2019 IL App (1st) 160930-U

No. 1-16-0930

Order filed February 28, 2019

Fourth Division

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. 15 CR 14743
	)	
ZACKERY REED,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride concurred in the judgment.
Justice Gordon specially concurred.

ORDER

¶ 1 *Held*: Defendant's convictions are affirmed over his challenge to the victim's identification testimony. Pursuant to the one-act, one-crime rule, defendant's sentence for unlawful restraint is vacated.

¶ 2 Following a bench trial, defendant Zackery Reed was found guilty of robbery (720 ILCS 5/18-1(a) (West 2016)), unlawful restraint (720 ILCS 5/10-3 (West 2016)), and aggravated battery (720 ILCS 5/12-3.05(c) (West 2016)). At sentencing, the court imposed concurrent terms

of 66 months for robbery and 36 months for unlawful restraint. The court did not impose a sentence for aggravated battery. On appeal, defendant challenges the sufficiency of the evidence, arguing that his convictions should be reversed because they depended on the victim's "dubious" identification testimony. In the alternative, 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 unlawful restraint. The State concedes that the sentence for unlawful restraint must be vacated, but asserts that the case should be remanded for the court to impose a sentence for aggravated battery.

¶ 3 For the reasons that follow, we affirm defendant's conviction for robbery, vacate his sentence for unlawful restraint, but we do not have jurisdiction over the unsentenced counts of aggravated battery. Therefore, we cannot grant the State's request to remand this case to the trial court for sentencing on the aggravated battery counts.

¶ 4 Defendant's convictions arose from an August 30, 2015, group beating and robbery of Rupert Earnest in Chicago. Defendant and two codefendants, Dimitri Hampton and Robert McCamury, were charged with one count of armed robbery (count 1), one count of aggravated unlawful restraint (count 2), and two counts of aggravated battery (counts 3 and 4). Neither codefendant is party to this appeal.

¶ 5 At trial, Rupert Earnest acknowledged that he had been diagnosed with and was taking medication for bipolar disorder, schizophrenia, and major depression, but stated that neither his conditions nor his medications affected his ability to recall events or caused him to hallucinate. He testified that about 11:30 p.m. on the day in question, he was leaving a gas station and walking toward a fast food restaurant when he was surrounded by a group of 15 to 20 black men

that included defendant, Hampton, and McCamury, each of whom he identified in court. Earnest explained that he knew defendant, Hampton, and McCamury because he used to buy marijuana from them.

¶ 6 Earnest testified that McCamury "kicked up," said, "Get that n***, kill that n***," and took two phones and $150 from his pocket. Earnest ducked punches thrown by the crowd until he fell to the ground. Hampton started hitting and stomping Earnest, and defendant started hitting Earnest as well. Earnest testified that all 15 or 20 men stomped on him, that one man hit him with a golf club with a nail in it, and that defendant tried to hit him with a brick and a liquor bottle, but he ducked those particular blows. At one point, Earnest ducked a blow from another man that then hit defendant in the eye. When a passing bicyclist called the police, the group scattered. Earnest was thereafter taken to the hospital.

¶ 7 The next morning, after leaving the hospital, Earnest was walking near the same gas station when he saw McCamury. Earnest rushed to the police station. The police drove him back to the gas station, where they thereafter arrested McCamury, Hampton, and defendant. Earnest noted that defendant had a black eye. The police recovered one of Earnest's phones, which he recognized by the phone numbers stored in it.

¶ 8 On cross-examination, Earnest acknowledged that his only injuries were a cut on his head and multiple bruises. He agreed that when the police drove him back to the gas station, he pointed out four men: defendant, McCamury, Hampton, and the man who had wielded the golf club. He also acknowledged giving a statement to a detective and an Assistant State's Attorney later that day, which he signed. However, when defense counsel asked about the indication in the statement that Earnest himself had punched defendant in the eye, Earnest stated that the detective

and Assistant State's Attorney "had a misunderstanding," and insisted he never hit defendant. With regard to his initial identification of his assailants, Earnest explained that when the police came to the scene, he told them he could not remember all the men who beat him, since "of course you ain't gone [sic] remember nothing when you get stomped down." Earnest admitted that he did not identify anyone in particular that night, but rather, it "came back to me the next day when I seen them."

