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2019 IL App (5th) 150478-U

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 5-15-0478

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 14-CF-316
	)	
JAMES B. GIBBS,	)	Honorable
	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court’s oral pronouncement of guilt and written finding of guilt are not in conflict. The court’s oral and written pronouncements did not constitute an acquittal of the charged offense. The defendant’s conviction of home invasion while armed with a firearm, as charged, is affirmed. The defendant’s sentence is affirmed. This court does not have jurisdiction to review on direct appeal the issue of fines and fees imposed by the circuit clerk.

¶ 2 I. BACKGROUND

¶ 3 The State charged defendant, James B. Gibbs, with the offense of home invasion while armed with a firearm in count I of the amended information filed on March 17, 2015. The amended information alleged that defendant, while armed with a firearm,

threatened the imminent use of force against Tia Lucio, in that while displaying a firearm he asked: “Where is the weed?”

¶ 4 On March 18, 2015, a bench trial was held. Witnesses testified that the defendant and his codefendant entered the home located at 719 West Lincoln Street in Harrisburg, Illinois, while Ms. Lucio, an adult female, and her two children were present in the home. Witnesses testified that the defendant forced his way into the home and brandished a firearm while demanding “weed.” There was no testimony offered of defendant’s possession of any weapon other than a firearm.

¶ 5 At the close of evidence and argument the trial court found the State proved beyond a reasonable doubt that on November 25, 2014, defendant was guilty of home invasion. The trial court’s phrasing in its oral pronouncement is the cause of the dispute at issue in this appeal. The trial court, in rendering its verdict on the offense of home invasion, stated:

“The Court further finds that the People have proved beyond a reasonable doubt that on November the 25th, 2014, defendant was not a peace officer acting in the line of duty and knowingly and without authority entered the dwelling place of Tia Lucio, knowing one or more persons were present while armed with a *dangerous weapon* and while so armed threatened imminent use of force against Tia Lucio, a person who was inside the dwelling. Therefore, the Court finds the defendant guilty of home invasion as charged in the amended Count I of the information and hereby enters a judgment of conviction upon the finding.” (Emphasis added.)

¶ 6 The trial court’s docket entry states:

“The court further finds that the [People] have proven beyond a reasonable doubt that on [November 25, 2014] the [defendant] was not a peace officer acting in the line of duty and knowingly and without authority entered the dwelling place of Tia Lucio knowing that one or more persons were present while armed with a *dangerous weapon* and while so armed threatened the imminent use of force against Tia Lucio, a person who was inside the dwelling and therefore the court finds the [defendant] guilty of home invasion as is charged in the amended count I of the information and hereby enters a Judgment of conviction upon the finding.” (Emphasis added.)

¶ 7 A sentencing hearing was held on July 2, 2015, at which the judge sentenced the defendant to the Illinois Department of Corrections for a period of 8 years, with an additional 15-year sentence imposed as a mandatory firearm enhancement. The mittimus entered by the trial court on July 16, 2015, indicated that the defendant was guilty of home invasion pursuant to section 19-6(a)(3) of the Criminal Code of 2012 (Code) (720 ILCS 5/19-6(a)(3) (West 2014)), which is the section dealing with an act committed while being armed with a firearm, and states the title of the charge as home invasion while armed with a firearm. The mittimus imposes the 15-year firearm enhancement.

¶ 8 The defendant filed a motion to reconsider sentence and at the hearing, held on September 3, 2015, argued that the court had found defendant guilty of home invasion pursuant to section 19-6(a)(1) of the Code, home invasion while armed with a dangerous weapon, other than a firearm, instead of the offense as charged, section 19-6(a)(3) of the

Code, home invasion while armed with a firearm. 720 ILCS 5/19-6(a)(3) (West 2014). The trial court denied the motion. At the sentencing hearing, the trial court commented as follows:

“The court, having considered the evidence at trial, the evidence at trial being that the defendant entered the home of Tia Lucio and committed a home invasion while armed with a firearm, that being the only evidence at trial as to the conduct of the defendant \*\*\*. Therefore, as to Count I the defendant is sentenced to the Illinois Department of Corrections for a period of eight years. He shall additionally serve a mandatory additional term of 15 years due to his being armed with a firearm pursuant to 720 ILCS 5/19-6(a)(3).”

