3d 710 (2001), for the proposition that Muniz's testimony was insufficient evidence that he or his co-offender had a firearm during the commission of the offenses. In *Ross*, 229 Ill. 2d at 276-77, our supreme court found insufficient evidence that the defendant's gun was a dangerous weapon to support an armed robbery conviction, noting "[t]he trial court incorrectly based its ruling on the subjective feelings of the victim, rather than the objective nature of the gun." However, at the defendant's trial, an officer had testified the gun

was a pellet gun. *Id.* at 277. Here, unlike in *Ross*, there was no evidence presented at trial that the gun in defendant or his co-offender's hand was not a firearm. Therefore, *Ross* is inapposite.

¶ 25 *Crowder* is similarly inapposite, as the case did not involve a challenge to the sufficiency of the evidence, but rather whether the trial court properly dismissed the defendant's indictment after the State destroyed the gun that was the basis for the defendant's charges. *Crowder*, 323 Ill. App. 3d at 711.

¶ 26 In sum, the case law on this matter is clear that the "eyewitness testimony that [a] offender possessed a firearm, combined with circumstances under which the witness was able to view the weapon, is sufficient to allow a reasonable inference that the weapon was actually a firearm." *Jackson*, 2016 IL App (1st) 141448, ¶ 15. Muniz's unequivocal testimony that she observed one of the men with a gun, combined with a strong opportunity to view it, was therefore sufficient evidence that defendant was armed with a firearm during the commission of the offenses. Accordingly, we affirm his convictions.

¶ 27 Defendant next contends, and the State agrees, that under the one-act, one-crime doctrine, his conviction for aggravated kidnaping based on wearing a robe, hood or mask, or concealing his identity (Count 3), should have merged into his conviction for aggravated kidnaping based on being armed with a firearm (Count 2). He therefore requests that this court vacate his conviction under Count 3. Although defendant failed to raise this issue in the trial court, we may review this claim of error for plain error as "a violation of the one-act, one-crime doctrine affects the integrity of the judicial process, thus satisfying the second prong of the plain-error analysis." *People v. Span*, 2011 IL App (1st) 083037, ¶ 81.

¶ 28 Under the one-act, one-crime doctrine, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010); see *People v. Miller*, 238 Ill. 2d 161, 165 (2010) ("Multiple convictions are improper if they are based on precisely the same physical act.").

¶ 29 In this case, defendant was convicted of two counts of aggravated kidnaping (Counts 2 and 3). Both counts alleged that defendant kidnapped Muniz by secretly confining her against her will. 720 ILCS 5/10-1(a)(1)(West 2008). The aggravating factors in each count differed. Count 2 alleged that defendant was armed with a firearm (720 ILCS 5/10-2(a)(6) (West 2008)), and Count 3 alleged that he wore a hood, robe, mask, or otherwise concealed his identity. 720 ILCS 5/10-2(a)(4) (West 2008). But both counts are based on the same physical act of secretly confining Muniz against her will. Consequently, as defendant's two convictions for aggravated kidnaping are based on the same physical act, they violate the one-act, one-crime doctrine. See *People v. Boyd*, 366 Ill. App. 3d 84, 100-01 (2006) (vacating one of the defendant's two aggravated kidnaping convictions because both of the convictions were based on the same physical act of inducing his victim, by deceit or enticement, to go from one place to another with the intent to secretly confine her against her will).

¶ 30 When a one-act, one-crime doctrine violation occurs, the sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). "In determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense." *Id.* Here, both of defendant's convictions were punishable as Class X felonies (720 ILCS 5/10-2(b) (West 2008)), requiring a sentence of between 6 and 30 years' imprisonment. 730 ILCS 5/5-8-1(a)(3)

(West 2008). However, defendant's conviction based on being armed with a firearm was "a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/10-2(b) (West 2008). Defendant's aggravated kidnaping conviction based on being armed with a firearm was therefore punishable with a sentence of between 21 and 45 years' imprisonment, while his aggravated kidnaping conviction based on wearing a hood, robe, mask, or otherwise concealing his identity, was punishable with a sentence of between 6 and 30 years' imprisonment.

¶ 31 "[C]ommon sense indicates that the legislature will provide a greater punishment for the crime it deems to be more serious." *Johnson*, 237 Ill. 2d at 97. Because defendant's aggravated kidnaping conviction based on being armed with a firearm had the greater potential sentence, we find it is the more serious offense. Accordingly, pursuant to our ability to vacate a conviction without remand (see *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 176), we vacate defendant's conviction for aggravated kidnaping based on wearing a hood, robe, mask, or otherwise concealing his identity (Count 3). We further direct the clerk of circuit court to amend his mittimus to reflect a single conviction for aggravated kidnaping under Count 2. See *id.*

¶ 32 We additionally note that defendant's mittimus currently still reflects a conviction for aggravated unlawful restraint (Count 4), albeit with no accompanying sentence. That conviction was merged into defendant's conviction for aggravated kidnaping based on being armed with a firearm (Count 2) as a lesser-included offense. We therefore also direct the clerk of circuit court to remove this conviction from the mittimus.

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 34 Affirmed in part and vacated in part.