2019 IL App (1st) 170113-U

No. 1-17-0113

Order filed July 12, 2019

Sixth 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. 14 CR 14095
	)	
LARRY WILLIS,	)	Honorable
	)	Thomas V. Gainer Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate defendant's conviction for aggravated discharge of a firearm, because the conviction violates the one-act, one-crime rule. We remand to the circuit court for imposition of sentence on an unsentenced count of aggravated discharge of a firearm against a different victim. Defendant waived objection to the adequacy of his presentence investigation report.

¶ 2 Following a bench trial, defendant Larry Willis was found guilty of one count of aggravated battery, two counts of aggravated discharge of a firearm, and four counts of aggravated unlawful use of weapon. The circuit court merged the two counts of aggravated

discharge of a firearm, along with the four counts of aggravated unlawful use of a weapon, and imposed concurrent sentences of eight years for aggravated battery, six years for aggravated discharge of a firearm, and three years for aggravated unlawful use of a weapon. Defendant appeals, arguing that this court should (1) vacate his conviction for aggravated discharge of a firearm under the one-act, one-crime rule, and (2) remand the matter for a new sentencing hearing because the statutorily required presentence investigation (PSI) report was not prepared and used in his sentencing.[1] We hold that defendant waived any objection to the PSI report, but we vacate his conviction for aggravated discharge of a firearm and remand for sentencing on the other aggravated discharge count, which involved a different victim.

¶ 3 Defendant was charged by information with six counts of attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014)) (counts I-VI); one count of aggravated battery (720 ILCS 5/12-3.05(e)(1) (West Supp. 2013)) (count VII); two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)) (counts VIII and IX); two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)) (counts X and XI); and eight counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (3)(A-5); (a)(1), (3)(C); (a)(2), (3)(A-5); (a)(2), (3)(C) (West 2014)) (counts XII-XIX). [2] All charges arose from an incident in which he allegedly fired multiple gunshots at Jose Ortiz and Manuel Recio. The State nol-prossed counts X through XV before the end of trial and proceeded on all others.

[1] In his initial brief on appeal, defendant also argued that his conviction for aggravated unlawful use of a weapon should be vacated under the one-act, one-crime rule. However, he withdrew the argument in his reply brief.

[2] Defendant and Dayvon Freeman, who is not a party to this appeal, were charged in the same information and tried in separate, but simultaneous bench trials. Freeman was acquitted of all charges.

¶ 4 Relevant here, count VII (aggravated battery) alleged that defendant "knowingly discharged a firearm" and injured Ortiz by shooting him about the body. Count VIII (aggravated discharge of a firearm) alleged that defendant "knowingly discharged a firearm in the direction of *** Ortiz," and count IX (also aggravated discharge of a firearm) alleged that defendant "knowingly discharged a firearm in the direction of *** Recio."

¶ 5 At trial, Ortiz testified that he and Recio were standing in a church parking lot at approximately 6 p.m. on July 11, 2014. They planned to play softball at the church, and were waiting for others to arrive. As they waited, Ortiz spotted two men and a woman walking toward them from about a half block away. He did not know any of the three people at the time, but identified defendant in court as one of the men. When the group was about 10 feet away, Ortiz called out "let's go" to his friend, Lonches, who was walking directly behind them. Defendant, apparently believing that Ortiz was talking to him, approached Ortiz and Recio. When Ortiz asked "what's up," defendant responded "LKK, King Killer, I will shoot you, bitch" and pulled a gun out of the woman's purse. Ortiz told him to "take a walk," and defendant fired multiple shots at him and Recio. Ortiz and Recio ran, but one of the shots hit Ortiz in the toe. He ran inside the chapel to find his aunt, who took him to the hospital.

¶ 6 Recio also testified that he and Ortiz were waiting for their friends to arrive for the softball game when he saw two men and a woman walking towards them. When Ortiz yelled out "let's go" to Lonches, the group approached them and one of the men said, "Don't worry what I'm is." Ortiz told the man that he was not talking to him, but the man pulled out a gun. Ortiz said "take a walk," and the man replied "LKK, King killer," and fired seven or eight shots at Ortiz and Recio.

