2018 IL App (1st) 152048-U

SIXTH DIVISION
SEPTEMBER 28, 2018

No. 1-15-2048

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. 14 CR 14843
	)	
ERIC TERRY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's constitutional challenges to his conviction for aggravated stalking, which was based in part on violation of subsection (a) of the general stalking statute, 720 ILCS 5/12-7.3(a) (West 2014), are without merit in light of our supreme court's decision in *People v. Relerford*, 2017 IL 121094. The defendant's convictions did not violate the one-act, one-crime rule, although we remand to the trial court so that it may specify which of the two aggravated stalking convictions should be merged. Finally, the defendant's challenges to the jury instructions are without merit.

¶ 2 A jury found the defendant-appellant guilty of two counts of aggravated stalking and one count of criminal damage to property. At sentencing, the trial court orally ruled that the two aggravated stalking convictions would merge, but the mittimus reflected convictions on all three

counts. For the following reasons, we remand the case to the trial court for a determination regarding which of the aggravated stalking convictions was more serious, then to merge the less serious count into the more serious count. The trial court shall also amend the mittimus accordingly. We otherwise affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The defendant was charged with six counts of aggravated stalking and three counts of criminal damage to property. The State proceeded to trial on a total of three counts, including two counts of aggravated stalking, counts 1 and 5. Count 1 alleged that the defendant, "in conjunction with committing stalking also violated an order of protection *** in that he knowingly engaged in a course of conduct directed at Yvonne Terry *** and he knew or should have known that this course of conduct would cause a reasonable person to fear for her safety ***." Count 5 alleged that the defendant, "in conjunction with committing stalking also violated an order of protection *** in that he knowingly and without lawful justification on at least two separate occasions followed or placed Yvonne Terry under surveillance *** and transmitted a threat of future bodily harm to Yvonne Terry ***."

¶ 5 The State also proceeded to trial on Count 8 for criminal damage to property, which charged that he "knowingly damaged the property of Michael Lee without his consent, to wit: the tires on his vehicle, and that damage to said property exceeded $300.00 ***."

¶ 6 At trial, Yvonne Terry (Yvonne) testified that she was married to the defendant in 2004. The defendant moved out of their residence in 2012, and their divorce was finalized in September 2013.

¶ 7 In April 2014, Yvonne received an order of protection against the defendant. A copy of the order was admitted into evidence. Yvonne subsequently installed a security system at her home, including a number of surveillance cameras.

¶ 8 On the evening of June 10, 2014, Yvonne was at her home with a friend, Ruth Singleton. At approximately 9:15 p.m., Yvonne heard "this sound that sounded like a pop" and looked outside but did not see anything. Approximately two hours later, as Singleton prepared to leave, she and Yvonne discovered that the driver's side tires on Singleton's car been slashed.

¶ 9 Yvonne reviewed surveillance footage from the evening of June 10, 2014, which showed a person approaching Singleton's vehicle. Although the person's face is not visible from the video, Yvonne testified that she recognized the person as the defendant because of the way he walked. The video footage was presented to the jury.

¶ 10 On July 9, 2014, just after midnight, Yvonne and a neighbor, James Lee (Lee), were sitting on the back porch at Yvonne's home, when suddenly a beer bottle "came flying [from] across the street." Yvonne and Lee looked at surveillance camera footage but could not determine the source of the bottle.

¶ 11 Later that evening, after Lee returned home, someone threw a brick through his window. A short time later, Yvonne drove to Lee's home. On the way there, she received a call on her cell phone from a number listed as "private." She did not answer the call, which went to her voicemail. She listened to the voicemail and recognized the defendant's voice. Yvonne saved the voicemail and provided it to police.

¶ 12 A recording of the voicemail was published to the jury. The speaker on the voicemail said words to the effect of "you know you did it, bitch," "you know you did this, or "you know you're dead, bitch." The speaker then states: "Wait till I catch your ass."

¶ 13 Yvonne additionally testified that on July 23, 2014, while she was out of town, she attempted to remotely check her surveillance camera through her phone, but she received a "video lost" message for one of the cameras. After she returned to her home, she discovered that a security camera had been "shattered." She subsequently reviewed video footage from that camera, in which she saw the defendant "coming up to the camera and smashing the camera with a hammer." That video footage was published to the jury.

¶ 14 Yvonne testified that the incident caused her to fear for her safety and that of her children. She acknowledged that the defendant has a twin brother, Derek, but testified that she can tell the defendant apart from his brother.

¶ 15 Following Yvonne's testimony, the State called Singleton, who testified about the June 10, 2014 incident at Yvonne's home, when she discovered that two of her tires were slashed. Singleton recalled that, with Yvonne, she reviewed surveillance camera footage that showed a person coming toward her vehicle.

¶ 16 Following Singleton, the State called Lee to testify. Lee stated that on July 8, 2004, he was talking with Yvonne on her porch, when a "bottle came from somewhere," and landed in front of Yvonne's home. After Lee returned to his home in the early morning hours of July 9, 2014, he heard a sound and discovered that a "brick [had] come through my window."

