2018 IL App (1st) 150084-U

No. 1-15-0084

June 6, 2018

Third Division

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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. 13 CR 6404
	)	
ADEWALE OSHIKOYA,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Pursuant to the one-act, one-crime rule, defendant's conviction for financial institution fraud and one of defendant's convictions for identity theft are vacated. Defendant's remaining identity theft conviction and conviction for continuing financial crimes enterprise are affirmed. The cause is remanded for the circuit court to determine which count of identity theft must be vacated.

¶ 2 Following a bench trial, defendant Adewale Oshikoya was found guilty of two counts of identity theft, one count of financial institution fraud, and one count of continuing financial crimes enterprise. The trial court sentenced defendant to four concurrent terms of four years'

imprisonment. On appeal, defendant contends that pursuant to the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551 (1977), this court must vacate his conviction for financial institution fraud and one of his convictions for identity theft.[1]

¶ 3 For the reasons that follow, we affirm in part, vacate in part, and remand.

¶ 4 Defendant was arrested on March 8, 2013. He was thereafter charged by indictment with one count of organizing a continuing financial crimes enterprise, one count of continuing financial crimes enterprise, one count of financial institution fraud, two counts of identity theft, and one count of forgery.

¶ 5 At trial, Akintunde Azeez testified that he had known defendant since 2010. On February 2, 2013, Azeez approached defendant and told him about problems he was having gaining employment. Defendant said that he was going to help Azeez make a lot of money, and asked Azeez if he had any credit cards. When Azeez answered that he had five, defendant told him to call the credit card companies and report the cards as lost so that the companies would cancel the cards and issue new ones. After Azeez made the calls, defendant told Azeez they were going to go shopping and he would show Azeez how they were going to make money.

¶ 6 That afternoon, Azeez, defendant, Gregory Ajayi, who was defendant's roommate, and a fourth man Azeez did not know went to a Target store. Inside, the group split up. Azeez and defendant picked up some greeting cards and four or five gift cards. Defendant explained to Azeez that when putting money on the gift cards, the amount should not exceed $280. The two men then went to the checkout counter, where defendant had $280 placed on each gift card,

[1] In his opening brief, defendant also contended that both his convictions for identity theft should have been vacated because those charges served as the predicates for the charge of financial institution fraud. However, defendant abandoned this contention in his reply brief, stating, "In light of *People v. Coats*, 2018 IL 121926, [defendant] concedes this issue."

making each purchase with a different credit card. Defendant, Azeez, and Ajayi then went back to defendant's apartment, where Azeez testified they talked "in general and trying to make me understand how we're going to go about make purchase and doing gift cards." Defendant asked Azeez for his cancelled credit cards and told Azeez to come back in a couple of days to retrieve them.

¶ 7 A few days later, Azeez went back to defendant's apartment, and defendant gave him back his cancelled credit cards. At some point that month, defendant gave Azeez a phone, which he told Azeez could not be traced, so that they could communicate. Defendant also gave Azeez a list of Target store locations and told Azeez to bring him all the gift cards Azeez purchased. Ajayi instructed Azeez that he should not leave credit cards in the car, and that when he was in the car, he should put the credit cards by the gas cap or the under the carpet in case he got pulled over by the police.

¶ 8 During that month, Azeez made gift card purchases with credit cards supplied to him by defendant. When Azeez would return the gift cards to defendant, defendant would give Azeez 50% of the value of the gift cards in cash. After "a couple of days" of these transactions, defendant instructed Azeez to purchase gift cards and then use them to purchase 64-gigabyte iPads, which Azeez estimated cost about $760. Azeez would give the iPads to defendant, and then either defendant would put them in his room, or defendant and Azeez would "go out to a supply iPads to a guy that sells for cash." Azeez testified that he and defendant would receive $500 cash for an iPad and split the money evenly.

¶ 9 Azeez testified that at various times during that February, he saw defendant swipe Azeez's credit cards and other credit cards through a card reader. Specifically, defendant,

working in his living room, would erase data from the credit cards and electronically re-encode them with new account numbers. While this was being done, Azeez could see images of bank accounts or credit card numbers on defendant's laptop screen.

¶ 10 The last Target transaction Azeez completed was on March 1, 2013. After leaving the store, Azeez drove to his own home in the suburbs to drop off some items, and then headed to defendant's apartment to give defendant the gift cards he had purchased. During the drive, Azeez was pulled over by the police in McHenry. The officer advised Azeez that his license had been suspended, handcuffed him, and placed him in a squad car. Azeez testified that he told the officer to search his car before they left the scene. He explained in court that he did so because he had heard about "bad cops trying to falsify fake evidence against innocent people" and he "didn't want anything negative to be on my car." At the police station, Azeez eventually agreed to "confess to what was going on with the cards."