¶ 7 Angelique Tucker testified that she witnessed a shooting on July 11, 2014, but stated that she did not remember where it occurred, what she was doing, or the names of the people she was with at the time. She also did not recall speaking to detectives on the morning of July 12, 2014, or participating in a videotaped interview on that occasion. The State presented her with two photo arrays and two advisory forms. She acknowledged that she signed both forms and initialed next to photographs of defendant and Dayvon Freeman, but did remember viewing the documents before. After viewing the photo arrays in court, Tucker acknowledged that she was with defendant and Freeman on the day of the shooting, but reiterated that she did not recall "anything else that happened."

¶ 8 Chicago Police detective Poole[3] testified that he showed Tucker the photo arrays, which are included in the record on appeal, at the police station on the night of the shooting. On one of the arrays, Tucker circled Freeman's photograph, initialed it, and wrote "was with me and Lil Larry when Larry shot a gun at two Mexican men" at the bottom of the page. Tucker circled defendant's photograph in the other array, initialed it, and wrote "This is the guy who shot at the two Mexicans" underneath.

¶ 9 The State entered a stipulation that Detective Trotman[4] would testify that he presented Tucker with the photo arrays, and that she identified defendant as the "guy that shot the two Mexicans."

¶ 10 Poole also conducted a videotaped interview of Tucker, which the State played in court over defense counsel's objection. In the interview, the audio of which is in the record on appeal, Tucker stated that she, defendant, and Freeman encountered two Mexican men in a church

[3] The transcript does not contain Poole's first name.

[4] The transcript does not contain Trotman's first name.

parking lot around 6 p.m. on July 11, 2014. The men asked them "what gang are you in." Defendant replied, "Why do you want to know," pulled a gun from a bag that Tucker was carrying, and fired multiple shots.

¶ 11 Chicago police officer Robert McGee testified that he was part of a team of officers that went to apprehend a suspect at an apartment building on South Vernon Avenue around 11:30 p.m. on the day of the shooting. While McGee watched the rear, external stairwell, he saw defendant exit a second-story apartment, light a cigarette, and reenter the apartment. Defendant returned outside shortly thereafter, this time carrying a dark, "L-shape[d]" object that McGee believed to be a handgun. Defendant went up to the third story, where McGee briefly lost sight of him. He then "immediately" returned to the second story empty-handed and went inside his apartment. Officers arrested defendant inside the apartment, and McGee subsequently recovered a loaded handgun that was tucked inside a cinder block on the third story.

¶ 12 The State entered a stipulation that that evidence technician Thomas Ellerbeck examined the firearm McGee recovered and found fingerprints on the magazine and slide. Cynthia Seavers, a latent fingerprint examiner, analyzed the prints and concluded that they matched defendant's. Defendant did not possess a valid Firearm Owner's Identification card at the time of the shooting.

¶ 13 Evidence technician Steven Swaine recovered five shell casings from the scene of the shooting. Another evidence technician, Brian Sokniewicz, examined the shell casings and determined that they were all fired by the firearm McGee recovered.

¶ 14 On July 11, 2016, the court found defendant guilty of aggravated battery (count VII), both counts of aggravated discharge of a firearm (counts VIII and IX), and all four counts of

aggravated unlawful use of a weapon (counts XVI-XIX), but not guilty of attempt murder (counts I-VI). The court also acknowledged that it would sign "a PSI order," and the parties agreed to continue the case until August 1, 2016.

¶ 15 In a written order dated July 11, 2016, the court ordered the preparation of both a PSI report for the present case and a pretrial investigation report for two other matters that defendant had pending before the court. The order indicated that the reports were due on August 1, 2016, and notified defendant that he was required to report to the Cook County Adult Probation Department for "a social investigation regarding your current case."[5]

¶ 16 The Adult Probation Department filed a document entitled "Investigative Report, which shows that it was ordered on July 11, 2016, due August 1, 2016, and filed on August 1, 2016. The report states that defendant was interviewed, and it includes his name, background, employment history, family status, education, health information, and criminal record. However, the first page specifies that it is a *pretrial* report for defendant's other two pending matters.[6] Under the heading "Defendant's Version of the Offense," the report states that "[b]ecause this is a pretrial investigation, the defendant's version was not requested." The only mention of the present case appears in a section of his criminal history labeled "Pending Case/BFW's."

¶ 17 On September 21, 2016, the court heard arguments on defendant's motion for a new trial. The court denied the motion, and the following exchange occurred:

[5] Throughout this order, certain capitalizations in quoted documents are omitted for readability.

[6] One of the case numbers on the report itself is listed incorrectly as "14cr737601." This appears to be a clerical error, as the correct number (14 CR 13762) is listed on the circuit court's order. The correct charges appear next to both case numbers in the order and the report.