¶ 17 Lee further testified that on July 11, 2014, he parked his car across the street from his home. The next day, July 12, 2014, he discovered that his tires were slashed, and it cost $440 to replace them. Lee acknowledged that he did not see who threw the brick or who slashed his tires.

¶ 18 The State called Darryl Oliver, who testified that he is Lee's neighbor. Oliver testified that on the night of July 11, 2014, he observed a black male with a shaved head crouch down

near the rear passenger's side tire of Lee's car and then "scoot[] forward to the front passenger side of the car" before walking away. Oliver saw the man get into a "burgundy Monte Carlo" with "temporary plates," before he drove away.

¶ 19 Oliver testified that, about a week later, he was driving when he observed the same Monte Carlo vehicle as it drove past him. On July 30, 2014, the police showed him a photo array, from which he identified the defendant as the driver of the Monte Carlo. Oliver also identified the defendant in court.

¶ 20 The State also called Derek Terry (Derek), the defendant's twin brother. Derek testified that the defendant drove a burgundy Monte Carlo, but Derek denied that he ever drove that vehicle. Derek specifically denied that he ever slashed the tires on either Singleton's or Lee's vehicle. He also denied leaving a threatening voicemail, or smashing the security camera at Yvonne's home.

¶ 21 The jury also heard testimony from Luwanda Thomas, the defendant's ex-girlfriend, and from Luwanda's husband, Willie Whitehead. Thomas and Whitehead testified about a 2012 incident, in which they discovered that Thomas' tires were slashed after Whitehead saw the defendant near her car.

¶ 22 Officer Deronis Cooper, who assisted in arresting the defendant on July 29, 2014, also testified for the State. Officer Cooper said that, when the defendant was arrested, he said "[t]his must be about that bitch Yvonne Terry."

¶ 23 The defendant elected not to testify. The defense called Kimberly McInnis, the defendant's current girlfriend. McInnis testified that on the night of July 12, 2014, she and the defendant went to a party before returning to her house, where they remained until the next

morning. On cross-examination, she indicated that the party was on July 10, 2014. The defendant rested after McInnis' testimony.

¶ 24 Outside the presence of the jury, the court and counsel conducted a jury instruction conference. During the jury instruction conference, the State indicated that it requested "two different versions" of Illinois Pattern Instruction 11.92x (IPI 11.92x), to reflect the counts for aggravated stalking premised on a "course of conduct" (count 1) and "surveillance" (count 5).

¶ 25 Instruction no. 16 corresponded to count 5, aggravated stalking based on "surveillance" and transmission of a threat to Yvonne. That instruction, as written, instructed the jury that the State had to prove: "That the defendant on at least two separate occasions knowingly followed or placed Yvonne under surveillance" and "that the defendant at any time transmitted a threat of immediate or future bodily harm to Yvonne Terry." The State now acknowledges that instruction no. 16 differed from IPI 11.92x, in that it omitted the word "knowingly" before the phrase "transmitted a threat."

¶ 26 Instruction no. 17 corresponded to count 1, aggravated stalking based on a "course of conduct." It instructed the jury that the State must prove "That the defendant knowingly engaged in a course of conduct directed at Yvonne Terry" and "that the defendant knew or should have known that this course of conduct would cause Yvonne Terry to fear for her safety or suffer emotional distress." The defendant's counsel raised no objection to either instruction no. 16 or 17.

¶ 27 Separately, defense counsel objected to instruction no. 20, a non-IPI instruction which tracks the stalking statute's definition of the phrase "Transmits a threat." 720 ILCS 5/12-7.3 (c)(9) (West 2014). Identical to the statute, instruction no. 20 states: " 'Transmits a threat' means a verbal or written threat or a threat implied by a pattern of conduct or a combination of

verbal or written statements or conduct." Instruction no. 20 was given over defense counsel's objection.

¶ 28 The jury returned verdicts finding the defendant guilty on both counts of aggravated stalking (counts 1 and 5), as well as the offense of criminal damage to property (count 8). The defendant's motion for a new trial was denied.

¶ 29 During the sentencing hearing, the trial court orally indicated that the two counts of aggravated stalking (counts 1 and 5) would merge into a single four-year sentence, to run concurrent with a three-year sentence on the criminal damage to property count (count 8):

> "THE COURT: *** let me indicate that the counts will merge in this case. So I will issue a single sentence for the count he was convicted of by the jury, which were aggravated stalking, a violation of a civil order of protection, aggravated on two counts, then also criminal damage to property.
>
> For those two offenses, you will be sentenced to a concurrent term of four years in the Illinois Department of Corrections. The criminal damage to property which is a class what?
>
> [State's Attorney]: Class 4.
>
> THE COURT: Class 4, it will be three years IDOC, that's to run concurrent."

Despite the court's verbal statement regarding merger of the aggravated stalking counts, the mittimus entered by the clerk of the circuit court reflects two separate convictions on counts 1

and 5, with concurrent sentences of four years on those counts, in addition to a concurrent three-year sentence on count 8.