¶ 11 With regard to other people who lived at defendant's apartment, Azeez testified that Ajayi never supplied him with any cards, gave him directions as to what to do with the cards, or split money with him based on gift card purchases. Similarly, Azeez testified that a woman he knew as defendant's girlfriend, Olubunmi Durojaiye, did not give him any counterfeit credit cards, direct him what to do, or split money with him.

¶ 12 Azeez acknowledged that in May 2013, he pled guilty to a misdemeanor charge of financial institution fraud in exchange for a sentence of 12 months of probation, and that as part of the plea agreement, he had agreed to cooperate with the Attorney General in the investigation and prosecution of other individuals.

¶ 13 McHenry police officer Ryan Pardu testified that about 11 a.m. on March 1, 2013, he was on patrol when he received a dispatch call reporting a reckless driver. Pardu located the car, curbed it, and made contact with the driver, Akintunde Azeez, whom Pardu took into custody for driving on a suspended license. When Pardu placed Azeez into the back of the patrol car, Azeez starting demanding that Pardu search his car and retrieve his coat, two cell phones, a GPS unit, and a small case that contained about 20 credit cards. Pardu searched the car and found the items Azeez had requested. Pardu also found a Target bag that had about 18 gift cards in it, and a second bag that contained a "bunch" of receipts for gift cards that were purchased that day.

¶ 14 Pardu testified that back at the station, he and Detective Kelly Ducak examined the items he recovered from Azeez's car and discovered that the credit card numbers on the receipts for the gift cards did not match the numbers printed on the physical credit cards. Using a "card reader," Pardu and Ducak then scanned the credit cards and determined that none of the numbers printed on the front of the credit cards matched the numbers registered to the credit card accounts. Pardu generated a report that identified the following information for each credit card: the banking company; the number embossed on the face of the card; the registered account number electronically encoded on the card; and the receipt for the corresponding purchase of a gift card. All of the credit cards had Azeez's name on them, and all the gift cards were for approximately $280. The credit cards, the receipts, and Pardu's written report were admitted into evidence at trial.

¶ 15 Consistent with Pardu, McHenry police detective Kelly Ducak testified that she and Pardu inspected the recovered credit cards, gift cards, and receipts; matched up the receipts to the gift cards; and found that the credit card numbers on the receipts did not correspond to the

numbers embossed on the faces of the credit cards. Ducak explained that when she and Pardu ran the recovered credit cards through a credit card reader, they were able to match the numbers electronically associated with the credit cards with the receipts.

¶ 16 U.S. Secret Service special agent Korey Smith testified that he and another special agent, George Wagner, were assigned to investigate a credit card fraud scheme in March 2013. After receiving some information from members of the McHenry police department, Smith traveled to Chicago and conducted a “trash pull” at defendant’s residence. In the trash can behind defendant’s residence, Smith found a Target bag. In the bag were six receipts, all dated March 3, 2013, and all for purchases made at a Target store in Mundelein with six different credit cards. Five of the purchases were for $280 gift cards, and the last was for a $150 gift card and additional miscellaneous items.

¶ 17 U.S. Secret Service special agent George Wagner testified that after he and Agent Smith spoke with detectives from the McHenry police department, he also spoke with Akintunde Azeez. Based on these conversations, Wagner obtained a search warrant for defendant’s apartment, which he and a team of other special agents and police officers executed on March 8, 2013. When the team entered, three people were in the apartment: defendant; his wife, Olubunmi Durojaiye; and Gregory Ajayi. The team had an arrest warrant for defendant.

¶ 18 Wagner testified that defendant was transported to a Chicago police station, where he was given *Miranda* warnings. Thereafter, defendant told Wagner and Smith that he had been purchasing credit card numbers over the internet from a person in Viet Nam who had also shipped defendant an encoding machine. Defendant explained that he would swipe credit cards through the machine, which caused their numbers to appear on his laptop. However, defendant

denied “re-encoding” the credit cards. Defendant told the agents that he would use the credit cards to make online purchases, pay bills, and buy gift cards. With the gift cards, defendant would purchase merchandise such as televisions and iPads, and then he would ship the products overseas. He would also give credit cards to Ajayi, with instructions that he use them to purchase gift cards and then buy iPads with the gift cards. Defendant further stated that he used cash derived from the credit card scheme to purchase a Honda Accord for $17,000. Wagner acknowledged that defendant’s statement was not videotaped or reduced to writing.