¶ 9

## II. ANALYSIS

¶ 10 Defendant asserts that the trial court found him guilty of home invasion while armed with a dangerous weapon other than a firearm. The defendant thus contends that the trial court actually acquitted defendant of the charged offense in amended count I, home invasion while armed with a firearm. The defendant challenges the finding of guilt and also the sentence, correctly pointing out that the 15-year mandatory firearm enhancement would not apply to a finding that defendant was innocent as charged, but guilty of home invasion while armed with a dangerous weapon that is not a firearm. The defendant urges this court to find that the defendant was found guilty of home invasion while armed with a dangerous weapon that is not a firearm (720 ILCS 5/19-6(a)(1) (West 2014)), and, since that uncharged offense is not a lesser-included offense of home

invasion while armed with a firearm, to amend that finding to the uncharged lesser-included offense of robbery (*id.* § 18-1(a)), and remand for a new sentencing hearing.

¶ 11 The State contends that the trial court actually convicted defendant of the charged offense: home invasion while armed with a firearm. The State urges that the sentence is therefore proper, consistent, and that no error occurred.

¶ 12 The trial court ordered defendant to “pay court costs, fees, and assessments as are mandated by statute in this matter.” Both the State and the defendant agree that any fines which were not ordered but imposed by the circuit clerk should be vacated.

¶ 13 A. Acquittal

¶ 14 The defendant frames the issue as a correction of the mittimus to conform to the trial court’s finding of guilt and goes on to argue that the guilty finding is void because it is not an allowable lesser-included offense of the charged offense. Whether the mittimus should be corrected in order to conform to the trial court’s oral pronouncement is reviewed *de novo*. *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 23. Whether an uncharged offense is a lesser-included offense of a charged offense is an issue of law that warrants *de novo* review. *People v. Kennebrew*, 2013 IL 113998, ¶ 18 (citing *People v. Kolton*, 219 Ill. 2d 353, 361 (2006)). The issue controlling the outcome of this case is whether the trial court found defendant guilty or not guilty of amended count I of the information. If the trial court found the defendant not guilty, the sentence on that count would be void. “A defendant is acquitted of an offense when a trial judge finds the evidence insufficient at trial and finds the defendant not guilty.” *People v. Lewis*, 379 Ill. App. 3d 829, 833 (2008) (citing *People v. Brown*, 227 Ill. App. 3d 795, 798 (1992)). “[A]

judgment of acquittal stemming from an evidentiary ruling, however erroneous, bars further prosecution on any aspect of the charge.” *People v. Carter*, 194 Ill. 2d 88, 92 (2000) (citing *Sanabria v. United States*, 437 U.S. 54 (1978)). Whether the trial judge made a mistake of fact or law when entering an acquittal is irrelevant. *Brown*, 227 Ill. App. 3d at 798 (citing *People v. Poe*, 121 Ill. App. 3d 457 (1984)). A judgment constitutes an acquittal where it “actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” (Internal quotation marks omitted.) *People v. Williams*, 188 Ill. 2d 293, 300 (1999).

¶ 15 At issue in this case is whether the trial court’s use of the phrase “dangerous weapon” in its pronouncement and docket order amounts to an acquittal of the charged offense of home invasion while armed with a firearm. We find that the record does not support the defendant’s contention that the trial court unequivocally acquitted the defendant of the charged offense in the amended count I of the information—home invasion while in possession of a firearm pursuant to section 19-6(a)(3) of the Code (720 ILCS 5/19-6(a)(3) (West 2014)).

¶ 16 At the close of the trial, the trial court used the following language in its pronouncement of guilt: Finding “that the [People] have proven beyond a reasonable doubt that on [November 25, 2014] the [defendant] was not a peace officer acting in the line of duty and knowingly and without authority entered the dwelling place of Tia Lucio knowing that one or more persons were present while armed with a *dangerous weapon* and while so armed threatened the imminent use of force against Tia Lucio, a person who was inside the dwelling and therefore the court finds the [defendant] guilty of home

invasion as is charged in the amended count I of the information and hereby enters a Judgment of conviction upon the finding.” (Emphasis added.)

¶ 17 The trial court found the defendant guilty of the offense “as charged” in the amended count I of the information. That count alleged as follows:

“That on November 25, 2014, in Saline County, Illinois, James B. Gibbs committed the offense of home invasion in that the said defendant, not a peace officer acting in the line of duty, knowingly and without authority, entered the dwelling of Tia Lucio, located at 719 W. Lincoln Street, Harrisburg, Saline County, Illinois, knowing Tia Lucio to be present within that dwelling place and while armed with a firearm, threatened the imminent use of force against Tia Lucio in that while displaying a *firearm* he asked where is the weed, in violation of Chapter 720 ILCS 5/19-6(a)(3).” (Emphasis added.)

