

No. 1-13-1319

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 15166
	)	
DONTE FERGUSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Howse and Ellis concurred in the judgment.

**O R D E R**

¶ 1 *Held:* We vacate defendant's conviction for the *uncharged* offense of aggravated vehicular hijacking with a dangerous weapon other than a firearm because it is not lesser-included within the *charged* offense of aggravated vehicular hijacking with a firearm. We enter a conviction on the lesser-included offense of vehicular hijacking, and remand for sentencing on that conviction.

¶ 2 Following a bench trial, defendant Donte Ferguson was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm and unlawful restraint, and sentenced to 14 years' imprisonment for aggravated vehicular hijacking and a concurrent 3-year

term for unlawful restraint. On appeal, defendant contends that his conviction for aggravated vehicular hijacking with a dangerous weapon other than a firearm was improper because it was not a lesser-included offense of aggravated vehicular hijacking with a firearm. For the following reasons, we vacate defendant's conviction and sentence for aggravated vehicular hijacking with a dangerous weapon, enter judgment on the lesser-included offense of vehicular hijacking, and remand for sentencing on the vehicular hijacking conviction.

¶ 3 Defendant and codefendant Terrence Williams<sup>1</sup> were charged, in pertinent part, with one count of aggravated vehicular hijacking in that on or about September 5, 2011, they knowingly took a motor vehicle from the victim, Juvenal Sepulveda, by the use of force or by threatening the imminent use of force, "and they carried on or about their person, or were otherwise armed with a firearm" in violation of section 18-4(a)(4) of the Criminal Code of 1961 (Code) (720 ILCS 5/18-4(a)(4) (West 2010)). Defendant and codefendant proceeded to a joint bench trial.

¶ 4 At trial, Juvenal Sepulveda testified that he parked his silver Chevrolet Avalanche in an alley at 3400 West 54th Place at about 9:30 p.m. on September 5, 2011. As Sepulveda exited his car, defendant and codefendant approached him, and codefendant pulled out a gun, placed it to his head, and demanded the keys. Sepulveda refused to turn over the car keys, and codefendant and defendant pulled Sepulveda's pants down and took his keys. The offenders then got into Sepulveda's car and left the scene. Sepulveda ran to his brother's apartment and called the police. When the police arrived about 15 minutes later, Sepulveda told them what happened and they took him to the intersection of Kedzie Avenue and Marquette Road where he saw his car, which was "crashed" and "completely destroyed," and the offenders. Sepulveda acknowledged that he

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<sup>1</sup> Codefendant Williams has a separate appeal (No. 1-13-0994).

initially told police that the taller offender had the gun, but explained that he said that because the person with the gun was closest to him and seemed taller. The court said it would “take note that Mr. Ferguson is taller than Mr. Williams.”

¶ 5 Officer Jose Lule testified that he and his partner were on patrol when he received a flash message that a vehicular hijacking had occurred. As Lule traveled northbound on Kedzie Avenue toward Marquette Road, he observed a car matching the description he had just received traveling southbound with squad cars behind it. He also observed two occupants inside of the subject car. As the subject car approached Lule’s vehicle, it turned east and immediately struck a traffic monitoring device and several other vehicles. Lule exited his car and identified the occupants of the subject car as defendant and codefendant. Lule’s partner, as well as other officers who were on the scene, pursued defendant and codefendant, and then brought them back to the scene where they were taken into custody. Lule looked inside of the subject car and saw a loaded gun on the passenger’s side floorboard. The victim identified defendant and codefendant at the scene as the individuals who took his car at gunpoint.

¶ 6 Following closing arguments, the trial court stated that there was an issue regarding who had the gun during the incident, and noted that it was never fired but used as bludgeon. The court found both defendants guilty “of the lesser offense of aggravated vehicular hijacking without a firearm with a dangerous weapon showing the gun used in the nature of a bludgeon in this case.” The court also found them both guilty of unlawful restraint. Defendant was subsequently sentenced to 14 years’ imprisonment for aggravated vehicular hijacking with a dangerous weapon other than a firearm pursuant to section 18-4(a)(3) of the Code, and a concurrent term of 3 years for unlawful restraint.