¶ 9 On cross-examination by codefendants' attorneys, which was adopted by defendant, Earnest explained that although he had purchased marijuana from his assailants in the past, he did not know their names. He stated that on the night of the beating, he told the police one of the men was bald and wearing a brown hoodie and blue jeans. Earnest further explained that he was already being beaten when that man, McCamury, took his phones and money; that Hampton attempted to hit him with a bottle; and that defendant attempted to hit him with a brick. He agreed that once Earnest hit the ground, Earnest "cover[ed] my face up." Earnest acknowledged that when he first spoke with the police, he told them he could not remember which person took which action, but stated that when Earnest got out of the hospital, it "came back to [his] attention." When confronted with his own written statement that Earnest did not see who threw the bottle and the brick, Earnest denied ever saying that to the detective and Assistant State's Attorney and attributed the statement to another misunderstanding.

¶ 10 Chicago police officer C. Hunter testified that between 8 and 9 a.m. on August 31, 2015, Earnest came to the front desk of the police station and spoke with an officer. Hunter and his partner then drove Earnest to a gas station, where Earnest pointed out a group of about five men as people who had robbed him. Among the men were defendant, McCamury, and Hampton, each

of whom Earnest identified as "one of them." Hunter and his partner radioed for assistance, got out of their squad car, and approached the group on foot. As they did so, the men started walking away. Hunter and his partner apprehended McCamury and a man named Lawrence Norwood, while other responding officers apprehended Hampton. Defendant "took off" down an alley, but was ultimately brought back to the scene by other officers. Earnest thereafter identified McCamury as having taken his phones and money, Hampton as having punched and stomped him, and defendant as having swung at him. Earnest also told the police that he hit defendant in the eye. On cross-examination, Hunter agreed that Earnest reported Norwood had struck him with a golf club. Hunter acknowledged that eventually, Norwood "alibied out."

¶ 11 Chicago police officer Oswaldo Ochoa testified that on the morning of August 31, 2015, he responded to Officer Hunter's call for assistance. Shortly after he arrived at the scene, other officers approached a group of men on foot. One of the men, later identified as defendant, ran into an alley. Ochoa pursued defendant in his squad car, caught up with and detained him, and brought him back to the scene, where Earnest identified him. Defendant had a black eye. Ochoa performed a custodial search of defendant's person, during which he recovered a cell phone. Ochoa showed the phone to Earnest, who identified it as his by numbers stored in it. On cross-examination, Ochoa stated that Earnest identified defendant as the man who attempted to punch him in the face and whom he punched in the eye. Ochoa also reported that he recovered less than 2.5 grams of cannabis from defendant's person, and that defendant said he "found" the phone.

¶ 12 The parties stipulated to two exhibits consisting of security video footage, recorded from the gas station and from a location about a block away, neither of which depicted the beating or robbery. The State also introduced three still shots from the recordings made at the gas station,

depicting a man retrieving a golf club from one vehicle and taking it into a different vehicle at 11:10 p.m., and a photograph taken of defendant when he was arrested, showing his black eye.

¶ 13 Defendant made a motion for a directed finding, which was denied. He then entered into evidence a video taken three days prior to the incident, depicting himself with a swollen black eye. Finally, the parties stipulated that if called as a witness, Chicago police officer Danny Comas would have testified that when he interviewed Earnest on August 30, 2015, Earnest said he was unable to physically describe the "unknown 15 to 20 male blacks" involved in the incident; and that if called as a witness, Chicago police detective Vincent Humphrey would have testified that on August 31, 2015, Earnest reported that after McCamury took his cell phones and money, the crowd started "whooping" him, one man struck him numerous times with a golf club, someone threw a bottle, and someone else threw a brick.

¶ 14 Following closing arguments, the trial court found defendant and McCamury guilty of the lesser included offenses of robbery on count 1 and unlawful restraint on count 2, stating that it could not attribute to either of them the use of the golf club, which was the weapon specified in those two counts. The court also found defendant and McCamury guilty of aggravated battery on count 3. The court acquitted Hampton of all charges. Defendant filed a motion for a new trial, which was denied by the trial court. At sentencing, the trial court imposed concurrent terms of imprisonment of 66 months for robbery and 36 months for unlawful restraint, and did not impose a sentence for aggravated battery. Defendant's motion to reconsider sentence was denied.

