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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 4124
)	
JERRY BROWN,)	Honorable
)	Michele M. Pitman,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for aggravated battery of a senior citizen vacated under the one-act, one-crime doctrine where it was based on the same single physical act as his robbery conviction.

¶ 2 Following simultaneous but severed bench trials, defendant Jerry Brown and codefendant Stevie Smith were convicted of robbery and aggravated battery of a senior citizen. Brown was sentenced to consecutive prison terms of 15 years and 7 years. On appeal, Brown contends that his conviction for aggravated battery of a senior citizen should be vacated because it violates the one-act, one-crime doctrine where it is based on the same single physical act as his robbery

conviction. Alternatively, Brown argues that the aggravated battery of a senior citizen conviction should be reduced to aggravated battery on a public way because the evidence did not prove that defendants caused great bodily harm to the victim. Codefendant Smith separately appealed. See *People v. Smith*, 2017 IL APP (1st) 151312.

¶ 3 Based on this record, we find that Brown committed only one single physical act. A single punch was used as the basis for the aggravated battery conviction, and as the element of force for the robbery conviction, and there was no evidence of any other use of force, threat of force or verbal threat. We vacate the aggravated battery of a senior citizen conviction under the one-act, one-crime doctrine and affirm Brown's conviction and sentence for robbery.

¶ 4 Background

¶ 5 Brown and Smith were tried on charges of first degree murder, aggravated battery of a senior citizen, robbery, and aggravated battery. At trial, Deborah Halloran testified that William Burtner was the commander of the Veterans of Foreign Wars (VFW) post in Midlothian, where she was employed as the bar manager. About 9:30 a.m. on November 16, 2009, Burtner and Halloran prepared money for deposit into four accounts the VFW maintained at A.J. Smith Bank. Deposits for three accounts were placed into three separate bank deposit bags. An additional amount was placed inside a cigar box for Burtner to open a new account. Burtner left the VFW post with the three deposit bags and the cigar box, and drove to the bank to make the deposits.

¶ 6 A teller at A.J. Smith Bank, Connie Weimar, testified that about 10:15 a.m. that day, she looked out the window and saw Burtner walking towards the bank carrying bank deposit bags in his hand. As Burtner approached the entrance, he passed behind a wall and Weimar lost sight of him. Next, Weimar saw a man wearing a hooded sweatshirt walking fast past the front of the

bank towards Burtner. The hood covered the man's head, and Weimar could not see his face. The man was not carrying anything in his hands. The man disappeared from Weimar's sight for "a matter of seconds." When next she saw him, he was carrying something in his hands, had turned around, and was running to the adjacent Wendy's parking lot. He entered the front passenger seat of a black car. The car headed north. Weimar yelled "Call 911." Two bank employees brought Burtner inside the bank and sat him down in a chair. Later, the man wearing the hooded sweatshirt was determined to be Smith.

¶ 7 Tamara Esposito was working at the bank when her supervisor yelled "Call 911, I believe somebody was just robbed." Esposito went to the front door and saw Burtner on the ground outside. Esposito and a security guard went outside and helped Burtner, who asked Esposito to retrieve a cigar box from the ground which contained money and checks. Esposito saw a black sports car speeding out of the Wendy's parking lot. Esposito and the security guard brought Burtner inside the bank and sat him down in a chair. Burtner was slightly bent over and holding his left side near his rib cage. His breathing was labored, and he was having difficulty speaking. Burtner told Esposito that he was punched in his left side.

¶ 8 Paramedics treated Burtner at the bank. Burtner was holding his left side in his back rib area. Burtner complained of pain in that area, and also experienced pain when taking deep breaths. He was administered oxygen and transported to the hospital. The State presented a stipulation that Burtner told a paramedic that "he was hit from behind, and he fell."