¶ 19 U.S. Secret Service special agent Tobey Corter testified that on March 8, 2013, he and a team of other special agents executed a search warrant at defendant’s apartment. During the search of a hall closet, Corter came across a jacket that was noticeably heavy. He reached in the pocket and found a credit card reader / encoder with its serial number scratched off. Another agent involved in executing the search warrant, Brett Colvin, testified that he recovered credit cards from a bedroom, as well as credit cards and credit card “access device items” from a Honda Accord parked in the garage. A third agent, Tobias Pitts, testified that he recovered credit cards and prepaid debit cards from the apartment. A fourth agent, Jonathan Lorenzi, recovered $10,000 cash, seven credit cards bearing no names, four debit cards bearing defendant’s wife’s name, three laptop computers, and 38 gift cards from a bedroom. Lorenzi also recovered a “large number” of money orders and three debit cards bearing defendant’s wife’s name from a second bedroom.

¶ 20 U.S. Secret Service special agent Ryan Murphy, a computer forensic examiner, testified that he performed a forensic analysis of three computers seized from defendant’s residence. On the first computer, he found over 140 credit card numbers in the unallocated space portion of the

hard drive, a number he agreed represented “a fraction or small portion” of the total number of credit card numbers found in the computer; a text file named “Amex For Money Pak” that contained the names, social security numbers, dates of birth, addresses, credit card information, and other personal information of seven different people; a text file named “Atinga Maryland” that contained 25 credit card numbers; a notepad file named “All Algbada Fullz” that contained the names, social security numbers, dates of birth, addresses, credit card information, and other personal information of 12 different people; a .pdf of a bank statement addressed to defendant; and an executable file related to a “skimming device” that would show the contents of the data of a swiped credit card and allow such a credit card to be coded and re-encoded. On both of the other two computers, Murphy found over 100 credit card numbers, as well as files related to the skimming device.

¶ 21 Melanie Mitchell, an investigator with Chase Bank Card Services, testified that in the spring of 2014, she was requested by law enforcement officers to do an analysis of 21 different credit card accounts issued by Chase Bank. She produced a written summary of those accounts, identifying fraudulent transactions that took place between February 2013 and March 2014 and that were reported and confirmed by each customer. With the exception of two transactions that took place at Walmart.com, all the transactions occurred at Target stores in Illinois, and all were for purchases around $280. Mitchell testified that Chase Bank lost $16,754.45 as a result of the fraudulent transactions.

¶ 22 The parties stipulated that if called as witnesses, 10 different people would have testified to fraudulent transactions made on their credit cards. The accounts of each of these individuals were among those identified by Mitchell as containing fraudulent transactions.

¶ 23 Paul Salce, the owner of a River Grove business with an auto sales division, testified that according to records kept in the ordinary course of business, on March 2, 2013, defendant bought a 2010 Honda from his business for $17,000 in cash.

¶ 24 Defendant made a motion for a directed finding, which the trial court denied.

¶ 25 Defendant's mother, Victoria Oshikoya, testified that she was a textile merchant in Nigeria, and that she sent defendant to the United States to study business at DeVry University. She stated that she sent defendant $10,000 per month for upkeep, "Sometimes more than that. Sometimes less than that." The defense introduced a document reflecting that Victoria Oshikoya had 23 million naire in a bank account in Nigeria, which she estimated was about $150,000 in American dollars. Victoria Oshikoya explained that this was her "travel" account, and that she had about five bank accounts in all.

¶ 26 Following closing arguments, the trial court acquitted defendant of two counts: organizing a continuing financial crimes enterprise and forgery. However, the court found defendant guilty of the remaining charges: one count of continuing financial crimes enterprise, one count of financial institution fraud, and two counts of identity theft. Defendant filed a posttrial motion, which the trial court denied. The court thereafter sentenced defendant to four concurrent terms of four years' imprisonment.

¶ 27 This appeal followed.

¶ 28 On appeal, defendant contends that pursuant to the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551 (1977), this court must vacate one of his two convictions for identity theft, as well as his conviction for financial institution fraud. We note that although defendant failed to preserve this issue by objecting at trial and addressing it in a posttrial motion, one-act, one-crime

violations are recognized under the second prong of the plain error rule. *People v. Coats*, 2018 IL 121926, ¶ 10; *People v. Harvey*, 211 Ill. 2d 368, 389 (2004) ("an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule").