"THE COURT: There was a presentence investigation prepared in this case filed with the Court on August 1st, 2016. And I think it was distributed shortly thereafter, if I'm not mistaken.

[DEFENSE COUNSEL]: Yes, Judge. I have my copy. We've reviewed it. We have no corrections or amendments.

THE COURT: How about you, [State]?

[THE STATE]: I also have my copy, Judge, and I have no corrections or amendments."

The court then began a sentencing hearing, but stopped the proceedings once it became aware that defendant had a pending motion in the circuit court to vacate a prior conviction pursuant to *People v. Aguilar*, 2013 IL 112116. The court postponed sentencing until the *Aguilar* issues could be resolved.

¶ 18 The full sentencing hearing was held on December 5, 2016. The court recounted its findings of guilt and heard the State's argument in aggravation, which focused on defendant's criminal history. In mitigation, defense counsel mentioned that defendant was 23 years old, was raised by a single mother, did not have a serious criminal history, and desired to "turn his life around." In allocution, defendant stated "I know things that I did wasn't right. But as I'm becoming a man and I'm becoming older, I'm knowing right from wrong. And I'm knowing my wrongs that I committed."

¶ 19 In announcing its decision, the court stated that it considered, among other things, "the nature and background of the defendant as outlined by the presentence investigation." Defense counsel did not object. The court also merged count IX (aggravated discharge of a firearm

toward Recio) into count VIII (aggravated discharge of a firearm toward Ortiz), and merged counts XVII through XIX into count XVI (aggravated unlawful use of a weapon). The State did not object to the merger. Then, the court imposed concurrent terms of eight years on count VII (aggravated battery of Ortiz), six years on count VIII (aggravated discharge of a firearm toward Ortiz), and three years on count XVI (aggravated unlawful use of a weapon).

¶ 20 On appeal, defendant first contends, and the State agrees, that his conviction for aggravated discharge of a firearm toward Ortiz (count VIII) violated the one-act, one-crime rule because it arose from the same physical act as his conviction for aggravated battery of Ortiz (count VII).

¶ 21 As a preliminary matter, the parties also acknowledge that defendant forfeited his one-act, one-crime challenge by not including it in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("both a trial objection and a written post-trial motion raising the issue are necessary to preserve an issue for review"). However, as the State rightly concedes, we may review the issue for plain error because a one-act, one-crime violation implicates fundamental fairness and the integrity of the judicial process. *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009). Accordingly, we will address the merits of defendant's claim.

¶ 22 Under the one-act, one-crime rule, a defendant cannot be sentenced on multiple offenses when those offenses are based on precisely the same physical act. *People v. King*, 66 Ill. 551, 566 (1977). In this context, an "act" is defined as "any overt or outward manifestation which will support a different offense." *Id.*

¶ 23 Separate acts do not become a single act simply because they were closely related or occurred closely in time. See *People v. Dixon*, 91 Ill. 2d 346, 355-56 (1982) (finding that the

defendant committed multiple acts by striking the victim with a club multiple times in succession). However, a defendant cannot be convicted of multiple offenses for closely related acts unless the charging instrument "indicate[d] that the State intended to treat the conduct of [the] defendant as multiple acts ***." *People v. Crespo*, 203 Ill. 2d 335, 345 (2001) (finding multiple convictions improper where, although multiple stabs could have been charged as separate acts, the State instead charged the stabbing as a single continuous act). Whether the one-act, one-crime rule was violated is reviewed *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). When a reviewing court finds that two of a defendant's convictions violated the one-act, one-crime rule, it must vacate the less serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009).

¶ 24 We agree with the parties that defendant's separate convictions for aggravated battery of Ortiz (count VII) and aggravated discharge of a firearm toward Ortiz (count VIII) constituted a one-act, one-crime violation. Count VII charged defendant with aggravated battery in that he "knowingly discharged a firearm" and shot Ortiz. Count VIII charged defendant with aggravated discharge of a firearm in that he "knowingly discharged a firearm" toward Ortiz. Thus, both counts were based on the same conduct: shooting toward Ortiz. We need not decide whether defendant could have been charged with multiple offenses based on multiple shots fired, because the charging instrument made no such apportionment. Multiple convictions for shooting at Ortiz were therefore improper. See *People v. Nunn*, 357 Ill. App. 3d 625, 641 (2005) (vacating the defendant's conviction for aggravated discharge of a firearm under the one-act, one-crime rule where he was also convicted of second degree murder and aggravated battery with a firearm in connection with multiple shots fired). Accordingly, we vacate defendant's conviction for

aggravated discharge of a firearm toward Ortiz (count VIII), as it is the less serious offense. See 720 ILCS 5/12-3.05(h) (West Supp. 2013) (as charged here, aggravated battery is a Class X felony); 720 ILCS 5/24-1.2(b) (West 2014) (aggravated discharge of a firearm is a Class 1 felony).