¶ 18 The trial court found the defendant guilty as charged, and the defendant was charged with the offense of home invasion while armed with a firearm under section 19-6(a)(3) of the Code (720 ILCS 5/19-6(a)(3) (West 2014)). An allegation that defendant was armed with a dangerous weapon other than a firearm cannot be reasonably inferred from the evidence presented to the trial court. The defendant was charged with being armed with a firearm, and there was no charge presented to the trial court that he was ever armed with any other type of weapon. The only testimony from two eyewitnesses that was offered at the bench trial was that the defendant was armed with a

firearm. Further, there was no evidence presented of defendant's possession of any other dangerous weapon.

¶ 19 The trial court specifically found that the defendant was guilty as charged in the amended count I. The trial court sentenced the defendant in a consistent manner with the finding of guilt, adding the 15-year firearm enhancement for possession of a firearm during commission of a home invasion.

¶ 20 The trial court's oral pronouncement and docket entry for the verdict on the home invasion offense are identical. The issue arises from the trial court using the words "dangerous weapon" instead of "firearm" in its pronouncement finding the defendant guilty. The trial court used the term firearm in its oral and written pronouncement at the sentencing hearing.

¶ 21 The phrase "dangerous weapon" has various legal definitions. According to Black's Law Dictionary, a "dangerous weapon" is an object or device that, because of the way it is used, is capable of causing serious bodily injury. Black's Law Dictionary (9th ed. 2009). Our supreme court in *Ross* has discussed at length the common law definition of "dangerous weapon," finding that an analysis of whether a weapon was dangerous required looking to three categories of dangerous objects: "(1) objects that are dangerous *per se*, such as loaded guns; (2) objects that are not necessarily dangerous, but were actually used in a dangerous manner during the robbery; and (3) objects that are not necessarily dangerous, but may become dangerous when used in a dangerous manner." *People v. Ross*, 229 Ill. 2d 255, 275 (2008). When a statute does not contain any definition of "dangerous weapon," the common law definition, as defined by our supreme

court in *Ross*, would control. *People v. Washington*, 2012 IL 107993, ¶¶ 29-37. For purposes of the armed violence statute, a person is considered “armed with a dangerous weapon” when he or she “carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon.” 720 ILCS 5/33A-1(a) (West 2014); see *People v. Ligon*, 2016 IL 118023, ¶ 19. These categories include firearms and weapons that are not firearms. The home invasion statute distinguishes between the commission of the offense “with a firearm” from the commission of the offense “with a dangerous weapon other than a firearm” by ascribing those two factors to different subsections of the statute. *People v. Booker*, 2015 IL App (1st) 131872, ¶ 59 (citing 720 ILCS 5/12-11(a)(1), (a)(3) (West 2010)). For purposes of the home invasion statute, a weapon cannot at once be a “firearm” and something “other than a firearm.” *People v. Clark*, 2016 IL 118845, ¶ 23.

¶ 22 It is the oral pronouncement of the judge which is the judgment of the court. The written order of commitment is merely evidence of the judgment of the court. *People v. Williams*, 97 Ill. 2d 252, 310 (1983). When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement of the court controls. *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993) (citing *Spriggs v. United States*, 225 F.2d 865, 868 (9th Cir. 1955); *Watkins v. Merry*, 106 F.2d 360, 361 (10th Cir. 1939)). However, often apparent inconsistencies may be resolved by examining the record as a whole to determine whether the written order expresses the intent of the judge’s oral pronouncement, or conforms to the oral pronouncement’s sense and meaning but is merely set forth with greater specificity. *Id.* When looking at the record as a whole, if the

written order is *not* inconsistent with the intent, sense, and meaning of the circuit court’s oral pronouncement, the written order will be enforced. *Id.*

