2012 IL App (1st) 100788-U

FOURTH DIVISION
March 8, 2012

Nos. 1-10-0788; 1-10-0789 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	08 CR 16873; 08 CR 16874
JAMES GREENE,	)	
	)	The Honorable
Defendant-Appellant.	)	James B. Linn,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

HELD: (1) The defendant was proven guilty beyond a reasonable doubt of home invasion where there was sufficient physical evidence that a gun was fired from inside the victim's apartment and that therefore defendant had entered the victim's dwelling. (2) The State committed incomplete impeachment when it questioned a witness concerning a conversation with a prosecutor where the witness stated defendant had moved out, which contradicted the witness' trial testimony, and then failed to prove up the statement. However, the incomplete impeachment was harmless error where the matter was tried in

a bench trial and several other witnesses testified that defendant had moved out of the victim's apartment. (3) The trial court erred in not addressing defendant's ineffective assistance of counsel claim, and thus the case was remanded for the required hearing and determination by the circuit court. (4) Because the State failed to file a written petition for an order of protection, the circuit court's subject matter jurisdiction was never invoked and the order was void and therefore vacated. (5) One of defendant's convictions for aggravated stalking violated the one-act, one-crime rule, and the matter was remanded for a determination of which offense was the less serious offense, which was ordered to be vacated.

¶1 BACKGROUND

¶2 Defendant, James Greene, was indicted in criminal action No. 08 CR 16873 on three counts of home invasion, one count of aggravated battery, and three counts of domestic battery, based on events that occurred on January 28, 2008. Defendant was indicted in another criminal action, No. 08 CR 16874, on seven counts of home invasion, one count of aggravated discharge of a firearm, two counts of aggravated stalking, one count of stalking, and one count of criminal damage to property, based on events that occurred on August 16, 2008. The two criminal cases were consolidated for a bench trial. Defendant was found guilty in the first case of one count of home invasion and two counts of aggravated stalking. Defendant was found guilty in the second case of one count of home invasion, one count of aggravated battery, and one count of domestic battery. Defendant was sentenced to an aggregate fifteen years in prison. The following facts were adduced at defendant's consolidated bench trial:

¶3 First Criminal Case, No. 08 CR 16873

¶4 In the first criminal case, No. 08 CR 16873, the complainant, Vivian Moffett, testified that she had an on-and-off relationship with defendant since she met him in 2005. When questioned whether defendant was living with her at her residence in January 2008, Moffett

testified that defendant was spending nights "back and forth over there." Moffett testified that defendant lived with her at the end of 2007, but then later testified that defendant moved out in August 2007 and was not living with her in January 2008.

¶5 The night before January 28, 2008, Moffett spent the night at her mother's house because defendant had called and threatened her. Moffett went back to her apartment the next day. At around 1:30 p.m., defendant came and knocked on the door. Moffett talked to defendant through the closed door. Defendant told her, "[I]f you don't open the door, I'm going to kick the door down." Moffett called her property manager, who told her to call the police. As Moffett was calling the police, defendant started kicking the door and succeeded in kicking it open. When the door opened, it knocked Moffett's two-year-old son, Tiron Henderson, down and he split his lip. Defendant entered the apartment, pushed Moffett against the wall, and started punching her in the face. Defendant then ran out and down the back stairs. As a result of the beating, Moffett's eye turned black and she developed a problem with her middle ear.

¶6 After this incident, Moffett did not have contact with defendant but received phone calls from him on February 3, 2008, when he left threatening messages on her voice mail. Defendant stated that "he helped make [her] kids and he could help take them out." Defendant also stated to Moffett in a voice mail, "I had you, bitch." Moffett obtained an emergency order of protection, and later a plenary order of protection. Moffett testified that after the incident she no longer had a relationship with defendant.

¶7 Chicago Police Officer Willie Akerson testified that he responded to the domestic battery call placed by Moffett on January 28, 2008. When he arrived at the scene, Moffett had a bloody,

swollen face, her right eye was swollen partially shut, and she was very upset, crying hysterically. Tiron had a small laceration on his lip. Akerson observed that the lock on the door was "split" and the plywood frame to the door was "broken up pretty bad."