¶ 9 Meanwhile, a high-speed police chase of the black car, driven by Brown, had ensued. Brown and Smith crashed into another vehicle and came to a stop. They ran from the black car in opposite directions. Minutes later, police found Brown hiding underneath a vehicle in a backyard

and placed him in custody. During a custodial search, police recovered cash from his right pocket. The A.J. Smith bank deposit bags and money were found inside the car. Blood samples taken from the passenger's side of the black car were submitted to the Illinois State Police crime laboratory for testing. Results of that testing indicated a DNA match with Smith, and he was arrested on February 5, 2010.

¶ 10 Mary Burtner, William's wife, testified that her husband was treated and released from the hospital on the day of the robbery. When he returned home, he was in a lot of pain, uncomfortable, and favoring his left side. The next day, he felt worse. The following morning, November 18, although still in a lot of pain, he went to his chemotherapy appointment for treatment of his lung cancer. At the hospital, he was unable to walk due to his pain and needed a wheelchair. When the couple arrived home about 3 p.m., Burtner was still holding his left side and was unable to get out of the car. Mary assisted him into their home, and into bed. Burtner fell asleep and Mary checked on him. About 8:30 p.m., she found Burtner unresponsive and called 911.

¶ 11 Paramedics arrived at the home, Burtner was unresponsive, not breathing, and had no pulse or blood pressure. Paramedics performed CPR, administered cardiac medications, and transferred Burtner to the hospital. There were no signs of life. The State presented Burtner's death certificate indicating that he was 65 years old at the time of his death.

¶ 12 Assistant chief medical examiner, Dr. Ponni Arunkumar, performed an autopsy on Burtner and found that he suffered from lung cancer, two prior heart attacks, and heart disease. She further found that Burtner had three fractured ribs on the left side of his chest wall. The rib fractures were less than three or four days old, and were consistent with being punched. Dr.

Arunkumar determined that Burtner's cause of death was hypertensive cardiovascular disease, and the fractured ribs, which were due to an assault, constituted a significant contributing factor of Burtner suffering a heart attack. In her opinion Burtner's cause of death was homicide.

¶ 13 The trial court found that the State failed to prove that defendants caused Burtner's death, and found them not guilty of first degree murder. The trial court, however, found that defendants "certainly" inflicted great bodily harm on Burtner, and found them guilty of aggravated battery of a senior citizen. The court also found defendants guilty of robbery and aggravated battery. The aggravated battery counts were merged into the aggravated battery of a senior citizen offense. As Burtner was over the age of 60, the trial court ruled that the robbery offense was elevated from Class 2 to a Class 1 felony.

¶ 14 The trial court sentenced Brown to 15 years' imprisonment for robbery, and a consecutive term of 7 years' imprisonment for aggravated battery of a senior citizen. Brown was convicted as an accomplice. The trial court expressly stated that, based on Brown's criminal history and character, and the nature and circumstances of the offense, consecutive sentences were required to protect the public from further criminal conduct by Brown.

¶ 15 Analysis

¶ 16 On appeal, Brown first contends that his conviction for aggravated battery of a senior citizen should be vacated because it violates the one-act, one-crime doctrine where it is based on the same single physical act as his robbery conviction. Brown argues that the only evidence of a physical act committed against Burtner was the single punch by Smith. Brown further argues that the single punch cannot serve as the basis for both the aggravated battery, and the force element for the robbery.

¶ 17 The State responds that the one-act, one-crime doctrine was not violated as Smith committed two separate acts. The State asserts that the punch was one act, and the taking of the deposit bags was a separate act. The State argues that the common act of the punch can serve as the basis of both offenses because there was another separate act for the robbery.

¶ 18 As a threshold matter, Brown acknowledges that he forfeited this issue for appeal because he failed to object to the multiple convictions at trial and did not raise the issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The parties agree, however, that our supreme court has repeatedly found that a one-act, one-crime violation is reviewable under the second prong of the plain error doctrine because it affects the integrity of the judicial process. *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009). Accordingly, we will consider the issue.