¶ 30 Immediately after the court announced its sentence, the defendant's counsel orally moved to reduce the sentence, which motion was denied. On the same date, the defendant filed a notice of appeal. Accordingly, we have jurisdiction. Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014).

¶ 31 ANALYSIS

¶ 32 On appeal, the defendant raises three separate lines of argument. First, he argues that the provision of the general stalking statute underlying his conviction on count 1, describing stalking premised on a "course of conduct," was unconstitutional on due process and first amendment grounds. Second, he contends that his convictions under counts 1 and 8 should be vacated under the one-act, one-crime doctrine, as they are "based on the same acts" as count 5. Finally, he contends that his conviction on count 5 must be reversed, as he claims that jury instructions no. 16 and 20 were erroneous.

¶ 33 We first address the defendant's constitutional challenges to the aggravated stalking count in count 1. Count 1 was premised on the aggravating factor of the defendant's violation of an order of protection, combined with an underlying violation of subsection (a) of the general stalking statute, which provides:

> "(a) A person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to:
>
> (1) fear for his or her safety or the safety of a third person; or

(2) suffer other emotional distress." 720 ILCS 5/12-7.3(a) (West 2014).

The stalking statute defines "course of conduct" to mean "2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet." 720 ILCS 5/12-7.3(c)(1) (West 2014).

¶ 34 The defendant first argues that, as a matter of due process, subsection (a) is invalid, because it does not specify a sufficiently culpable mental state to impose criminal liability. His argument turns on the statutory language that a person commits stalking when he or she "*knows or should know that*" his or her "course of conduct would cause a reasonable person" to fear for his or her safety, or suffer emotional distress. (Emphasis added.) 720 ILCS 5/12-7.3(a)(1),(2) (West 2014). He claims that this provision is unconstitutional on its face because it "allows a felony conviction for the mere negligent infliction of emotional distress." He argues that the statute improperly penalizes nearly any conduct that one "knows or should know" could cause emotional distress. He urges that we should find that subsection (a) is invalid because it "criminalizes innocent conduct," and thus that we should vacate his conviction under count 1.

¶ 35 The defendant's due process challenge to subsection (a) of the stalking statute relies heavily on the United States Supreme Court's decision in *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015), as that decision was interpreted by our court in *People v. Relerford*, 2016 IL App (1st) 132531. In *Elonis*, the United States Supreme Court discussed a federal statute, 18 U.S.C. § 875(c), which criminalized the transmission in interstate commerce of "any communication containing any threat *** to injure the person of another," but did not specify a

mental state requirement. The decision in *Elonis* observed that federal courts "have long been reluctant to infer that a negligence standard was intended in criminal statutes." (Internal quotation marks omitted.) 135 S. Ct. at 2011. "Because the federal statute at issue in *Elonis* *** did not specify a required mental state, the [United States Supreme] Court inferred that the government must prove the defendant either intended to issue threats or knew that his communications would be viewed as threats. [Citation.] However, the [United States Supreme] Court also acknowledged that, if Congress had intended to criminalize reckless or negligent conduct, it could have done so specifically. [Citation.]" *People v. Relerford*, 2017 IL 121094, ¶ 20.

¶ 36 In a 2016 decision, this court relied on *Elonis* to find that portions of the stalking statute were unconstitutional. *Relerford*, 2016 IL App (1st) 132531. The defendant in *Relerford* was convicted under subsections (a)(1) and (a)(2) of the general stalking statute, for engaging in a "course of conduct" that he "knows or should know" would cause a reasonable person to "fear for his or her safety" or "suffer other emotional distress." 720 ILCS 5/12-7.3(a)(1), (2)) (West 2012). The *Relerford* defendant was also convicted under similarly-worded provisions of the cyberstalking statute. 720 ILCS 5/12-7.5(a)(1), (2) (West 2012) (providing that cyberstalking is committed when a person engages "in a course of conduct using electronic communication directed at a specific person" and "knows or should know" that it would cause fear for safety or emotional distress).

¶ 37 The *Relerford* defendant claimed that these statutes violated the due process clause because they "d[id] not contain a *mens rea* requirement." 2016 IL App (1st) 132531, ¶ 16. Our court agreed, relying on our reading of *Elonis.* We reasoned that: "In *Elonis*, the [United States Supreme] Court held that due process precluded the government from convicting a defendant

under a federal stalking statute because the defendant's conviction 'was premised solely on how his posts would be understood by a reasonable person.' " *Id.* ¶ 22 (quoting *Elonis*, 135 S. Ct. at 2011). We found that *Elonis* had "explained that imposing criminal liability using a 'reasonable person' standard was incompatible with due process requirements." *Id.* ¶ 24. Based on that interpretation of *Elonis*, our court in *Relerford* concluded that subsections (a)(1) and (a)(2) of the general stalking statute were facially unconstitutional because they did not "contain a mental state requirement" but merely required that the defendant "knows or should know" that his course of conduct would instill fear or emotional distress. *Id.* ¶¶ 26-31. On that basis, our court vacated each of the *Relerford* defendant's convictions. *Id.* ¶ 35.