¶8 Diamond Wallace, Moffett's cousin, lived in the same building as Moffett. She testified that defendant was living with Moffett until early 2008. Moffett testified that between January 2008 and August 16, 2008, she saw defendant when he was visiting her baby because defendant was still socializing with her mother. She also saw him at a gas station but did not call the police.

¶9 Second Criminal Case, No. 08 CR 16874

¶10 On August 16, 2008, Moffett was home with four of her children. The night before, she and her children had stayed with a friend because defendant had called her trying to argue and she "didn't want to go home and have to fight." At about 1 p.m. on August 16, 2008, Moffett went upstairs to a friend to get a cigarette, taking the baby, Jamarion, with her. Moffett testified she was gone for about a minute. During the summertime, the back door to the building was left open. When Moffett returned, she got to the threshold of the door when defendant came up behind her and grabbed her shoulder. Moffett handed Jamarion to her daughter Miangel, who was standing in the doorway. Moffett and defendant started wrestling and "tussling," with defendant trying to grab her and Moffett trying to push him out the door. Moffett noticed that defendant had a gun in his waistband and then saw it in his hand. As they continued wrestling, the gun went off. When the gun fired, defendant's hands were on the gun and Moffetts's hands were around his. The gun was fired from the inside of Moffett's apartment, through her door,

with the bullet hitting the wall in the outer hallway. At trial, photographs depicted the bullet holes. People's Exhibit Number 11 depicted the bullet hole in Moffett's door. People's Exhibits Number 17 and Number 18 show the resulting bullet hole in the hallway. Moffett's seven-year-old son Ronald was about five or six feet away from Moffett and defendant. After the gun went off, Moffett was able to push defendant out the door, hitting the hand that was holding the gun with the door, causing defendant to drop the gun on the floor inside her residence. Moffett locked the door and called the police. Wallace came to Moffett's apartment and told her defendant was "busting out" Moffett's car windows.

¶11 Wallace testified that on August 16, 2008, she saw defendant get something out of the trunk of Moffett's car and then "bust[] her car windows out." Wallace tried calling Moffett, but Moffett's phone kept going to voice mail. Wallace watched defendant leave through the alley of the back parking lot, and then went upstairs to Moffett's apartment. When Moffett opened the door, she was crying and appeared scared and angry. Wallace saw the gun in Moffett's hand. Moffett told her that she and defendant "got into it."

¶12 When the police operator told Moffett that the police had arrived, she went downstairs with the gun in her hand but handed the gun to Wallace because she did not want to walk up to the squad car with a loaded gun. The police told Wallace to drop the gun and put her hands up. A police officer took the gun from Wallace. Wallace then told the police what she had seen defendant do to Moffett's car.

¶13 Officer Hickey testified that she responded to the call and saw Officer Jordan talking to Moffett and a witness and saw Jordan turn the gun over to Hickey's partner, Matt Michetich, who

inventoried the gun. The gun was a Rossi .38 special blue steel revolver with a three-inch barrel and a defaced serial number. The gun contained four live rounds and one shell casing. Hickey observed that Moffett was very upset and concerned for both her children and herself.

¶14 The parties stipulated that Officer Kenneth Jordan would testify that he was the first responding officer on August 16, 2008, and that Wallace turned the gun over to him, which he then turned over to Matthew Michetich. The gun was later inventoried. The parties also stipulated that Marc Pomerance would testify that he received the inventoried gun and that it contained three unfired cartridges and one fired cartridge case. The parties stipulated that the chain of custody for the gun was properly maintained at all times.

¶15 Bernice Moffett, Vivian Moffett's mother, testified on behalf of defendant. Bernice testified that defendant and Moffett had an "up and down relationship" but that defendant was very loving with the children. Bernice testified that defendant and Moffett were living together in January 2008 and that defendant never moved out after the altercation in January. Some of defendant's personal items are still in Moffett's apartment.