¶ 25 Although the parties agree that count VIII should be vacated, they disagree about what should be done with count IX (aggravated discharge toward Recio), which the court merged into the now-vacated count VIII. The State argues that, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we should modify the mittimus to reflect a conviction and six-year sentence on count IX. Defendant, however, contends that count IX should remain unsentenced. He argues that: (1) we lack jurisdiction to consider the circuit court's finding of guilt on count IX because it is "non-final" and was not "included in [his] notice of appeal"; (2) the State forfeited the argument by not objecting to the merger in the court below; and (3) count IX was based on the same physical act as count VII (aggravated battery with a firearm as to Ortiz).

¶ 26 We first address defendant's jurisdictional argument. The appellate court's jurisdiction extends only to "final judgments" of a circuit court. Ill. Const. 1970, art. VI, § 6. As a criminal conviction is not "final" until the imposition of sentence, appeals from an unsentenced conviction generally cannot be entertained. *People v. Flores*, 128 Ill. 2d 66, 95 (1989). However, our supreme court has held that, when a defendant appeals, the reviewing court may correct the trial court's erroneous ruling that one offense merged into another. *People v. Scott*, 69 Ill. 2d 85, 87-88 (1977). More recently, in *People v. Relerford*, 2017 IL 121094, our supreme court clarified the extent to which this court may remand for sentencing on unsentenced counts. There, the defendant was found guilty of two counts of stalking and two counts of cyberstalking. *Id.* ¶¶

3, 14. However, the trial court imposed sentence on only one count of stalking, and the record did not reflect why it left the other three counts unsentenced. *Id.* ¶ 14. This court vacated all of the trial court's findings of guilt on the grounds that the statutes under which the defendant was found guilty violated due process. *Id.* The State appealed, and our supreme court held that, on the facts of that case, this court lacked jurisdiction to consider the validity of the unsentenced findings of guilt because they were nonfinal orders and it was not clear why the trial court failed to impose a sentence on those counts. *Id.* ¶¶ 71, 74.

¶ 27 In so holding, however, the supreme court noted that, under different circumstances, it would be appropriate to consider an appeal from a judgment of guilty for which sentenced had not been imposed. In particular, the court discussed *Dixon* (*id.* ¶¶ 71-75), where the trial court found the defendant guilty of four counts, but only imposed a sentence on two of the counts because it incorrectly determined that the two unsentenced counts merged into the sentenced counts (*Dixon*, 91 Ill. 2d at 349). The defendant appealed the trial court's findings of guilt on only the two sentenced counts. *Id.* at 353. In response, the State asked this court to remand the matter so that a sentence could be imposed on one of the unsentenced counts. *Id.* at 349. This court affirmed one of the convictions, reversed the other, and refused to remand for further sentencing. *Id.*

¶ 28 Our supreme court reversed and remanded, rejecting the defendant's argument that this court lacked jurisdiction because he appealed only his sentenced convictions. *Id.* at 354. Instead, the supreme court held that remand was appropriate because the two unsentenced, unappealed findings of guilt were "intimately related to and 'dependent upon' the appealed convictions within the meaning of [Illinois Supreme Court] Rule 615(b)(2)." *Id.* at 354-55; see also Ill. S. Ct.

R. 615(b)(2) (eff. Jan. 1, 1967) (providing that a reviewing court may "modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken").

¶ 29 In the present case, as in *Dixon*, the trial court improperly determined that count IX (aggravated discharge toward Recio) merged with count VIII (aggravated discharge toward Ortiz), and thus did not impose a sentence on count IX. See *People v. Moore*, 264 Ill. App. 3d 901, 913 (1994) (merger inappropriate where separate counts related to two different victims). Thus, the fact that defendant did not specifically appeal the finding of guilt on count IX does not deprive us of jurisdiction to remand for sentencing on that count. *Relerford*, 2017 IL 121094, ¶¶ 74-75; *Dixon*, 91 Ill. 2d at 354.