¶ 15 On appeal, defendant first challenges the sufficiency of the evidence, arguing that his convictions should be reversed because they depended on Earnest's "dubious" identification testimony. Defendant argues that Earnest's recall of his assailants was unreliable, in that: one of

the offenders he identified had an alibi and another was acquitted; despite knowing defendant and his codefendants, he did not identify them to the police immediately after the attack; he did not give physical descriptions of his assailants immediately after the attack; and his trial testimony regarding who hit defendant in the eye and whether he saw defendant with a brick and/or a bottle varied from the account he provided in his written statement. Defendant further asserts that Earnest's opportunity to view his attackers was limited because he had covered his face, and that his identification testimony was unreliable due to the highly stressful nature of the beating and to his attention being riveted on the weapons being used.

¶ 16 When reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v.* (1999). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 17 To assess identification testimony, this court applies the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *People v. Branch*, 2018 IL App (1st) 150026, ¶ 25. Those factors are: (1) the opportunity that the witness had to view the offender at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the

witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification; and (5) the length of time between the crime and the identification. *Id.*

¶ 18 We find that the majority of the *Biggers* factors favor the State in this case. First, Earnest had ample opportunity to observe defendant. Earnest had purchased marijuana from defendant in the past, and therefore knew defendant prior to the attack. Moreover, before falling to the ground and covering his face, Earnest would have been able to see his attackers when they surrounded him. Second, Earnest testified to details about the attack, such as his assailants' use of a brick, a liquor bottle, and a golf club, that demonstrate his high degree of attention at the time. See *id.* ¶ 26. We disagree with defendant's assertion that Earnest's attention on these weapons led him to make inconsistent statements about who was bearing them. At trial, Earnest was clear that it was defendant who wielded the brick and bottle, and explained that his written statement indicated otherwise due to the detective and the Assistant State's Attorney misunderstanding him. Third, Earnest demonstrated a high level of certainty when identifying defendant to the police. Fourth, only one night passed between the attack and the identification. And finally, Earnest's identification of defendant as one of his attackers was corroborated by defendant's possession of Earnest's phone at the time of arrest.

¶ 19 We are mindful that Earnest identified one man who had an alibi, did not give responding officers descriptions of the offenders or tell them he knew some of his assailants from prior marijuana purchases, and contradicted certain details of his written statement regarding who punched defendant in the eye and whether he saw which assailant was holding the bottle and the brick. However, Earnest's shortcomings as a witness were fully explored at trial during cross-examination, and trial counsel highlighted them in closing arguments. The trial court was well

aware of defendant's position that Earnest's identification was questionable and found defendant guilty nevertheless. We will not substitute our judgment for that of the trier of fact on this issue of credibility. *Brooks*, 187 Ill. 2d at 131; *Branch*, 2018 IL App (1st) 150026, ¶ 29. We do not find Earnest's identification "so unsatisfactory, improbable or implausible" as to create a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Defendant's challenge to the sufficiency of the evidence fails.

¶ 20 Next, defendant contends, and the State concedes, 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 unlawful restraint because it was based on the same physical act as his conviction for robbery. 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").

¶ 21 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). 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. If none of the offenses are lesser-included offenses, then multiple convictions are proper. *Coats*, 2018 IL 121926, ¶ 12.

¶ 22 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. It follows that the offense of unlawful restraint, which is often committed in conjunction with other offenses, is punishable as a separate crime only if the restraint is independent of the other offenses and arose from separate acts. *People v. Alvarado*, 235 Ill. App. 3d 116, 117 (1992). 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. In addition, a reviewing court may look to "the way the State presented and argued the case." See *People v. Crespo*, 203 Ill. 2d 335, 342 (2001).