¶16 On cross-examination, the State asked Bernice if, on the morning she testified, she had a conversation with the State's attorney and stated that defendant moved out sometime in January 2008. Bernice denied that she made this statement. The trial court then asked the State's attorney if he had a witness to prove up the conversation, and the State's attorney said, "Yes." However, the State did not call the witness to testify regarding the conversation between the State's attorney and Bernice.

¶17 In rebuttal, Valerie Liggins, Moffett's sister, testified. Liggins testified that she had

"never been aware of [defendant] ever moving out." Liggins testified that she remembered when Moffett obtained an order of protection against defendant, and the next day Liggins saw defendant driving Moffett's car. The last time Liggins saw defendant at Moffett's apartment was sometime in January 2008, but she saw him on many occasions with the children up until August 2008.

¶18 Porsche Dawson, Moffett's neighbor, also testified in rebuttal. Dawson testified that she last saw defendant living with Moffett around the end of January 2008. Bobbie Sims, Moffett's friend, also testified in rebuttal. Sims testified that defendant moved out in December 2007, and that she saw no sign of defendant living there after that.

¶19 During the State's closing argument, regarding the issue of whether defendant was living with Moffett, the court questioned, "Well if he is living there, would he be expected to have a key? Does he have to tear down his own door to get in?" In the first case, the court found defendant guilty of one count of home invasion and two counts of aggravated stalking. The court found that the facts regarding the gun and where the gun was fired were "a little bit ambiguous," and therefore did not convict defendant of the counts based on the gun. In the second case, the court found defendant guilty of one count of aggravated battery and one count of domestic battery. In the first case, the court sentenced defendant to seven years' imprisonment for the home invasion count and two five-year sentences on the two aggravated stalking counts, to run concurrently. In the second case, the court sentenced defendant to eight years' imprisonment for the home invasion count, five years for the aggravated battery count, and 364 days for the domestic battery count, to run concurrently. The sentences in the two cases were ordered to run

consecutively.

¶20 At sentencing, the State orally requested an order of protection. The State did not file a written petition and provided no notice to defendant. The trial court entered an order of protection.

¶21 Defendant filed a motion for a new trial, alleging the following errors: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the finding is against the manifest weight of the evidence; (3) he was denied due process of law; (4) he was denied equal protection of the laws; (5) the State failed to prove every material allegation of the offense beyond a reasonable doubt; (6) defendant did not receive a fair and impartial trial; (7) the court erred in overruling defendant's motion for a directed finding at the close of the State's case; and (8) the finding is based upon evidentiary facts which do not exclude every reasonable hypothesis consistent with the innocence of defendant. The court denied the motion. Defendant appealed.

¶22 ANALYSIS

¶23 Defendant argues the following: (1) he was not proven guilty beyond a reasonable doubt of the home invasion in his second criminal case where the testimony of Vivian Moffett that he entered her apartment was contradicted by the physical evidence; (2) he was denied a fair trial where the State failed to perfect its impeachment of the defense witness regarding whether defendant lived in the apartment; and (3) the trial court erred where it failed to address defendant's *pro se* claim of ineffective assistance of counsel; (4) the order of protection issued against him was void and should be vacated where the State failed to file a written petition; and (5) one of defendant's convictions for aggravated stalking should be vacated where both of his

convictions were based on the same conduct.

¶24 We hold that: (1) the physical evidence, under the appropriate standard of review, supports the court's finding of defendant's guilty beyond a reasonable doubt; (2) the incomplete impeachment in this case was harmless error; (3) the trial court erred in not addressing defendant's ineffective assistance of counsel claim; (4) because the State failed to file a written petition for an order of protection the court's subject matter jurisdiction was never invoked and the order is void; and (5) one of defendant's convictions for aggravated stalking must be vacated because it violates the one-act, one-crime rule and the less serious offense must be vacated. Therefore, we affirm defendant’s conviction and sentence for home invasion, but we reverse and vacate the order of protection. We remand for a hearing and findings on defendant's post-conviction petition. We also remand the case for a determination of which is the less serious offense of defendant's convictions for aggravated stalking and order that conviction vacated.