¶ 38 Significantly, however, since the defendant filed his opening brief in this appeal, our supreme court reviewed this court's decision in *Relerford*, and explicitly rejected our initial reading of *Elonis*. 2017 IL 121094. Our supreme court explained: "*Elonis* was not a due process case, and the [United States] Supreme Court did not engage in any due process analysis. Rather, *Elonis* merely decided a question of statutory interpretation and determined that, where the subject criminal statute was silent as to *mens rea*, a mental state of intent or knowledge would suffice." *Id.* ¶ 21.

¶ 39 Our supreme court in *Relerford* specifically rejected our court's earlier conclusion that the relevant stalking provisions were invalid on due process grounds:

> "[T]he appellate court's conclusion that due process does not permit criminal liability based on negligent conduct is unfounded. Indeed, *Elonis* acknowledged that criminal negligence has been recognized as a valid basis for imposing criminal liability. [Citations.] Also, the Criminal Code of 2012 includes both

> recklessness and negligence as permissible mental states ***. [Citation.] Contrary to the views expressed by the appellate court, substantive due process does not categorically rule out negligence as a permissible mental state for imposition of criminal liability, and *Elonis* does not suggest such a categorical rule. Therefore, we reject the appellate court's reasoning and its determination that *Elonis* mandates invalidation of the statutory provisions at issue here." *Id.* ¶ 22.

Nevertheless, the supreme court in *Relerford* proceeded to affirm the judgment of our court, after concluding that the convictions were based on statutory provisions that otherwise violated the first amendment. See *id.* ¶ 78 (striking the phrase "communicates to or about" from subsection (a) of the stalking and cyberstalking statutes and vacating the defendant's convictions).

¶ 40 The defendant's reply brief recognizes our supreme court's decision in *Relerford*, but maintains his due process challenge. He argues that our supreme court did not hold that the stalking statute "complied with due process, it simply rejected one court's reasoning why it might not." We disagree, as we find that our supreme court's statements in *Relerford* are clearly dispositive. Our supreme court in *Relerford* emphasized that "substantive due process does not categorically rule out negligence as a permissible mental state" for criminal liability, *id.* ¶ 22, and thus specifically rejected a nearly identical due process challenge to the same statutory language—the phrase "knows or should know"— that the defendant challenges in this appeal. Thus, his due process challenge fails.

¶ 41 We turn to the defendant's second constitutional challenge to his count 1 conviction, which is premised on the first amendment. In particular, he focuses on the stalking statute's

definition of "course of conduct" to mean "2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, *** *communicates to or about*, a person." (Emphasis added.) 720 ILCS 5/12-7.3(c)(1) (West 2014). He posits that, when construed with subsection (a), this language allows a criminal conviction whenever a person "communicates to or about a person," and knows or should know that it would cause a reasonable person emotional distress. He argues that this amounts to "an overbroad prohibition on speech" that "ensnares much routine communications." Because the statutory definition of "course of conduct" is unconstitutionally overbroad, he argues that his conviction for aggravated stalking predicated on a "course of conduct" under subsection (a) of the general stalking statute is likewise unconstitutional. On this basis, he requests that we vacate his conviction for count 1.

¶ 42 Again, our supreme court's decision in *Relerford*, 2017 IL 121094, is dispositive, as it discussed a first amendment challenge including the same statutory language that is the basis of the defendant's first amendment argument in this case. Our supreme court in *Relerford* recognized that, as drafted, "subsection (a) of the stalking statute defines the offense *** to include a course of conduct evidenced by two or more nonconsensual communications to or about a person that the defendant knows or should know would cause a reasonable person to suffer emotional distress. [Citations.]" *Id.* ¶ 52. Our supreme court recognized that the statute "embrace[d] a vast array of circumstances that limit speech far beyond the generally understood meaning of stalking" and "criminalizes any number of commonplace situations in which an individual engages in expressive activity ***. The broad sweep of subsection (a) reaches a host of social interactions that a person would find distressing but are clearly understood to fall within the protection of the first amendment." *Id.*

¶ 43 Our supreme court in *Relerford* proceeded to hold that subsection (a) of the stalking statute was "overbroad on its face" and "that the portion of subsection (a) *** that makes it criminal to negligently 'communicate[] to or about' a person, where the speaker knows or should know the communication would cause a reasonable person to suffer emotional distress, is facially unconstitutional." *Id.* ¶ 63.

¶ 44 However, our supreme court did not strike down the stalking statute in its entirety, but merely struck the specific "communicates to or about" phrase that rendered it overbroad. Our supreme court reasoned: "Public Act 96-686, which added the language 'communicates to or about' a person to the definition of stalking and cyberstalking, specifically states that its provisions are severable ***. [Citation.] Therefore, the phrase 'communicates to or about' must be stricken from subsection (a) in each statute." *Id.* ¶ 65. Thus, our supreme court made clear that the remainder of the statutory definition of "course of conduct" remained intact.

