

No. 1-14-2794

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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. 13 CR 2267
)	
JULIAN GARITA,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* We vacate defendant's conviction for unlawful restraint under the one-act, one-crime rule as it was based on the same physical act as his conviction for armed robbery. We affirm defendant's conviction for aggravated battery with a deadly weapon as the charging instruments indicate the State sought convictions for aggravated battery and armed robbery under separate physical acts and the record supports a finding that separate, interrelated acts occurred and thus the separate convictions do not violate the one-act, one-crime rule. *Mittimus* corrected.

¶ 2 Following a bench trial, defendant Julian Garita was found guilty of armed robbery (720 ILCS 5/18-2(a)(1) (West 2012)), aggravated battery (720 ILCS 5/12-3.05(f)(1) (West 2012)), and unlawful restraint (720 ILCS 5/10-3 (West 2012)) and sentenced to concurrent terms of six

years', four years', and three years' imprisonment, respectively. On appeal, defendant contends that his convictions for aggravated battery and unlawful restraint must be vacated as they arose from the same physical act as his armed robbery convictions and thus violate the one-act, one-crime rule. We affirm in part, vacate in part, and correct the *mittimus*.

¶ 3 Defendant, his brother Josimar Garita, and David Ferguson were charged with one count of armed robbery, two counts of aggravated battery, and one count of unlawful restraint. The armed robbery charge alleged that defendants "knowingly took property *** from the person or presence of Abi Neupane by the use of force or by threatening the imminent use of force and they carried on or about their person or were otherwise armed with a dangerous weapon, other than a firearm, to wit: a glass bottle." 720 ILCS 5/18-2(a)(1) (West 2012).

¶ 4 The first aggravated battery charge alleged that defendants caused bodily harm to Neupane by striking him "about the head a glass bottle" and, in committing the battery, "used a deadly weapon, to wit: a glass bottle." 720 ILCS 5/12-3.05(f)(1) (West 2012). The second aggravated battery charge alleged defendants caused bodily harm to Neupane by striking him about the head and body knowing Neupane was a transit passenger. 720 ILCS 5/12-3.05(d)(7) (West 2012). The charge for unlawful restraint alleged that defendants, "knowingly and without legal authority, detained Abi Neupane." 720 ILCS 5/10-3(a) (West 2012). Defendant and Garita were tried in a simultaneous bench trial. Ferguson was tried separately.

¶ 5 At trial, Abiod Neupane testified through a translator that, on November 11, 2013, he was aboard the CTA red line train on his way to work with his coworker, Ran Dahal, when he saw three men "drinking on the other side of the car." Neupane identified defendant and Garita at trial as two of the three men he saw on the train that night. Neither Neupane nor Dahal said anything

to the men. Defendant approached them, took Dahal's hat off his head, and returned to the other side of the car. When asked to return the hat, he threw it back at Dahal. As Neupane and Dahal attempted to exit the train at the Thorndale stop, defendant struck Neupane. Neupane told the conductor what happened. At the conductor's suggestion, he and Dahal sat in the conductor's car, but when the three men came into that car, Neupane exited to the platform.

¶ 6 The three men followed Neupane off the train. Garita threw a bottle at Neupane, striking him in the forehead. Neupane testified that the three men "all were hitting" him and attempted to push him off the platform onto the train tracks. Neupane was carrying a "bag" containing \$141, shoes, and clothes that defendant "snatched" from him during the attack.

¶ 7 The State introduced video from CTA surveillance footage taken that night. They played the video at trial. Neupane testified the video "fairly and accurately" depicted the events that occurred that evening. On the video, he recognized Garita throwing a bottle at him, all three men hitting and kicking him, and defendant taking his bag and walking away with it. Neupane testified he was "pretty sure" it was defendant who took his bag, though his vision was obstructed because he "was really bleeding that time and my eyes were all covered."

¶ 8 Neupane went downstairs and reported what happened to the CTA "guard" and called the police. The police arrived and brought Neupane outside the Thorndale police station, where they had three men "in front of the cars." Neupane identified them as the three men who assaulted him. The men did not have Neupane's bag when he identified them and he never received his bag or his belongings back. The wound caused when the bottle struck Neupane's forehead required eight stitches and a scar remained visible on Neupane's forehead at trial. During cross-examination, Neupane testified that he did not know who snatched his backpack from his back.

¶ 9 Ran Dahal testified through a translator that, on the night in question, he and Neupane were on the train on their way to work when defendant "approached me and forcefully tried to snatch my hat." During cross-examination, Dahal testified that he did not see anyone take Neupane's bag and he did not see anyone throw a bottle at Neupane, but he did hear the bottle "crash on the floor."

¶ 10 Officer David Ivanov testified that, on November 11, 2013, he was dispatched to "a battery in progress at the CTA station on Thorndale." He arrived and spoke to Neupane and Dahal, who were able to communicate with him despite their "limited English ability." Ivanov received a radio transmission from Officer O'Rourke, who had "three individuals in custody." Neupane, bloodied from the attack, identified defendant and Garita as two of the men who attacked him. Ivanov observed blood on both defendants' hands and clothes as they were being taken into custody and identified photographs at trial showing the blood on defendant's and Garita's hands and clothing.