¶25 I. Reasonable Doubt on Home Invasion Count in Case No. 08 CR 16874

¶26 Defendant asks us to reverse his conviction on the home invasion count in his second criminal case, No. 08 CR 16874, based on reasonable doubt where the testimony of the complaining witness, Vivian Moffett, was allegedly "contradicted by the physical evidence and undermined by inconsistencies." Defendant argues that the physical evidence shows the gun was fired from the inside of Vivian Moffett's apartment, through her door, but that Moffett inconsistently testified that at the time the gun went off she was trying to push defendant out of her apartment and testified that the door was never closed. Defendant maintains that based on the position of the bullet hole in the hallway, Moffett's testimony could not be true and therefore

he was not proven guilty beyond a reasonable doubt and his conviction for home invasion should be overturned.

¶27 The following acts, in relevant part, constitute the offense of home invasion:

> "(a) A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present *** and
>
> (1) While armed with a dangerous weapon, other than a firearm, uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or
>
> * * *
>
> (3) While armed with a firearm uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or
>
> (4) Uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs and during the commission of the offense personally discharges a firearm." 720 ILCS 5/12-11(a)(1), (3), (4) (West 2010).

Unauthorized entry into the dwelling of another is an essential element of home invasion. *People v. Hicks*, 181 Ill. 2d 541, 545 (1998). Defendant contends he was not proven guilty of this essential element.

"It is axiomatic that the State has the burden of proving the defendant guilty beyond a reasonable doubt, a burden that can be met with the testimony of a single, credible eyewitness." *People v. Zarate*, 264 Ill. App. 3d 667, 673 (1994) (citing *People v. Gibson*, 205 Ill. App. 3d 361,

367 (1990)). A criminal conviction will not be set aside on review unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *People v. Gilyard*, 237 Ill. App. 3d 8, 22 (1992) (citing *People v. Steidl*, 142 Ill.2d 204, 226 (1991)). Determinations as to the credibility of witnesses and the weight given their testimony are the province of the trier of fact. *People v. Burnette*, 325 Ill. App. 3d 792, 802 (2001) (citing *People v. Coleman*, 311 Ill. App. 3d 467, 473 (2000)). It is not the function of the appellate court to retry a defendant when considering a challenge to the sufficiency of the evidence; rather, the determination of the weight to be given to the witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *Gilyard*, 237 Ill. App. 3d at 22 (citing *Steidl*, 142 Ill.2d at 226). 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' ***." (Emphasis in original.) *People v. Trimble*, 220 Ill. App. 3d 338, 350 (1991) (quoting *People v. Schorle*, 206 Ill. App. 3d 748, 759 (1990), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[A]fter a defendant has been found guilty, ' *** *all of the evidence* is to be considered in the light most favorable to the prosecution.' " (Emphasis in original.) *Trimble*, 220 Ill. App. 3d at 350 (quoting *Schorle*, 206 Ill. App. 3d at 759, quoting *Jackson*, 443 U.S. at 319).

¶28 In the instant case, viewing the evidence in the light most favorable to the prosecution, we find the trier of fact could have found the elements of home invasion proven beyond a reasonable doubt. Moffett testified that she and defendant started wrestling inside her apartment and that she was trying to push defendant out the door. As they continued wrestling, the gun went off.

Moffett testified that the gun was fired from the inside her apartment, through her door, with the bullet hitting the wall in the outer hallway. Photographs entered into evidence at trial depicted the bullet hole through Moffett's door out into the hallway, as well as the resulting bullet hole in the wall of the hallway. Defendant's theory at trial was that he had returned to the apartment to retrieve his things and the door was shut, not partially open as during a struggle, and thus the bullet went through the closed door.

¶29 Contrary to defendant's assertion, we find the physical evidence corroborates Moffett's testimony that the gun was fired from inside her apartment during a struggle. The fact that the door opens to the inside of the apartment and, according to Moffett, was not shut does not contradict a finding that defendant was inside Moffett's apartment, which is an essential element of home invasion. The physical evidence still establishes that the bullet traveled through Moffett's door from inside her apartment and left a bullet hole in the wall of the hallway outside Moffett's apartment. No matter how open or shut the door was, one would have to be inside the apartment in order for a fired bullet to travel through the door and hit the wall in the hallway outside the apartment. Even without Moffett's testimony that she struggled with defendant and that the gun went off as she was trying to push him out of her apartment, the physical evidence supports a finding that defendant was inside Moffett's apartment, thereby satisfying this element of home invasion.