¶ 30 Although, as defendant notes, the State forfeited the issue by not objecting to the merger in the trial court, we may nevertheless address it because forfeiture is a limitation on the parties, not the court. See *People v. Yaworksi*, 2011 IL App (2d) 090785, ¶ 10 (finding that "relaxation of the forfeiture doctrine is appropriate" where the State's interest in punishing a defendant who has been proven guilty beyond a reasonable doubt would otherwise be "frustrated by the trial court's misapplication of the sometimes nebulous rules concerning merger of convictions"). However, the *Relerford* court made clear that, under *Dixon*, our jurisdiction over unsentenced findings of guilt is limited to remanding for the imposition of a sentence. *Relerford*, 2017 IL 121094, ¶ 75. Accordingly, we remand to the circuit court for sentencing on count IX (aggravated discharge toward Recio) without considering whether it was carved from the same physical act as count VII (aggravated battery of Ortiz).

¶ 31 Defendant next contends that the circuit court erred in sentencing him without considering a PSI prepared specifically for this case. In particular, he contends that, although the court ordered a PSI, the report submitted by the Adult Probation Department was a pretrial investigation report for his pending matters. Thus, he maintains that we should remand for a new sentencing hearing. The State argues that the report was a valid PSI, and, in any event, defendant waived his right to challenge the PSI by not objecting below.

¶ 32 Section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2014)) provides that "a defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court." The PSI must contain, among other things, information on the defendant's criminal history, education, family situation, and background. 730 ILCS 5/5-3-2 (West 2014). The preparation of a PSI report is a statutory requirement, rather than a personal right of the defendant, and therefore cannot be waived absent limited exceptions not relevant here. *People v. Youngbey*, 82 Ill. 2d 556, 565 (1980) (noting that the purpose of a PSI is to inform the trial court of circumstances relevant to its sentencing decision).

¶ 33 However, where the trial court considers a PSI, the parties are obligated to bring any deficiencies or inaccuracies to the court's attention. *People v. Williams*, 149 Ill. 2d 467, 493 (1992); *People v. Meeks*, 81 Ill. 2d 524, 533 (1980). When a defendant fails to object to the inadequacy of the PSI, the issue is deemed waived. *Meeks*, 81 Ill. 2d at 533; *People v. James*, 255 Ill. App. 3d 516, 530 (1993).

¶ 34 Here, despite being labeled as a pretrial report for defendant's pending matters, it is clear from the record that both the parties and the court considered the report to be a PSI for the

present case. Even on appeal, defendant does not argue that the report excluded any statutorily-mandated information. See 730 ILCS 5/5-3-2 (West 2014) (setting out what a PSI must contain). Instead, defendant now maintains that the report does not qualify as a PSI at all. In so arguing, defendant relies on cases in which the circuit court failed to consider any kind of report whatsoever. See *Youngbey*, 82 Ill. 2d at 565 (parties purportedly agreed to waive the PSI requirement in favor of holding an immediate sentencing hearing); *People v. Childress*, 306 Ill. App. 3d 755, 756 (1999) (same). However, as the trial court here considered a report that contained most, if not all, of the PSI requirements, the present case is more analogous to those in which a PSI was merely deficient or incomplete. See, *e.g.*, *James*, 255 Ill. App. at 529 (PSI contained only the defendant's criminal history); *People v. Doe*, 175 Ill. App. 3d 371, 381 (1988) (trial court considered the defendant's pretrial investigation report instead of a PSI). In such cases, the defendant's failure to object constitutes waiver of the issue. See *James*, 255 Ill. App. 3d at 530; *Doe*, 175 Ill. App. 3d at 382.

¶ 35 Here, the record clearly shows that defense counsel had received and reviewed the report by September 21, 2016. At a hearing on that date, defense counsel did not object when the trial court referred to the report as a "presentence investigation," and affirmatively stated that the defense had no corrections or amendments. At a subsequent hearing on December 5, 2016, the court again referred to the report as "the presentence investigation," without objection from the defense. Thus, defendant has waived review of the matter.

¶ 36 The judgment of the circuit court is affirmed in part and vacated in part. The cause is remanded for the imposition of a sentence on count IX (aggravated discharge of a firearm toward Recio).

¶ 37 Affirmed in part; vacated in part; remanded.