¶ 11 The trial court found defendant guilty on all counts. It denied defendant's posttrial motions and sentenced defendant to six years' imprisonment for the armed robbery, four years' imprisonment for aggravated battery with a deadly weapon, and four years' imprisonment for unlawful restraint, to be served concurrently.

¶ 12 On appeal, defendant contends that his convictions for unlawful restraint and aggravated battery with a deadly weapon must be vacated under the one-act, one-crime rule, as they are based on the same physical act as his armed robbery conviction.

¶ 13 Under the one-act, one-crime rule, "a defendant may not be convicted of multiple offenses based on the same physical act." *People v. Almond*, 2015 IL 113817, ¶ 47. If a

defendant is convicted of two offenses based upon the same physical act, the less serious offense must be vacated. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). Our supreme court has defined "act" as " 'any overt or outward manifestation which will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996) (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). If a defendant commits multiple acts, then multiple convictions may stand provided that none of the offenses are lesser-included offenses. *People v. Nunez*, 236 Ill. 2d 488, 494 (2010).

¶ 14 Factors to be considered in determining whether one act or multiple acts occurred include: "(1) whether the defendant's actions were interposed by an intervening event; (2) the time interval between the successive parts of the defendant's conduct; (3) the identity of the victim; (4) the similarity of the acts performed; (5) whether the conduct occurred in the same location; and (6) the prosecutorial intent, as shown by the wording of the charging instruments." *People v. Sienkiewicz*, 208 Ill. 2d 1, 7-8 (2003); see also *People v. Dresher*, 364 Ill. App. 3d 847, 866 (2006) (applying the *Sienkiewicz* factors to an alleged violation of the one-act, one-crime rule). A defendant may still be convicted of two offenses when a common act is part of both offenses because, " [a]s long as there are multiple acts * * *, their interrelationship does not preclude multiple convictions.' " *Rodriguez*, 169 Ill. 2d at 188-89 (quoting *People v. Myers*, 85 Ill. 2d 281, 288 (1981)). Whether a defendant has been improperly convicted of multiple offenses arising out of the same act and whether a charge encompasses another as a lesser-included offense are questions of law that we review *de novo*. *Nunez*, 236 Ill. 2d at 493.

¶ 15 Initially, we note that defendant concedes that he failed to properly preserve his one-act, one-crime claims for review as he did not raise them in the trial court. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both trial objection and written posttrial motion raising issue are required

to preserve error for review); accord *People v. Herron*, 215 Ill. 2d 167, 175 (2005). Defendant is, however, correct that we may review one-act, one-crime arguments under the second prong of the plain-error doctrine and the State agrees. *Nunez*, 236 Ill. 2d at 493 (forfeited one-act, one-crime arguments implicate the integrity of the judicial process and are, therefore, reviewable under the second prong of the plain error rule).

¶ 16 Defendant first contends, and the State concedes, that his conviction for unlawful restraint should be vacated under the one-act, one-crime rule, as both the class X armed robbery conviction and the class 4 unlawful restraint conviction were based on the same physical act, namely the restraint of Neupane that occurred while defendant and his accomplices beat and robbed him. We agree. As defendant's unlawful restraint conviction was the less serious offense, we vacate that conviction. See *People v. McWilliams*, 2015 IL App (1st) 130913, ¶¶ 22 (vacating class 3 unlawful restraint convictions as defendant's "acts of restraint were inherent in and concurrent to the [class X] armed robbery, therefore his aggravated unlawful restraint convictions are based on the same, singular act as the armed robbery convictions").

¶ 17 Defendant next contends that his aggravated battery with a deadly weapon conviction must be vacated because it rested on the same physical act, hitting Neupane with the bottle, that constituted the force element of his armed robbery conviction.

¶ 18 Comparing the charges, the aggravated battery with a deadly weapon charge required the State to prove that defendant caused bodily harm to Neupane while using a "deadly weapon other than by discharging a firearm." 720 ILCS 5/12-3.05(f)(1) (West 2012). The armed robbery charge required the State to prove that defendant knowingly took property from Neupane by the use of force or threatening the imminent use of force while armed with "a dangerous weapon

other than a firearm." 720 ILCS 5/18-2(a)(1) (West 2012). Defendant is correct that both charges were predicated on the same deadly or dangerous weapon, the glass bottle. However, the two convictions are not predicated on precisely the same physical act. Aggravated battery required the act of causing bodily injury with the bottle, while armed robbery required the entirely separate act of taking property while armed with the bottle. While both the armed robbery and the aggravated battery occurred closely in time and shared the use of a bottle, defendant's act of injuring Neupane with the bottle and his act of taking the backpack armed with the bottle were separate overt outward manifestations supporting both offenses. See *People v. Pearson*, 331 Ill. App. 3d 312, 322 (2002) (holding that, although closely related in time, taking the victim's purse and knocking her to the ground were separate acts, outward manifestations supporting the offenses of robbery and aggravated battery). Although striking Neupane was closely related to taking his bag, "[t]wo acts do not become one simply because they are closely related in time." *Id.*