¶30 The instant case is similar to *People v. Cassell*, 283 Ill. App. 3d 112 (1996). In *Cassell*, there was sufficient evidence that defendant entered apartment without authority to support his conviction for home invasion, despite defendant's contention that he entered apartment through

an open door, where the back window of the apartment was shattered and the apartment's door frame was broken and in splinters lying on floor. *Cassell*, 283 Ill. App. 3d at 122.

¶31 *People v. Davis*, 3 Ill. App. 3d 738 (1972), relied upon by defendant, is distinguishable where in Davis the evidence established only that the defendant pounded a hole through the wall and there was no evidence the defendant actually crossed the threshold of the premises. *Davis*, 3 Ill. App. 3d at 740. Here, on the other hand, although defendant contend the door was open and he was not inside Moffett's apartment, there was sufficient evidence that defendant was indeed inside Moffett's apartment where there was a bullet hole through the door and another resulting bullet hole in the wall of the hallway. As in *Casell*, the physical evidence here corroborates the victim's testimony that defendant was inside her apartment.

¶32 Under the proper standard of review, after viewing the evidence in the light most favorable to the prosecution and considering whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt, we determine the evidence supports the court's finding of guilt beyond a reasonable doubt. Therefore, we affirm defendant's home invasion conviction in 08 CR 16874.

¶33 II. Incomplete Impeachment

¶34 Defendant next argues that his convictions should be reversed because the State's incomplete impeachment of Bernice Moffett constituted reversible error. After Bernice Moffett testified that defendant was still living with her daughter, Vivian Moffett, in January of 2008 and never moved out of the apartment, the State asked Bernice if, before she testified, she had a conversation with the State's attorney during which she said that defendant moved out sometime

in January 2008. Bernice denied that she made this statement. The State's attorney indicated that it had a witness to prove up the statement, but the State never called the witness to testify. In order to impeach a witness with a prior inconsistent statement, the impeachment must be completed by later offering evidence of the inconsistent statement if the statement was denied. *Garcia v. City of Chicago*, 229 Ill. App. 3d 315, 320 (1992) (citing *Rigor v. Howard Liquors, Inc.*, 10 Ill. App. 3d 1004 (1973)). It is reversible error to fail to offer substantive proof of the impeaching statements due to the highly prejudicial innuendo created through the incomplete impeachment. *Garcia*, 229 Ill. App. 3d at 320 (citing *Green v. Cook County Hospital*, 156 Ill. App. 3d 826 (1987)).

¶35 As the State points out, defendant failed to object at trial and did not raise this issue in his post-trial motion. Generally, a defendant must object to claimed errors at trial and raise them in his post-trial motion; otherwise, they are procedurally defaulted or forfeited. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008). Here, defendant did not object at trial and did not raise this issue in his post-trial motion, and therefore the issue has been forfeited. See *People v. Williams*, 204 Ill. 2d 191, 208 (2003) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)).

¶36 However, the plain error doctrine permits courts to consider otherwise forfeited claims when: "(1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶37 Yet, in this case, we find that the error was harmless and does not rise to the level of plain error. We note that the case was tried before the court. "In a bench trial, in the absence of evidence to the contrary, it is presumed that the court considers only competent evidence and the admission of incompetent evidence is harmless." *Dowd and Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 389 (2004) (citing *In re Application of the County Collector for Judgment & Sale Against Lands & Lots Returned Delinquent for Non-payment of General Taxes and/or Assessments for the Year 1985 and Prior Years*, 219 Ill. App. 3d 396, 405 (1991)). See also *People v. Williams*, 246 Ill. App. 3d 1025, 1033 (1993) ("[A] trial judge is presumed to know the law and only consider competent and admissible evidence." (citing *People v. Gilbert*, 68 Ill. 2d 252 (1977))). "In a nonjury case the whole record is before the reviewing court." *Eychaner v. Gross*, 202 Ill. 2d 228, 262 (2002). "Any error which may have been committed in ruling upon the admission or exclusion of evidence is unimportant." *Eychaner*, 202 Ill. 2d at 262. "If there is competent evidence sufficient to sustain the trial court's decision it will be affirmed, regardless of the views of the trial court as to the competency of the evidence at trial." *Eychaner*, 202 Ill. 2d at 262 (citing *Newman v. Youngblood*, 394 Ill. 617, 625 (1946)).