¶ 23 Count 1 charged armed robbery based on an allegation that defendant and his codefendants knowingly took property from Earnest "by the use of force or by threatening the imminent use of force." Count 2 charged aggravated unlawful restraint based on an allegation that defendant and his codefendants "knowingly without legal authority detained Rupert Earnest." We agree with defendant that these counts did not allege separate acts. Moreover, the State never argued that defendant committed separate physical actions of robbing and restraining Earnest. Rather than independent acts, the restraint was inherent in the robbery. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 55. As such, the dual convictions in this case violate the one-act, one-crime rule.

¶ 24 When convictions violate the one-act, one-crime rule, the conviction for the less serious offense must be vacated. *Johnson*, 237 Ill. 2d 81, 97. Robbery is a Class 2 felony. 720 ILCS 5/18-1(a), (c) (West 2016). Unlawful restraint is a Class 4 felony. 720 ILCS 5/10-3(a), (b) (West 2016). Because unlawful restraint is a lower class offense than robbery, we vacate the sentence imposed on count 2. The trial court's guilty finding on that count will merge.

¶ 25 The State asserts that this court should remand this case and order the trial court to impose a sentence on the aggravated battery conviction. That charge alleged that in committing a battery, defendant knowingly caused bodily harm to Earnest, "to wit: struck him about the head and body, while they were on or about a public way." As previously stated, the trial court in this case sentenced defendant on count 1 for robbery and count 2 for unlawful restraint. The court never imposed a sentence on the guilty finding of aggravated battery. Defendant does not challenge the guilty finding of aggravated battery. While we agree with the State that imposing a sentence would not violate the one-act, one-crime rule because the aggravated battery count and the armed robbery count were based on different physical acts, we find that we do not have jurisdiction over the non-final aggravated battery conviction to order a remand for the imposition of a sentence.

¶ 26 Although neither party has raised the issue of jurisdiction, the appellate court has an independent duty to examine whether or not jurisdiction is proper. *People v. Lewis*, 234 Ill. 2d 32, 36-37 (2009). While the conviction for aggravated battery was listed on the notice of appeal, this does not, standing alone, confer jurisdiction. Our jurisdiction extends only to final judgments, and there is no final judgment in a criminal case unless a sentence has been imposed. Ill. Const. 1970, art. VI, § 6; *People v. Flores*, 128 Ill. 2d 66, 95 (1989).

¶ 27 The final step in a criminal judgment is the sentence and in its absence, an appeal ordinarily cannot be entertained because the judgment is not final. See *Flores*, 128 Ill. 2d at 95. In certain limited circumstances, our supreme court has found that the appellate court did have jurisdiction to remand a non-final criminal conviction. For instance, in *People v. Dixon*, 91 Ill. 2d 346, 349 (1982), the defendant was convicted of armed violence, aggravated battery, mob action and disorderly conduct. The trial court incorrectly merged the mob action and disorderly conduct convictions into the armed violence and aggravated battery convictions. *Id.* at 353. The trial court did not impose sentences on the merged counts. *Id.* Those merged counts were not being challenged on appeal but were interrelated to, and dependent upon, the convictions that were being appealed. *Id.* The State requested that the appellate court remand the case for imposition of sentences on the lesser offenses. *Id.* at 349. The appellate court reversed one of the sentenced convictions and affirmed the other but refused the State's request to remand to impose sentences on the lesser offenses. *Id.*

¶ 28 In limiting its finding, our supreme court found that the appellate court was authorized to remand for the imposition of a sentence on the previously merged convictions under this "anomalous" fact pattern. *Id.* at 353. Although those counts were non-final orders, the appellate court had jurisdiction on the unsentenced convictions because they were interrelated to, and dependent upon, the convictions that were being appealed. *Id.* at 353-54.

¶ 29 In this case, the trial court did not find that the aggravated battery conviction merged into the robbery conviction, nor was the aggravated battery conviction dependent upon the robbery conviction. The *Dixon* trial court incorrectly ruled that the lesser offenses should merge, and it was then prohibited from imposing a sentence. Here, we have no explanation for the trial court's

failure to impose a sentence on the aggravated battery conviction, we have no merger of the counts, and we have no incorrect legal reasoning applied by the trial court. Therefore, the limited applicability of *Dixon* does not allow us to have jurisdiction on the aggravated battery conviction.