¶ 19 Whether a conviction should be vacated under the one-act, one-crime doctrine is a question of law which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). Under this rule, Brown cannot be convicted of multiple offenses that are based on precisely the same single physical act, and where he is convicted of two such offenses, the conviction for the less serious offense must be vacated. *Id.* Our supreme court has defined an “act” as “any overt or outward manifestation which will support a different offense.” *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 20 In clarifying the one-act, one-crime rule from *King*, the supreme court explained that a court must first determine whether Brown’s conduct consisted of a single physical act or separate acts. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). A defendant can be convicted of two offenses where a common act is part of both crimes. *Id.* at 188. But, where two offenses share a common act, there must be another separate act to sustain the two convictions. See *id.* at 188-89.

“ ‘As long as there are multiple acts *as defined in King*, their interrelationship does not preclude multiple convictions ***.’ (Emphasis added.)” *Id.* at 189 (quoting *People v. Myers*, 85 Ill. 2d 281, 288 (1981)).

¶ 21 The State charged Brown with robbery for taking money from Burtner by the use of force or by threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2008). The aggravated battery of a senior citizen offense alleged that defendants intentionally and knowingly caused great bodily harm to Burtner, a person 60 years of age or older, by striking him about the body, causing injuries. 720 ILCS 5/12-4.6(a) (West 2008).

¶ 22 The record reveals that the evidence presented at trial demonstrated that defendants committed one single physical act—a single punch by codefendant Smith to Burtner’s left side. The only evidence of any act by defendants was Esposito’s testimony that Burtner told her that he was punched in his left side, and the State’s stipulation that Burtner told a paramedic that “he was hit from behind, and fell.” The single punch was used as the basis for the aggravated battery conviction, and as the element of force for the robbery conviction. There was no evidence of any other use of force or threat of force by defendants. There was no evidence of a verbal threat. Indeed, as Burtner was punched from behind, he was likely unaware that Smith was approaching him. Based on this record, we find that defendants committed only one single physical act.

¶ 23 The State asserts that the taking of the money from Burtner constituted a separate physical act for the robbery, and thus, the two convictions may stand. The State primarily relies on this court’s decision in *People v. Pearson*, 331 Ill. App. 3d 312 (2002), which it claims is directly on point. In *Pearson*, the defendant grabbed a woman’s purse off her shoulder. *Id.* at 314. A struggle ensued and the woman was knocked to the ground. *Id.* The defendant was

convicted of both robbery and aggravated battery. *Id.* at 316. On appeal, this court found that the two convictions did not violate the one-act, one-crime doctrine because the defendant committed two separate physical acts—he took the woman’s purse, and he then pushed her to the ground. *Id.* at 322.

¶ 24 We find the facts here distinguishable from *Pearson*. In *Pearson*, the act of grabbing the woman’s purse off her should was, in and of itself, a taking of property by force. *Pearson*’s subsequent act of pushing the woman to the ground was a separate act. Here, however, the evidence demonstrates that defendants committed only one physical act, Smith’s punch. There was no evidence that defendants used another act of force to take the money from Burtner. There is no evidence explaining how the taking occurred. There is no evidence of a struggle over the deposit bags, nor any evidence that defendants forcefully removed them from Burtner’s hand. It is possible that Burtner dropped the bags after he was punched and fell to the ground, as he apparently did with the cigar box. Consequently, *Pearson* does not apply to this case.

¶ 25 Based on this record, we find that Brown’s convictions for robbery and aggravated battery of a senior citizen were both grounded on the single physical act of codefendant Smith punching Burtner. The two convictions violate the one-act, one-crime principle and cannot stand. The aggravated battery of a senior citizen offense is a Class 2 felony, and thus, is less serious than the robbery of a senior citizen, which was elevated to Class 1. Accordingly, we vacate Brown’s conviction for aggravated battery of a senior citizen.

¶ 26 Because we have vacated Brown’s conviction for aggravated battery of a senior citizen, we need not consider his alternative argument that the conviction be reduced to aggravated battery on a public way.

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¶ 27 We vacate the aggravated battery of a senior citizen conviction, and affirm Brown's conviction and sentence for robbery.

¶ 28 Affirmed in part and vacated in part.