¶38 In this bench trial, there were five other witnesses who all testified that defendant had indeed moved out of Vivian Moffett's apartment before the January 2008 incident. Also the State asked the question only once and did not return to this line of questioning, nor did it refer to the matter in closing argument. The instant case is similar to *People v. Foules*, 258 Ill. App. 3d 645, 657 (1993). In *Foules*, the prosecutor similarly did not call another witness to perfect attempted impeachment. We held that the issue was waived due to forfeiture by the defendant but, in any

event, there was no prejudicial error. *Foules*, 258 Ill. App. 3d at 657. We held that there was some substantiation for the prosecutor's attempt to impeach the witness due to the fact that the impeachment was based upon the prosecutor's own conversation with the witness just prior to the witness testifying. *Foules*, 258 Ill. App. 3d at 657. Here, the prosecutor's attempted impeachment concerned the witness' conversation with another prosecutor just before testifying. Also, in *Foules* the prosecutor did not argue any insinuation or innuendo related to the attempted impeachment in closing argument, just as in the instant case. *Foules*, 258 Ill. App. 3d at 657. Thus, just as in *Foules*, here there was no prejudicial error sufficient to support a finding of plain error. Therefore, defendant has forfeited the issue.

¶39 In any event we presume that the court considered only the competent evidence, which here is sufficient to affirm the court's finding of guilt for home invasion and aggravated stalking. We therefore affirm defendant's home invasion and aggravated stalking convictions.

¶40 III. Ineffective Assistance of Counsel Claim

¶41 "The trial court must conduct an adequate inquiry into allegations of ineffective assistance of counsel, that is, inquiry sufficient to determine the factual basis of the claim." *People v. Banks*, 237 Ill. 2d 154, 213 (2010) (citing *People v. Johnson*, 159 Ill. 2d 97, 124 (1994); *People v. James*, 362 Ill. App. 3d 250, 256 (2005)). If the trial court conducted no inquiry and made no ruling, we may need to remand for " 'the limited purpose' of allowing the trial court to make an inquiry and ruling." *People v. Tolefree*, 2011 IL App (1st) 100689, ¶24 (August 12, 2011) (quoting *People v. Moore*, 207 Ill. 2d 68, 77-81 (2003) (remanded "for the limited purpose of allowing the trial court to conduct the required preliminary investigation")),

reh'g denied, Dec. 13, 2011.

¶42 Here, there is no indication in the record that the trial court conducted any inquiry into defendant's ineffective assistance of counsel claim and the State concedes that the matter must be remanded for such inquiry by the trial court. Therefore, we remand for the limited purpose of allowing the trial court to make an adequate inquiry into defendant's ineffective assistance of counsel claim and make a ruling.

¶43 IV. Order of Protection

¶44 Defendant argues that the order of protection should be vacated because the circuit court "did not have authority to issue the order of protection because the State did not file a petition in writing seeking the order, as explicitly required by statute." The State argues that defendant waived this argument because he did not raise it in his post-trial motion (see *People ve. Enoch*, 122 Ill. 2d 176, 186 (1988)), and also because defendant failed to argue that there was plain error (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (holding that "[a] defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion")). Although defendant frames his argument as a general matter of the court lacking "authority," his argument may be considered an attack on the order of protection as being void. See *People v. Sturgess*, 364 Ill. App. 3d 107, 117 (2006) ("While we agree with the State that defendant failed to properly raise any issues as to her sentence at the trial level, we will consider her argument as an attack on a void judgment, which can be challenged at any time." (citing *People v. Mathis*, 357 Ill. App. 3d 45, 51 (2005))).