¶ 7 On appeal, defendant contends that his conviction for aggravated vehicular hijacking must be reversed because aggravated vehicular hijacking with a dangerous weapon other than a firearm is not a lesser-included offense of aggravated vehicular hijacking with a firearm. Defendant acknowledges he failed to object when the court found him guilty, but he contends the matter is reviewable under the second prong of the plain error doctrine. The State asserts defendant has failed to establish plain error.

¶ 8 Under the plain error doctrine, we may consider unpreserved claims of error when a clear or obvious error occurred and either (1) the evidence is so closely balanced the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant bears the burden of persuasion under both prongs of the analysis. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). We must first determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 9 A criminal defendant has a fundamental due process right to notice of the charges against him. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). Accordingly, a defendant may not be convicted of a crime with which he has not been charged. *Id.* However, a defendant can be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence supports a conviction on the lesser-included offense and acquittal on the charged offense. *Id.* at 360. To determine whether an uncharged offense is a lesser-included offense of a charged offense, Illinois courts employ the charging instrument approach. *People v. Kennebrew*, 2013 IL 113998, ¶ 32. Under this approach, "[a] lesser offense will be 'included' in the charged offense if the factual description of the charged offense

describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367. Whether an offense is a lesser-included offense of a charged crime is an issue of law we review *de novo*. *Kennebrew*, 2013 IL 113998, ¶ 18.

¶ 10 Defendant was charged with aggravated vehicular hijacking under section 18-4(a)(4) of the Code, which provides that a person commits aggravated vehicular hijacking when he commits vehicular hijacking and carries or is armed with a firearm. 720 ILCS 5/18-4(a)(4) (West 2010). He was convicted of aggravated vehicular hijacking under section 18-4(a)(3) of the Code, which specifies that an individual commits aggravated vehicular hijacking when he commits vehicular hijacking and carries or is armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-4(a)(3) (West 2010).

¶ 11 We find *People v. Barnett*, 2011 IL App (3d) 090721, relied on by defendant, instructive on the issue of whether aggravated vehicular hijacking with a dangerous weapon other than a firearm is a lesser-included offense of aggravated vehicular hijacking with a firearm. In *Barnett*, the court concluded that armed robbery with a dangerous weapon was not an included offense of armed robbery with a firearm. *Id.*, ¶ 38. The court reasoned that armed robbery with a dangerous weapon contained the additional element of dangerousness not required by the section pertaining to armed robbery with a firearm, and violations under each section of the armed robbery statute were mutually exclusive of each other. *Id.*, ¶¶ 37-38. Stated differently, where the State charged a person with armed robbery based on using a "dangerous weapon," that weapon could not be a firearm, and where the State charged a person with armed robbery based on using a firearm, it was not required to prove the firearm was dangerous. *Id.*, ¶ 38; see also *People v. Wright*, 2013

IL App (3d) 100522, ¶ 19 (stating that "[i]f a defendant is charged with armed robbery based on using a 'dangerous weapon,' then the weapon cannot be a firearm."). We note that although *Barnett* dealt with the crime of armed robbery (720 ILCS 5/18-2(a)(1),(2) (West 2010)), the crime of aggravated vehicular hijacking involved the same statutory subsections and was amended in the same way by Public Act 91-404. Therefore, the case law that developed in the context of the armed robbery statute is equally applicable to the crime of aggravated vehicular hijacking. See *People v. Clark*, 2014 IL App (1st) 123494, ¶ 32; *People v. McBride*, 2012 IL App (1st) 100375, ¶ 24 (finding that a firearm could not qualify as a dangerous weapon other than a firearm under section 18-4(a)(3) of the Code). Therefore, aggravated vehicular hijacking with a dangerous weapon other than a firearm is not a lesser-included offense of aggravated vehicular hijacking with a firearm. *Clark*, 2014 IL App (1st) 123494, ¶ 32. Accordingly, the trial court violated defendant's due process rights by convicting him of an uncharged offense that was not a lesser-included offense.