¶ 23 The first issue is whether or not the trial court’s oral pronouncement was an acquittal. We find that it was not. The trial court unequivocally stated that the defendant was found guilty of home invasion as charged in count I of the amended information. While it used the phrase “dangerous weapon” in the same sentence, this court would have to assume which definition of “dangerous weapon” listed above that the court intended in order to find that its use of the phrase constituted an acquittal of count I of the amended information and a finding of guilty of an uncharged offense, and that the uncharged offense it was referring to was the offense of home invasion while in possession of a dangerous weapon other than a firearm. The trial court could have been using the phrase in the colloquial sense, wherein, a firearm is most assuredly a dangerous weapon under the Black’s Law definition cited above. If we are to read into the court’s use of “dangerous weapon” a finding of acquittal, despite the end of the sentence finding the defendant guilty as charged, we would also have to assume which uncharged statutory definition it may have been referring to, not just the alternative version of home invasion as defendant urges. The phrase more closely mirrors the language of armed violence, since the court never uses the end of the statutory home invasion language—“dangerous weapon other than a firearm.”

¶ 24 Nonetheless, this court will not engage in a guessing game ascribing legal meaning to the court’s use of the phrase “dangerous weapon.” “A trial judge is presumed to know the law and to be able to ignore irrelevant, inflammatory or emotional factors in

arriving at the court's judgment." *People v. Terrell*, 132 Ill. 2d 178, 219 (1989). "Unlike a jury, a trial judge in a bench trial is presumed to know the law and to follow it and 'this presumption may only be rebutted when the record affirmatively shows otherwise.' " *People v. Thorne*, 352 Ill. App. 3d 1062, 1078 (2004) (quoting *People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001)). This court agrees with the State that there is nothing in the record to indicate that the trial court was resolving the fact of defendant possessing a firearm in defendant's favor. There is nothing to show that the trial court was not aware of the distinction between a firearm and a dangerous weapon other than a firearm. There is nothing to show that the trial court was specifically finding the defendant guilty of the uncharged offense of home invasion while armed with a dangerous weapon other than a firearm nor that the trial court was unaware of the finding in *Booker*, holding that "home invasion with a dangerous weapon is not a lesser-included offense of home invasion with a firearm." *Booker*, 2015 IL App (1st) 131872, ¶ 61. Further, there is nothing in the record to show that the trial court was unaware of the legal fact that the 15-year statutory firearm enhancement would not apply to a defendant found guilty of home invasion while armed with a dangerous weapon other than a firearm.

¶ 25 We would have to presume that the trial court's use of the phrase "dangerous weapon" in its oral pronouncement meant that defendant was acquitted of home invasion while armed with a firearm, even when in the same sentence the trial court states that the defendant is guilty as charged, the charge being home invasion while armed with a firearm. We find that the trial court's use of the phrase "dangerous weapon" was colloquial in nature, and that the record does not support a finding that the trial court's

oral pronouncement was tantamount to an acquittal. There is no way to read the charge to allege that the defendant used a dangerous weapon other than a firearm. There was no evidence presented of defendant's possession of any weapon other than the firearm testified to by multiple witnesses. The court at sentencing stated that it had found the defendant guilty of home invasion while in possession of a firearm. The sentencing order explicitly states the same. At most, the initial oral pronouncement after the bench trial uses a phrase that can be interpreted in a myriad of ways. The phrase "dangerous weapon" could refer to a firearm as a dangerous weapon in a non-legal sense, the common-law meaning, or may refer to the various statutory legal definitions for that term.

¶ 26 Apparent inconsistencies may be resolved by examining the record as a whole to determine whether the written order expresses the intent of the judge's oral pronouncement, or conforms to the oral pronouncement's sense and meaning but is merely set forth with greater specificity. *Smith*, 242 Ill. App. 3d at 402. When looking at the record as a whole, if the written order is *not* inconsistent with the intent, sense, and meaning of the circuit court's oral pronouncement, the written order will be enforced. *Id.* Under these facts, this court finds that the written order is consistent with the intent of the judge's oral pronouncement and is merely set forth with greater specificity.

¶ 27 In support of his argument, the defendant cites *People v. Lewis*, 379 Ill. App. 3d 829, 833-34 (2008). In that case the defendant was acquitted of delivery of heroin in count III, rendering the trial court's later sentence of six years for count III void. The trial court stated on the record after trial that, " 'The court finds that the State has met its

burden of proof with regard to Count No. 3 \*\*\*.’ ” *Id.* at 831. Later the trial court stated, “ ‘With regard to the transactions, details culminating in Count No. 3 which is the delivery of a controlled substance, again, the Court finds that the State has met its burden of proof, and that in fact the Defendant delivered some items containing a substance containing heroin to the undercover officers.’ ” *Id.* at 831-32. Further, the trial court stated, “ ‘The State has not met its burden of proof. As a result, there would be a finding of not guilty for Count No. 3. There would be a finding of guilty as to Count No. 4, PCS only.’ ” *Id.* at 832. *Lewis* is distinguishable from the case at bar in that there was nothing equivocal about the trial court’s finding of not guilty at the pronouncement. It was an unequivocal resolution of some or all of the elements of the offense charged. In the present case, while the trial court used the term “dangerous weapon,” which holds various meanings, the court unequivocally found defendant guilty “as charged.”