¶45 The State argues, in a footnote in its brief, that the order of protection cannot be void but,

rather, can merely be voidable because it is not disputed that the circuit court had jurisdiction. However, we determine that due to the State's failure to file a petition for the order of protection in this case, the circuit court's subject matter jurisdiction was never properly invoked.

¶46 An absence of subject-matter jurisdiction cannot be waived by parties, and may be raised at any time, even *sua sponte* by a reviewing court. (Citations.) *Veazey v. LaSalle Telecommunications, Inc.*, 334 Ill. App. 3d 926, 934 (2002). It is axiomatic that " '[c]ourts, at every level, have an obligation to raise the lack of jurisdiction *sua sponte*.' " *In re K.C.*, 323 Ill. App. 3d 839, 846 (2001) (quoting *People v. Wright*, 189 Ill. 2d 1, 34 (1999) (Freeman, C.J., specially concurring)).

" 'Subject matter jurisdiction refers to a court's power both to adjudicate the general question involved and to grant the particular relief requested.' " *In re K.D.*, 407 Ill. App. 3d 395, 402 (2011) (citing *In re A.H.*, 195 Ill.2d 408, 415 (2001)). The circuit court's authority to exercise subject matter jurisdiction and resolve a justiciable question is invoked through the filing of a complaint or petition. *In re Marriage of Baniak*, 2011 IL App (1st) 092017, ¶ 15 (citing *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 335 (2002)). See also *Ligon v. Williams*, 264 Ill. App. 3d 701, 707 (1994) (holding that the court's authority to exercise its jurisdiction and resolve a justiciable question is invoked through the filing of a complaint or petition). Lack of subject matter jurisdiction is not subject to waiver and cannot be cured through the consent of the parties. *In re M.W.*, 232 Ill. 2d 408, 417 (2009) (citing *People v. Flowers*, 208 Ill. 2d 291, 303 (2003)). See also *Belleville Toyota, Inc.*, 199 Ill. 2d at 333 ("The issue of subject matter jurisdiction cannot be waived."). " '[E]very act of the court beyond its

jurisdiction is void.' " *Diaz v. Provena Hospitals*, 352 Ill. App. 3d 1165, 1173 (2004) (quoting *Miller v. Balfour*, 303 Ill. App. 3d 209, 215 (1999)).

¶47 While the circuit court's original jurisdiction to adjudicate the matter derives from the constitution, a justiciable matter itself is defined by the legislature, which may define the justiciable matter in such a way as to limit or preclude the circuit court's authority, and in such instances "the circuit court is governed by the rules of limited jurisdiction and must proceed within the statute's strictures." *In re Estate of Gebis*, 186 Ill. 2d 188, 192-93 (1999) (citing *In re M.M.*, 156 Ill.2d 53, 66 (1993)). Here, the relevant statutory provisions require the filing of a petition for an order of protection.

¶48 Section 5-7-1(f) of the Unified Code of Corrections (730 ILCS 5/1-1-1 *et seq.* (West 2010)) provides, in relevant part:

> "(f) The court may issue an order of protection pursuant to the Illinois Domestic Violence Act of 1986 [(750 ILCS 60/101 *et seq*.] as a condition of a sentence of periodic imprisonment. The Illinois Domestic Violence Act of 1986 [(750 ILCS 60/101 *et seq*.] shall govern the issuance, enforcement and recording of orders of protection issued under this Section." 730 ILCS 5/5-7-1(f) (West 2008).

¶49 Section 207 of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 *et seq.* (West 2010)) provides for subject matter jurisdiction over orders of protection in all circuit courts: "Each of the circuit courts shall have the power to issue orders of protection." 750 ILCS 60/207 (West 2010).