¶ 45 After striking that language, the supreme court proceeded to examine whether the defendant's convictions could otherwise "be sustained based on other conduct prohibited by the stalking and cyberstalking statutes." *Id.* In doing so, the court found that the convictions could not be premised upon *non-threatening* communications, but, significantly, indicated that *threats* could still form part of the requisite "course of conduct." See *id.* ¶ 66 ("Under counts I and II, defendant was charged with calling and e-mailing [the victim]. However, because there is no evidence that any of the calls or e-mails were threatening, they cannot be considered as part of a course of conduct"); *id.* ¶ 69 (finding that convictions for counts III and IV, which were predicated "exclusively on communications about [the victim] in the Facebook posts" could not be sustained because "they cannot be characterized as conveying a threat against [the victim]").

¶ 46 Applying *Relerford*'s first amendment holding to the facts of the instant case, we do not find that it undermines the basis for the defendant's conviction under count 1. That is, even without the "communicates to or about" phrase struck by *Relerford* on first amendment grounds, the defendant's alleged actions in this case otherwise constituted activity within the remaining "course of conduct" definition. Our supreme court made clear that *threatening* communications may still serve as part of the predicate "course of conduct." *Id.* ¶¶ 66, 69. In this case, count 1 alleged that the defendant's course of conduct was based on his acts of "communicat[ing] a threat" to Yvonne, surveilling her residence, damaging property, and other actions, rather than mere communications to or about Yvonne. At trial, the State did not attempt to argue that count 1 was premised on any non-threatening communication. In other words, none of the defendant's conduct that formed the basis of the "course of conduct" supporting count 1 was impacted by *Relerford*'s removal of the phrase "communicates to or about" from the statutory definition. Thus, the defendant's conviction on count 1 is not affected by his first amendment argument, which is governed by *Relerford*. Thus, we reject the defendant's attempt to vacate his count 1 conviction on this basis.

¶ 47 We turn to the defendant's arguments under the one-act, one-crime rule. He argues that we should vacate one of the aggravated stalking counts, as well as the criminal damage to property count. First, he contends that the aggravated stalking counts (counts 1 and 5) cannot both be sustained, because they "share the same suite of predicate acts" and were both based on the same aggravating factor—the violation of an order of protection. Of those two counts, he asserts that count 1 should be vacated, because it is the less serious offense. On that point, he urges that stalking based upon surveillance and transmission of a threat, under subsection (a-3) of the general stalking statute, "has a more culpable mental state" than a stalking offense due to a

"course of conduct" under subsection (a). Separately, he asserts that the one-act, one-crime rule also warrants vacating his conviction for criminal damage to property (count 8), because the act of slashing Lee's tires "was one of the predicate acts of aggravated stalking under both Counts 1 and 5."

¶ 48 The State responds that "no one-act, one-crime analysis is required" with respect to the two aggravated stalking convictions, because the trial court explicitly stated on the record that it was merging those two convictions. The State does not suggest which of the two aggravated stalking convictions should be merged, but suggests we remand the case for the trial court to determine which conviction should be vacated. The State otherwise argues that the criminal damage to property conviction under count 8 is not a violation of the one-act, one-crime rule.

¶ 49 The one-act, one-crime doctrine has been articulated as follows:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. *** [W]hen more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *People v.*

Artis, 232 Ill. 2d 156, 161 (2009) (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)).

¶ 50 Whether there has been a violation of the one-act, one-crime doctrine is a "question of law, which we review *de novo*." *People v. Coats*, 2018 IL 121926, ¶ 12. "To determine whether a violation of the one-act, one-crime doctrine has occurred, the court performs a two-step analysis. [Citation.] First, the court determines whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper where they are based on precisely the same act. [Citation.] Second, if the conduct involved multiple acts, then the court must determine if any of the offenses are lesser-included offenses. If so, multiple convictions are improper. [Citation.]" *People v. Span*, 2011 IL App (1st) 083037, ¶ 83. However, "[i]f none of the offenses are lesser-included offenses, then multiple convictions are proper." *Coats*, 2018 IL 121926, ¶ 12.

¶ 51 The "abstract elements approach" is used to determine if an offense is a lesser-included offense of another. *People v. Miller*, 238 Ill. 2d 161, 173-75 (2010). Under that approach, "a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. [Citation.]" *Id.* at 166. "In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense. [Citations.]" *Id.*

¶ 52 If multiple convictions are barred by operation of the one-act, one crime-rule, the defendant "should be sentenced on the most serious offense and the less serious offense should be vacated. [Citation.] *** If the punishments are identical, we are instructed to consider which offense has the more culpable mental state. [Citation.]" *In re Samantha V.*, 234 Ill. 2d 359, 379

(2009). If the reviewing court cannot determine "which is the more serious offense," it may "remand the matter to the trial court for that determination." *Id.* at 379-80.