¶ 28 The defendant also cites *People v. Clark*, 2014 IL App (1st) 123494, where the defendant was charged with armed robbery while armed with a firearm. Following a bench trial, the trial court specifically found that the defendant did not use a firearm, and thus, acquitted him of that offense. Again, *Clark* is distinguishable.

¶ 29 In the present case, unlike *Clark*, the trial court did not use clear language of acquittal. The trial court’s oral pronouncement was a finding of guilty for the offense as charged in the amended count I, home invasion while armed with a firearm. Therefore, the trial court did not acquit the defendant of the amended count I and did not find the defendant guilty of an uncharged offense, and the court’s sentence is therefore proper.

¶ 30

## B. Fines and Fees

¶ 31 The trial court's judgment at sentencing indicated that "defendant shall pay court costs, fees and assessments as are mandated by statute in this matter." The defendant outlines fines, totaling \$170, that were imposed by the circuit clerk, and maintains the clerk lacked authority to do so. The State concedes that the circuit clerk improperly imposed certain fines. The defendant filed a motion to reconsider sentence on July 29, 2015, which made no mention of improperly assessed court fines and fees.

¶ 32 During the pendency of this appeal, the Illinois Supreme Court issued its opinion in *People v. Vara*, 2018 IL 121823, holding that on review of a judgment of a criminal conviction, the reviewing court did not have jurisdiction to review a circuit clerk's assessment of improper fines. In *Vara*, the defendant was convicted of child pornography, and the clerk of the circuit court indicated in its "electronic accounts receivable record" that the defendant was obligated to pay certain fines that were not specified in the circuit court's judgment. *Id.* As in this case, in *Vara*, on direct appeal from his conviction and sentence, the defendant "challenged the data entries recorded by the circuit clerk that purported to assess additional fines not imposed by the circuit court." *Id.* ¶ 1. The appellate court vacated the fines. *Id.* ¶ 7. However, the supreme court held that the appellate court lacked jurisdiction in the appeal to review the fines and fees assessed by the circuit court. *Id.* ¶ 23.

¶ 33 The Illinois Supreme Court held that the circuit clerk's "payment status information sheet" was a clerical document created outside the record of the trial court proceedings and was not part of the common law record or report of proceedings of the

defendant's criminal prosecution. *Id.* ¶ 22. Further, although the clerk was obligated to record the ruling of the court and had no authority to levy fines against the defendant that were not issued by the court's judgment, the clerk improperly doing so was in the nature of a clerical function that was not part of the circuit court's judgment. *Id.* ¶ 23. The supreme court concluded that "the improper recording of a fine is not subject to direct review by the appellate court." *Id.* "Any questions as to the accuracy of the data entries included in the payment status information must be resolved through the cooperation of the parties and the circuit clerk or by the circuit court in a *mandamus* proceeding." *Id.* ¶ 31.

¶ 34 In the present appeal, the defendant's appellate counsel requested that this court vacate clerk-imposed fines without remand. However, since defendant's brief was filed, the *Vara* decision held that this court does not have jurisdiction to do so. *Vara* is controlling with respect to this issue. The defendant did not address court fines and fees in his timely filed motion to reconsider. Accordingly, we do not have jurisdiction in this appeal to review the circuit clerk's clerical data entries with respect to the assessment of fines and fees. The clerk's entries were made outside of the court proceedings below and are not a part of the judgment from which the defendant appeals.

¶ 35

### III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm defendant's conviction and sentence for home invasion while armed with a firearm. Because defendant was not acquitted and found guilty of an uncharged offense, his sentence is also appropriate and we affirm his

sentence. This court does not have jurisdiction to address clerk-imposed fines and fees, and therefore that portion of the defendant's appeal is dismissed for lack of jurisdiction.

¶ 37 Affirmed in part and dismissed in part.