¶ 12 *People v. Washington*, 2012 IL 107993, relied on by the State, does not show that a different result should be found here. In that case, the defendant was charged with armed robbery based on a prior version of section 18-2(a) of the Code, which provided that a person committed armed robbery if, at the time of the offense, he "carried on or about his person or otherwise was armed with a dangerous weapon." *Id.*, ¶¶ 6-7. As the *Washington* court noted, the legislature subsequently amended the armed robbery statute to create distinct offenses based on whether the armed robbery was committed with a dangerous weapon other than a firearm, or committed with a firearm. *Id.*, ¶ 6. Because the *Washington* decision involved the prior version of the armed robbery statute, it has no bearing on the issue before this court. See *Clark*, 2014 IL App (1st)

123494, ¶ 33 (distinguishing *Washington* on similar grounds). For this same reason, the State's citation to *People v. Skelton*, 83 Ill. 2d 58 (1980), is unavailing. We further note that the State spends several pages discussing the definition of a dangerous weapon and argues at length that a firearm "may be considered a dangerous weapon." As correctly pointed out by defendant in his reply brief, however, the State's discussion is irrelevant to the case at bar. The case law shows that although a firearm can in certain circumstances be a dangerous weapon, it cannot be a dangerous weapon "other than a firearm." 720 ILCS 5/18-4(a)(3) (West 2010).

¶ 13 We now turn to whether defendant has satisfied either prong of the plain error doctrine. Defendant contends only that his claim is reviewable under the second prong. To demonstrate error under the second prong, a defendant must show a clear or obvious error occurred and also "that the error was a structural error." *People v. Eppinger*, 2013 IL 114121, ¶ 19. An error is typically found to be structural in nature only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence. *Thompson*, 238 Ill. 2d at 609. The supreme court had found structural error in six classes of cases that are not applicable here, *i.e.*, a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. See *Id.* Nevertheless, a defendant has a fundamental due process right to notice of criminal charges against him (*Kolton*, 219 Ill. 2d at 359), and thus our court has found that a conviction for an uncharged offense that is not a lesser-included offense of a charged crime violates due process and must be reversed under the plain error doctrine. *People v. McDonald*, 321 Ill. App. 3d 470, 474 (2001). Therefore, we find defendant has established that plain error occurred where the trial court convicted him of the

uncharged offense of aggravated vehicular hijacking with a dangerous weapon other than a firearm.

¶ 14 In so finding, we note that this court has previously rejected the State's argument that *Thompson*, 238 Ill. 2d at 598 and *People v. Glasper*, 234 Ill. 2d 173 (2009), limited the second prong of the plain error doctrine to the aforementioned six categories of error. *Clark*, 2014 IL App (1st) 123494, ¶ 40 ("[w]e reject the State's contention that second-prong plain error applies only to six identified structural errors"); but see *People v. Spencer*, 2014 IL App (1st) 130020, ¶¶ 46-51 (refusing to vacate the defendant's conviction of the uncharged offense of armed robbery with a dangerous weapon other than a firearm based on the second prong as it was not one of the six listed structural errors, but nevertheless vacating the conviction and reducing it to robbery because trial counsel was ineffective for failing to object to the court's improper finding of guilt). We highlighted in *Clark* the fact that the Illinois Supreme Court has held that second prong plain error applied to errors not listed in the six categories. *Clark*, 2014 IL App (1st) 123494, ¶ 40, citing to *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (failure to apply the one-act, one crime rule constituted plain error under the second prong), and *People v. Walker*, 232 Ill. 2d 113, 131 (2009) (failure to exercise discretion in denying a request for a continuance constituted second prong plain error). We thus find the State's contention that defendant cannot meet the second prong of the plain error analysis unpersuasive.

¶ 15 Having found his conviction improper, defendant requests we reverse the conviction for aggravated vehicular hijacking with a dangerous weapon other than a firearm and enter a conviction on the lesser charge of vehicular hijacking. Supreme Court Rule 615(b)(3) (eff. Feb. 6, 2013), provides the appellate court with broad authority to reduce the degree of a defendant's

conviction, even when the lesser offense is not charged. *Kennebrew*, 2013 IL 113998, ¶ 25.

Vehicular hijacking is an included offense of aggravated vehicular hijacking. *Clark*, 2014 IL App (1st) 123494, ¶ 43, citing *People v. Andrews*, 364 Ill. App. 3d 253, 282-83 (2006). We therefore reduce defendant's conviction from aggravated vehicular hijacking to vehicular hijacking, and remand the matter to the trial court for sentencing on the vehicular hijacking conviction.

¶ 16 For the foregoing reasons, we vacate defendant's aggravated vehicular hijacking conviction and corresponding sentence, and enter a conviction for the lesser-included offense of vehicular hijacking and remand for sentencing on that offense. The judgment of the circuit court is otherwise affirmed.

¶ 17 Affirmed in part; vacated and remanded in part.