¶ 53 We first address the defendant's one-act, one-crime argument concerning the two aggravated stalking counts, counts 1 and 5. Notably, as the State points out, the trial court's comments at sentencing indicated its intent that these two counts would merge into a single aggravated stalking conviction. "When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls. [Citations.]" *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87. Thus, although the mittimus reflects convictions and concurrent sentences on *both* aggravated stalking counts, the oral ruling—reflecting merger into a single conviction—controls. The mittimus should be corrected accordingly, to reflect a single aggravated stalking conviction. In light of the merger, we agree with the State that there is no need for our court to engage in a separate "one-act, one-crime" analysis with respect to the aggravated stalking counts.

¶ 54 However, our conclusion leads to a secondary question, that is, which of the two aggravated stalking convictions should be merged, and which should be maintained. Notably, the trial court's oral ruling did not indicate which of the counts would merge into the other.

¶ 55 It is not apparent which of the two aggravated stalking counts was more serious. As the State point outs, either count of aggravated stalking was a Class 3 felony. 720 ILCS 5/12-7.4(b) (West 2014). Further, both counts were premised on the same aggravating factor – violation of Yvonne's order of protection. In addition, both counts were premised on violations of the general stalking statute that require the defendant to act "knowingly." That is, count 1 was premised on a violation of subsection (a), which requires that the defendant "knowingly engages in a course of conduct directed at a specific person ***." 720 ILCS 5/12-7.3(a) (West 2014).

Count 5 was based upon a violation of subsection (a-3), which occurs when a person "knowingly and without lawful justification, on at least 2 separate occasions follows another person or places the person under surveillance ***." 720 ILCS 5/12-7.3(a-3) (West 2014).

¶ 56 We agree with the State that the trial court is in the best position to determine which count in this case is the more serious offense, and which offense will be merged into the other. See *Samantha V.*, 234 Ill. 2d at 379-80. Thus, we remand the matter to the trial court for a determination of which of the aggravated stalking counts will be merged and which conviction will be maintained. The court shall then correct the mittimus accordingly.

¶ 57 We turn to the defendant's additional claim under the one-act, one-crime rule. He urges that his conviction for criminal damage to property, count 8, be vacated because it was based on the act of slashing Lee's tires, which was also "alleged and argued as a predicate act" for both aggravated stalking counts. Essentially, the defendant suggests that, because there was a common act used to support multiple counts, multiple convictions cannot be sustained.

¶ 58 The defendant's interpretation of the one-act, one-crime rule is against the weight of authority. It is true that a defendant "may not be convicted of multiple offenses when those offenses *are all based on precisely the same physical act.*" (Emphasis added.) *People v. Curtis*, 354 Ill. App. 3d 312, 328 (citing *King*, 66 Ill. 2d at 566). However, governing precedent makes clear that a *common* act (in conjunction with other acts), can be offered as support for multiple offenses where "defendant committed multiple acts, despite the interrelationship of those acts." *People v. Rodriguez*, 169 Ill. 2d 183, 188-89 (1996) (affirming convictions for aggravated criminal sexual assault and home invasion despite the fact that they "shared the common act" of defendant threatening the victim with a gun). Indeed, our supreme court recently reiterated that "a person can be guilty of two offenses when a common act is part of both offenses" or "part of

one offense and the only act of the other offense." (Internal quotation marks omitted.) *Coats*, 2018 IL 121926, ¶ 15. That decision addressed a defendant's claim that "his convictions for both armed violence and [being an] armed habitual criminal violated the one-act, one-crime rule because they were predicated on the same physical act of gun possession." *Id.* ¶ 6. Our supreme court reasoned:

> "Although the two offenses shared the common act of possession of the handgun, which served as a basis for both convictions, defendant's armed violence conviction involved a separate act, possessing the drugs. That act was applicable only to the armed violence offense. Since the possession of the handgun was only part of the conduct which formed the basis for the separate armed violence conviction, the two offenses were not carved from precisely the same physical act." *Id.* ¶ 17.

Coats thus illustrates that the use of a single common act may support multiple offenses.

¶ 59 On this point, we note that we reject the defendant's reliance on *People v. Sucic*, 401 Ill. App. 3d 492 (2010), which vacated a conviction for harassment through electronic communication where the single e-mail used to support that offense was also one of two threatening e-mails offered to prove a separate offense. The *Sucic* decision reasoned: "There is no separate act in this case. In one instance the [first] e-mail *** is combined with a second e-mail to constitute cyberstalking, and in the other it is the same [first] e-mail *** to create a separate offense of harassment through electronic communication. We hold that the one-act, one-crime rule applies to these convictions." *Sucic*, 401 Ill. App. 3d at 507. We find that *Sucic*'s

reasoning is flawed, to the extent it conflicts with our supreme court's ruling that a single *common* act may support multiple offenses.