¶ 29 In *King*, 66 Ill. 2d at 566, our supreme court held that a defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act. Whether a violation of this "one-act, one-crime" rule has occurred is a question of law that is reviewed *de novo*. *Coats*, 2018 IL 121926, ¶ 12. To determine whether a one-act, one-crime violation has occurred, courts follow a two-step analysis. *Id.* First, the court must determine whether the defendant's conduct consisted of a single physical act or separate acts. *Id.* If the convictions were based upon the same physical act, the conviction for the less serious offense must be vacated. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). However, if multiple acts were committed, then the court proceeds to the second step, *i.e.*, determining whether any of the offenses are lesser-included offenses. *Coats*, 2018 IL 121926, ¶ 12. A lesser-included offense is one that is "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2012). If none of the offenses are lesser-included offenses, then multiple convictions are proper. *Coats*, 2018 IL 121926, ¶ 12.

¶ 30 Defendant first argues that one of his two convictions for identity theft must be vacated because both counts were based on the same act. As noted above, convictions for multiple offenses cannot stand when the offenses are all based on precisely the same physical act. *King*, 66 Ill. 2d at 566. An "act," as defined in *King*, is "any overt or outward manifestation which will

support a different offense." *Id.* at 566. We look to the charging instruments to determine whether offenses are based on the same act. *People v. Kotero*, 2012 IL App (1st) 100951, ¶ 22.

¶ 31 Here, count IV charged defendant as follows:

> "[B]etween on or about December 1, 2012 through March 8, 2013, at and within Cook County, [defendant] Committed the Offense of IDENTITY THEFT in that [defendant] within a 12-month period, knowingly possessed the personal identification information of 3 or more separate individuals with the intent to commit any felony, in violation of Illinois Compiled Statutes, Chapter 720, Section 5/16-30(a)(3)."

¶ 32 Count V consisted of the following language:

> "[B]etween on or about December 1, 2012 through March 8, 2013, at and within Cook County, [defendant] Committed the Offense of IDENTITY THEFT in that [defendant] within a 12-month period, knowingly possessed the personal identification information of 3 or more separate individuals knowing that such personal identification information was stolen or produced without lawful authority, in violation of Illinois Compiled Statutes, Chapter 720, Section 5/16-30(a)(4)."

¶ 33 We conclude that both of these counts are based on precisely the same physical act: possessing the personal identification information of three or more non-specified individuals between December 1, 2012, and March 8, 2013. We are mindful that the charges differ in that count IV alleged defendant possessed the information "with the intent to commit any felony," while count V alleged he possessed the information "knowing that such personal identification

information was stolen or produced without lawful authority." However, we cannot find that defendant's knowledge or intent constitutes either a physical act or an outward manifestation capable of supporting a different offense. See *People v. Moshier*, 312 Ill. App. 3d 879, 882 (2000) (rejecting argument that knowledge of wrongdoing as a public official qualified as an "act" for one-act, one-crime purposes). Moreover, while we agree with the State that, given the scores of victims involved in this case, defendant "could have been credibly charged and convicted of far more than just two counts of identity theft," defendant was not actually charged in such a way for this to happen. In light of the language used in the indictment here, we find that one of defendant's convictions for identity theft must be vacated.

¶ 34 In general, when convictions violate the one-act, one-crime rule, the conviction for the less serious offense must be vacated. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). When a reviewing court cannot determine which of two or more convictions is the more serious offense, the cause will be remanded to the trial court for that determination. *People v. Artis*, 232 Ill. 2d 156, 177 (2009). Here, both identity theft convictions were for the same offense, the statutory penalties were the same, and defendant received identical concurrent sentences. In these circumstances, we cannot determine which count is the less serious offense. Accordingly, we remand the matter to the trial court for that determination.

¶ 35 Next, relying on the holding of *People v. Kotero*, 2012 IL App (1st) 100951, defendant argues that his conviction for financial institution fraud (count III) must be vacated because it served as the predicate for the charge of continuing financial crimes enterprise (count II).

¶ 36 In *Kotero*, the defendant was convicted of five counts of theft and one count of official misconduct. *Id.* ¶ 1. The theft convictions arose from five separate occasions between August 4

and September 28, 2006, when the defendant, a parking enforcement officer for the Village of Oak Park, took cash from people in exchange for removing Denver boots from their cars, but never gave the money to the Village. *Id.* ¶¶ 3, 22 n.1. The official misconduct charge brought against the defendant alleged that "between July 21, 2006 and September 28, 2006," he knowingly performed "theft of money due to the Village of Oak Park." *Id.* ¶ 24. On appeal, the defendant contended that his convictions violated the one-act, one-crime rule. *Id.* ¶ 18.

¶ 37 This court found that the charge of official misconduct and the aggregated theft charges were based on the same physical act: stealing money over a two-month period. *Id.* ¶ 26. Therefore, we concluded that the convictions violated the one-act, one-crime doctrine. *Id.* Because official misconduct was a Class 3 felony and theft of government property, as charged in that case, was a Class 2 felony, we vacated the conviction for official misconduct, the less serious offense. *Id.* ¶ 27.