¶ 19 We find *People v. Cobern*, 236 Ill. App. 3d 300 (1992), on strikingly similar facts, instructive here. In *Cobern*, the victim saw three men standing on the sidewalk drinking beer. *Cobern*, 236 Ill. App. 3d at 301. One of the men, the defendant, struck the victim in the head with a bottle, shattering the bottle and cutting the victim. *Id.* The victim attempted to flee but was caught by the defendant, who grabbed the sports bag the victim was carrying. *Id.* The victim then fled. The defendant was convicted of aggravated battery and armed robbery. He appealed, arguing, as defendant does here, that the force used to establish the armed robbery conviction, *i.e.* striking the victim in the head with the bottle, also caused the bodily injuries referred to in the aggravated battery charge. *Id.* at 302-03. He claimed that the offenses were, therefore,

"carved from the same physical act" and his conviction for aggravated battery should be vacated. *Id.* at 303.

¶ 20 The court disagreed, finding:

"Although there was but one victim, and the action took place in the same locale, the record also shows a brief interval between acts, and the charging instrument reflected the State's intention to charge defendant with separate offenses based on them. [Victim]'s testimony disclosed the hit on the head with the beer bottle causing injury which completed the aggravated battery, then pursuit by defendant and the taking of his property by defendant while he was still armed. In our judgment these distinct acts support the multiple convictions and concurrent sentences entered by the trial court." *Cobern*, 236 Ill. App. 3d at 304.

¶ 21 We find no reason to depart from this precedent and find that the defendants' distinct acts support multiple convictions. The acts of causing bodily harm to Neupane with the bottle and taking his backpack, while interconnected, each represent individual outward manifestations that support a conviction for individual offenses, and thus we cannot say that the aggravated battery and armed robbery were carved from the same physical act. As it is well established that aggravated battery is not a lesser-included offense of armed robbery, we need not address that issue. See *Pearson*, 331 Ill. App. 3d at 323 ("[A]ggravated battery is not a lesser included offense of robbery"). Accordingly, we affirm defendant's convictions for both aggravated battery and armed robbery.

¶ 22 Defendant's relies on *People v. Harvey*, 366 Ill. App. 3d 119, 122 (2006), in arguing that his actions constituted a single act supporting only his armed robbery conviction. However, in

Harvey, the State conceded that there was only a single act and the court did not analyze whether, in fact, defendant's convictions for armed robbery/discharging a firearm causing great bodily harm and aggravated battery with a firearm causing great bodily harm were based on the same act. *Harvey* at 122. We, therefore, decline to follow *Harvey* and instead rely on *Cobern* in finding that defendant committed multiple acts supporting multiple offenses.

¶ 23 Finally, we note that the *mittimus* incorrectly reflects that defendant was convicted for aggravated battery with a deadly weapon (720 ILCS 5/12-3.05(f)(1) (West 2012)) under count 2. In fact, count 2 was directed solely to Garita, charging that he committed an aggravated battery when he spit at Officer Martinez. 720 ILCS 5/12-3.05 (d)(4)/(i) (West 2012). During the hearing on defendant's posttrial motions, the court recapped its guilty findings, correctly stating defendant was "convicted in Counts 3 and 4 of aggravated battery for striking *** Neupane." It then sentenced defendant to a single term of six years for aggravated battery but incorrectly stated that "Counts 2 and 3 as to Julian [defendant]" merged, which is what the *mittimus* reflects. In fact, defendant's aggravated battery of a transit passenger conviction (count 4) merged into his aggravated battery with a deadly weapon conviction (count 3). Although a written order of the trial court is evidence of the judgment of the trial court, the trial judge's oral pronouncement is the judgment of the court. *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993). "When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls." *Id.* Accordingly, we correct the *mittimus* to reflect that defendant's conviction for aggravated battery with a deadly weapon was under count 3. The *mittimus* also reflects that defendant's unlawful restraint conviction was under count 4 rather than count 5. Count 4 was an

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aggravated battery count. However, as we vacated defendant's conviction for unlawful restraint, we need not belabor this discrepancy.

¶ 24 The State having conceded that the unlawful restraint conviction was carved from the same physical act as the armed robbery, we vacate defendant's conviction for unlawful restraint. Having found that the aggravated battery and armed robbery arose from separate, interrelated acts, we reject defendant's contention that his conviction for aggravated battery must be vacated.

¶ 25 For the foregoing reasons, we vacate defendant's conviction for unlawful restraint, correct the *mittimus*, and otherwise affirm the ruling of the trial court.

¶ 26 Affirmed.