¶ 60 With this principle in mind, the applicable two-step analysis makes clear that the criminal damage to property conviction in count 8, combined with either of the aggravated stalking counts, does *not* create a violation of the one-act, one-crime rule. With respect to the first inquiry—whether the defendant's conduct involved multiple acts or a single act—it is clear that the offenses encompassed multiple acts. That is, while count 8 was based on the single act of slashing Lee's tires, additional acts were required to sustain either of the aggravated stalking convictions. Thus, it cannot be said that the defendant's convictions were based on precisely the same act.

¶ 61 Having determined that there were multiple acts, the second part of the inquiry is whether "any of the offenses are lesser-included offenses." *Span*, 2011 IL App (1st) 083037, ¶ 83. In turn, we consider whether "all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense." *Miller*, 238 Ill. 2d at 166. In order to find a lesser-included offense, "it must be impossible to commit the greater offense without necessarily committing the lesser offense. [Citations.]" *Id.*

¶ 62 To convict the defendant under count 8, the State was required to prove the elements that the defendant "knowingly damaged" Lee's property, and that the damage exceeded $300. 720 ILCS 5/21-1(a)(1), (b), (d)(F) (West 2014). Clearly, property damage is *not* a required element of aggravated stalking. With respect to count 1, we recognize that damaging a person's property is one of several enumerated acts that can form a "course of conduct," as that term is defined by the stalking statute. 720 ILCS 5/12-7.3(c)(1) (West 2014). However, a person need not damage another's property in order to engage in a "course of conduct" under the stalking statute. In

other words, it is certainly possible to engage in a "course of conduct" without damaging property. Similarly, the State did not need to establish a property damage element with respect to count 5. Moreover, count 8 had an additional element, which is property damage amounting to at least $300.

¶ 63 As it is possible to commit aggravated stalking without criminal damage to property, count 8 was not a lesser-included offense. Accordingly, we reject the defendant's one-act, one-crime challenge to count 8, and we affirm his conviction on that count.

¶ 64 We turn to the defendant's two claims of error regarding the jury instructions. Both of his arguments pertain to count 5, under which the State was required to prove, *inter alia*, that the defendant "knowingly *** on at least 2 separate occasions follow[ed]" Yvonne or "placed [her] under surveillance or any combination thereof" and that he "transmit[ted] a threat." 720 ILCS 5/12-7.3(a-3)(1) (West 2014). He argues that two separate instructions "allowed for conviction under unconstitutional theories of guilt," requiring reversal of his conviction for count 5.

¶ 65 His first claim is premised upon the omission of the word "knowingly" from instruction no. 16, which was premised on IPI 11.92x. Thus, he claims that the instruction impermissibly permitted the jury to convict without finding any mental state with respect to the threat.

¶ 66 The State concedes that the written jury instruction omitted the word "knowingly" from the IPI instruction, claiming that the omission was accidental. However, the State points out that defendant's counsel did not object to that instruction. Thus, the State argues that this claim is forfeited and subject to plain error review. In turn, the State urges that the omission was not plain error, as "the record shows that the jury would have come to the same verdict even absent the omission of the word knowingly" from the instruction.

¶ 67 "Generally, a defendant forfeits review of any supposed jury instruction error if he does not object to the instruction or offer an alternative at trial and does not raise the issue in a posttrial motion." *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). It is undisputed that defense counsel failed to object to the submission of the instruction without the word "knowingly," and so the claim is forfeited.

¶ 68 We note that the defendant's reply brief argues that forfeiture should not apply, as defense counsel's "failure to object was the product of the State's violation of Illinois Supreme Court Rules" in that it "mislabeled the non-pattern instruction as a pattern instruction" and thus "subverted the court's ability to exercise its discretion as to whether the instruction should be given." We disagree, as we perceive no attempt by the State to "subvert" or "mislabel" the instruction at issue in an effort to mislead defense counsel. Rather, it appears to have been an inadvertent omission of a single word from the IPI instruction.

¶ 69 "[A]n omitted jury instruction constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Hopp*, 209 Ill. 2d 1, 12 (2004). Under the record, we do not perceive any serious risk that the jurors incorrectly convicted the defendant of count 5, due to the omission of the word "knowingly" from the instruction. First, as the State notes, at other points the jury was properly instructed about the requisite mental state. The jury was given IPI 11.87x, which defined the offense of stalking to include when a person "knowingly transmit a threat *** of immediate or future bodily harm." Further, the transcript reflects that the trial court's oral instructions reiterated the "knowing" mental state with respect to count 5. The court instructed the jury: "A person commits the offense of stalking when he knowingly on at least two separate occasions follows another person

or places another person under surveillance and at the time *knowingly transmits a threat to that person* ***."

¶ 70 Moreover, in light of the overwhelming evidence of the defendant's numerous acts, including the threatening voicemail, we cannot discern any realistic probability that the jury would have acquitted him of count 5, if only the word "knowingly" had been included in the written instruction. Indeed, as the State points out, the content of the voicemail, in which he called Yvonne a "bitch" and stated he would "catch" her, left little room for doubt as to the speaker's knowledge that it communicated a threat. It is difficult to imagine a scenario in which the jury could have possibly believed that the speaker lacked knowledge or intent to transmit a threat. Further, apart from the voicemail, the State introduced ample evidence tending to show a series of intentional acts by the defendant to harass his ex-wife, even after she obtained an order of protection against him.