¶ 38 Here, count II charged defendant with the offense of continuing financial crimes enterprise, alleging that between December 1, 2012, and March 8, 2013, he:

> "[W]ithin an 18-month period, knowingly committed 3 or more separate offenses under the Illinois Criminal Code involving one or more financial institutions, to wit: between on or about the said dates, [defendant] knowingly committed 3 or more offenses of Financial Institution Fraud, in violation of Illinois Compiled Statutes, Chapter 720, Section 5/17-10.6(c)(1), in that [defendant] used under false pretenses the personal identification information of three or more individuals in executing a scheme to defraud one or more financial institutions, in violation of Illinois Compiled Statutes, Chapter 720, Section 5/17-10.6(h)."

¶ 39 Count III charged defendant with the offense of financial institution fraud, alleging that between December 1, 2012, and March 8, 2013, he:

> "[K]nowingly executed a scheme to defraud one or more financial institutions, by means of pretenses [defendant] knew to be false, the full value of which exceeded $10,000 but did not exceed $100,000, and in furtherance of the scheme [defendant] engaged in at least one of the following acts:
>
> > 1. [Defendant] re-encoded one or more credit cards through the use of a skimming device with the personal identification information, specifically, the credit card account number, of one or more individuals;
> >
> > 2. [Defendant] caused said re-encoded credit cards to be used to defraud one or more financial institutions under the false pretense that the re-encoded credit cards were being used by the actual owner of the credit card accounts[;]
>
> in violation of Illinois Compiled Statutes, Chapter 720, Section 5/17-10.6(c)(1)."

¶ 40 Defendant argues that because the offense of continuing financial crimes enterprise (count II) was predicated on the aggregate acts of financial institution fraud (count III), the charges consist of the same physical act and therefore, the one-act, one-crime rule is violated. The State maintains that the crimes were not based on the same act, as the financial institution fraud charge (count III) required the prosecution to prove only that defendant defrauded a financial institution of more than $10,000, while the continuing financial crimes enterprise charge (count II) required the prosecution to prove additional acts, *i.e.*, that defendant engaged in at least three separate financial crimes within an 18-month period.

¶ 41 There is no dispute that between December 1, 2012, and March 8, 2013, defendant committed multiple acts of re-encoding credit cards and causing those cards to be used to defraud one or more financial institutions. However, only a single charge of financial institution fraud was brought based on those multiple acts being committed during the stated time frame. The charge of continuing financial crimes enterprise was, in turn, based on an allegation that defendant committed financial institution fraud during that same span of time. Although the charge of continuing financial crimes enterprise references "an 18-month period," it only alleges that defendant committed this crime between December 1, 2012, and March 8, 2013. As this court explained in *Kotero*, the dates an alleged offense occurred are an essential part of a charging instrument (725 ILCS 5/111-3(a)(4) (West 2012)), and, as in *Kotero*, they define the "act" for which defendant was convicted. *Kotero*, 2012 IL App (1st) 100951, ¶ 26.

¶ 42 Here, the charges of financial institution fraud and continuing financial crimes enterprise were based on the same physical act, which was re-encoding credit cards and causing those cards to be used to defraud one or more financial institutions over the period of time between December 1, 2012, and March 8, 2013. The charges do not distinguish different "acts" by, for example, specifying names of different financial institutions or different individuals, or specifying different time periods. Had four or more identifiably separate banks, individuals, or dates been named in the indictment, no one-act, one-crime issue would arise. However, as charged, count II and count III are based on the same acts of financial institution fraud. Accordingly, we conclude that the convictions on these two counts violate the one-act, one-crime doctrine.

¶ 43 As noted above, when convictions violate the one-act, one-crime rule, the conviction for the less serious offense must be vacated. *Lee*, 213 Ill. 2d at 226-27. The offense of continuing financial crimes enterprise is a Class 1 felony (720 ILCS 5/17-10.6(j)(3) (West 2012)) and the offense of financial institution fraud, as charged here, is a Class 2 felony (720 ILCS 5/17-10.6(j)(1)(D) (West 2012)). Therefore, we vacate defendant's conviction for the less serious offense, financial institution fraud.

¶ 44 For the reasons explained above, we vacate defendant's conviction for financial institution fraud and one of defendant's convictions for identity theft. Defendant's remaining identity theft conviction and conviction for continuing financial crimes enterprise are affirmed. The cause is remanded for the circuit court to determine which count of identity theft must be vacated.

¶ 45 Affirmed in part, vacated in part, and remanded.