¶ 30 Our supreme court further limited the applicability of *Dixon* in *People v. Relerford*, 2017 IL 121094. "In our view, the decision in *Dixon* must be understood to be limited to the type of factual situation presented in that case." *Id.* ¶ 74. The *Dixon* trial court determined incorrectly that sentences could not be imposed on the lesser offenses because they merged into the other offenses. In *Relerford*, the appellate court found it had jurisdiction to review the validity of the defendant's unsentenced convictions. *Id.* ¶ 15. But our supreme court reversed the appellate court's finding that it had jurisdiction over these unsentenced convictions. *Id.* ¶ 75. Accordingly, we do not have jurisdiction to remand this case for the imposition of a sentence on defendant's conviction for aggravated battery.

¶ 31 For the reasons explained above, we affirm defendant's conviction for robbery and vacate his sentence for unlawful restraint.

¶ 32 Affirmed in part; vacated in part.

¶ 33 JUSTICE GORDON, specially concurring:

¶ 34 I concur with the portions of the majority opinion that affirm defendant's convictions over his challenge to the victim's identification testimony, and that vacated defendant's sentence for unlawful restraint pursuant to the one-act, one-crime rule. I also concur with the majority's finding that we must reject the State's argument to remand for sentencing on count III, the

aggravated battery count. However, I must write separately on this issue because the supreme court's opinion in *People v. Dixon*, 91 Ill. 2d 346, 352 (1982), is not crystal clear.

¶ 35 In *Dixon*, our supreme court found: "the final step in a criminal judgment is the sentence [citation] and that, in its absence an appeal *ordinarily* cannot be entertained because the judgment is not final." (Emphasis added.) *Dixon*, 91 Ill. 2d at 352. However, the key word in that sentence is "ordinarily." *Dixon*, 91 Ill. 2d at 352. Thus, in *Dixon*, the supreme court found that the situation before it was "an anomalous one" and an exception to the general rule, thereby permitting jurisdiction. *Dixon*, 91 Ill. 2d at 353. The exception was permitted because the trial court's failure to enter sentences stemmed from its incorrect reading of the law. *Dixon*, 91 Ill. 2d at 353. By contrast, in the case at bar, the State does not argue that the omission occurred from any erroneous interpretation of law by the trial court. See *People v. Olaska*, 2017 IL App (2d) 150567, ¶ 112 (finding "no jurisdiction over [two counts] because the trial court did not impose sentence on them").

¶ 36 In *People v. Releford*, 2017 IL 121094, our supreme court revisited *Dixon*. In *Releford*, the appellate court had found that it had jurisdiction to review the validity of the defendant's three unsentenced convictions. *Releford*, 2017 IL 121094, ¶ 71. However, our supreme court found "the appellate court's conclusion to be unwarranted under the circumstances of this case." *Releford*, 2017 IL 121094, ¶ 71. Our supreme court explained that "the decision in *Dixon* must be understood to be limited to the type of factual situation presented in that case," which it found was not present in the case before it—and also is not present in the case before us. *Releford*, 2017 IL 121094, ¶ 74. However, *Releford* did not overrule *Dixon* and, thus, the *Dixon* exception leaves room for argument about whether jurisdiction does, or does not, exist in a particular case.

In addition, the supreme court in *Releford* found that, "[i]n the exercise of this court's supervisory authority, we opt to exercise jurisdiction over the unsentenced convictions"—thereby further muddying the waters. *Releford*, 2017 IL 121094, ¶ 76. However, in the case at bar, based on the facts, this court does not have jurisdiction to order the trial court to resentence defendant.

¶ 37 I would further observe that, in the case at bar, even if we had jurisdiction, the State failed to object at sentencing, thereby also waiving the issue for our review. To preserve an issue for review, a party must both object in the court below and file a posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48. "Failure to do either results in forfeiture." *Sebby*, 2017 IL 119445, ¶ 48. In our case, the State did neither.[1]

¶ 38 Thus, one of two things is true: either we do not have jurisdiction to entertain the State's argument; or we have jurisdiction and the State waived the issue for our review. In either case, we must reject the State's argument to remand for sentencing on count III.

¶ 39 For these reasons, I specially concur with the majority.

[1] In its brief to this court, the State concedes that "[a] conviction for the offense was not mentioned at sentencing."