¶ 71 In light of all the evidence, we cannot conclude that the omission created a "serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law." *Hopp*, 209 Ill. 2d at 12. In turn, we do not find that the omission was plain error. Thus, we reject the defendant's first claim of error regarding the jury instructions for count 5.

¶ 72 We turn to the defendant's second and final argument related to the jury instructions. That argument attacks the propriety of instruction no. 20, which told the jury that: " 'Transmits a threat' means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements or conduct." The defendant acknowledges that this instruction tracked the statutory definition of "transmits a threat" in subsection (c)(9) of the general stalking statute. 720 ILCS 5/12-7.3(c)(9) (West 2014). However, the defendant argues

that this "statutory definition contradicts First Amendment precedent" because it permitted a conviction "for communicating a threat that was less than a true threat."

¶ 73 Specifically, he claims that the first amendment "requires that a threat be express" in order to be punishable, but that subsection (c)(9) "authorizes a conviction if it is implied." He also argues that the statutory definition fails to reflect that an actionable threat under the first amendment must "express intent that the speaker is to act unlawfully." He claims that the corresponding jury instruction violates the first amendment, as it suggests that a threat could be "implied" rather than require specific intent to threaten an act of violence. On this basis, he claims that he is entitled to a new trial. He further urges that we should "find that the definition of a threat in subsection (c)(9) of the [general stalking] statute to be unconstitutional on its face."

¶ 74 We first note that, in contrast to the defendant's claim regarding instruction no. 16, defense counsel at trial objected to instruction no. 20, and preserved that claim in his motion for new trial.

¶ 75 The defendant essentially contends that the jury instruction is improper, because it incorporates a statutory definition that is unconstitutional under the first amendment. "In general, statutes are presumed constitutional, and the party challenging the constitutionality of a statute carries the burden of proving that the statute is unconstitutional. [Citation.] The primary objective in construing a statute is to ascertain and give effect to the legislature's intent in enacting the statute. [Citation.] This court has a duty to construe the statute in a manner that upholds the statute's validity and constitutionality if reasonably possible. [Citation.] The determination of whether a statute is constitutional is a question of law to be reviewed *de novo*." *Relerford*, 2017 IL 121094, ¶ 30.

¶ 76 "[C]ertain 'historic and traditional' categories of expression do not fall within the protections of the first amendment, and content-based restrictions with regard to those recognized categories of speech have been upheld. [Citations.] Those accepted categories of unprotected speech include true threats [citation] and speech integral to criminal conduct [citation]." *Id.* ¶ 33. The United States Supreme Court has explained the nature of a "true threat" as follows:

> " 'True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." (Internal quotation marks omitted.) *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

¶ 77 In *Black*, the United States Supreme Court agreed that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." *Id.* at 363. However, the same decision proceeded to

strike down a statutory provision stating that cross-burning "shall be prima facie evidence of an intent to intimidate." *Id*. at 365-67.

¶ 78 The defendant's argument suggests that the statutory definition underlying instruction no. 20 permits a conviction for something less than a "true threat." We disagree. First, as the State points out, the defendant's argument relies on the incorrect premise that instruction no. 20 sought to define what constitutes a "threat." That is not accurate. Neither instruction no. 20, nor the statute upon which it is based, purports to define a "threat." Rather, the statute defines how a threat may be *transmitted.* 720 ILCS 5/12-7.3(c)(9) (West 2014) (" '[To] transmit[] a threat' means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements or conduct."). The stalking statute does not define the term "threat," and neither did the jury instructions in this case.

¶ 79 We also reject the defendant's suggestion that the word "implied" renders the statutory definition incompatible with First Amendment precedent. The defendant asserts that the statute's recognition that a threat can be "implied" necessarily conflicts with *Black*'s statement that " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359. Certainly, a person who "means to communicate" a threat can do so by engaging in conduct that "implies" a threat.

¶ 80 For the foregoing reasons, we find that there is no conflict between the statutory definition of "transmits a threat" within subsection (c)(9) and any First Amendment precedent. Accordingly, we reject the defendant's challenge to the propriety of instruction no. 20.

¶ 81 Under the record before us, the State presented overwhelming evidence that the defendant engaged in repeated, intentional acts to harass Yvonne, including a threatening

voicemail. Those acts easily met the underlying statutory criteria for either count of aggravated stalking.

¶ 82 For the foregoing reasons, we remand this case to the circuit court of Cook County to determine which of the two aggravated stalking counts (counts 1 and 5) was the more serious offense. The court shall then merge the lesser offense into the more serious offense. Further, the court shall correct the mittimus to reflect a single conviction for aggravated stalking. We otherwise affirm the defendant's conviction on count 8 for criminal damage to property.

¶ 83 Affirmed and remanded with directions.