¶50 Section 202(a)(3) of the Illinois Domestic Violence Act of 1986 provides, in relevant

part, that a proceeding for an order of protection is commenced:

> "(3) In conjunction with a delinquency petition or a criminal prosecution: By filing a petition for an order of protection, under the same case number as the delinquency petition or criminal prosecution, to be granted during pretrial release of a defendant *** or as a condition of *** periodic imprisonment, parole or mandatory supervised release, or in conjunction with imprisonment or a bond forfeiture warrant; provided that:
>
> (i) the violation is alleged in an information, complaint, indictment or delinquency petition on file, and the alleged offender and victim are family or household members or persons protected by this Act; and
>
> (ii) the petition, which is filed by the State's Attorney, names a victim of the alleged crime as a petitioner." 750 ILCS 60/202(a)(3) (West 2010).

Under section 202(a)(3), an order of protection may be granted as a condition of periodic imprisonment provided that the conditions listed are satisfied. *People v. Cuevas*, 371 Ill. App. 3d 192, 196 (2007).

¶51 Here, due to the State's failure to file a petition for an order of protection, the circuit court's subject matter jurisdiction was never invoked. Though the court had subject matter jurisdiction and personal jurisdiction over defendant for the other crimes of which he was convicted, subject matter jurisdiction for the order of protection to grant the particular relief requested was never properly invoked. The lack of subject matter jurisdiction here renders the order of protection void. The lack of subject matter jurisdiction thus cannot be waived, and therefore defendant's challenge to the order of protection is not subject to forfeiture.

¶52 The State argues that the written plenary order of protection in the common law record satisfies the requirements of the Unified Code of Corrections and the Illinois Domestic Violence Act. However, "[t]he plain language of section 203(a) requires that a petition for an order of protection be in writing." *Cuevas*, 371 Ill. App. 3d at 197. The court in *Cuevas* reversed the order of protection because the State failed to file a written petition. *Cuevas*, 371 Ill. App. 3d at 197.

¶53 Here, just as in *Cuevas*, due to the failure of the State to file a written petition, we must vacate the order of protection. Though the State attempts to distinguish *Cuevas* based on the fact that in *Cuevas* no document of any kind was previously on file, whereas in this case there was a previous plenary order of protection naming the complainant entered March 19, 2008, the court in *Cuevas* made clear that the plain language of section 203(a) requires that a petition for an order of protection be in writing. We find no support for the State's position that a prior order of protection can satisfy this requirement. As such, we reverse and vacate the order of protection entered as part of defendant's sentence.

¶54 V. One-Act, One-Crime Rule

¶55 Finally, defendant argues that one of his convictions for aggravated stalking must be violated due to the violation of the one-act, one-crime rule. The one-act, one-crime rule was established by our supreme court in *People v. King*, 66 Ill. 2d 551 (1977). Under the rule, a defendant may not be convicted of multiple offenses that are based upon precisely the same single physical act. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010) (citing People v. Rodriguez, 169 Ill. 2d 183, 186 (1996); *King*, 66 Ill. 2d at 566. In *King*, our supreme court explained as follows:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *King*, 66 Ill. 2d at 566.

"[U]nder the one-act, one-crime doctrine, sentence should be imposed on the more serious offense and the less serious offense should be vacated." *People v. Artis*, 232 Ill. 2d 156, 170 (2009). However, where punishments are identical, reviewing courts must consider which offense requires the more culpable mental state, which we review *de novo*. *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009) (citing *Artis*, 232 Ill. 2d at 170-71). Where a reviewing court cannot determine which offense is more serious, the cause should be remanded for the trial court to determine which conviction should be vacated. See *Artis*, 232 Ill. 2d at 177 (holding that "the better course is to continue to adhere to the principle that when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination").

¶56 Here, count 9 of the indictment charged defendant under section 12-7.4(a)(3), while count

10 of the indictment charged defendant under section 12-7.4(a)(1). See 720 ILCS 5/12-7.4(a)(1), 12-7.4(a)(3) (West 2010). Section 12-7.4(a)(1) provides that a person commits aggravated stalking when he or she commits stalking and "causes bodily harm to the victim." 720 ILCS 5/12-7.4(a)(1) (West 2010). Section 12-7.4(a)(3) provides that a person commits aggravated stalking when he or she commits stalking and "violates a temporary restraining order, an order of protection, a stalking no contact order, a civil no contact order, or an injunction prohibiting the behavior described in subsection (b)(1) of Section 214 of the Illinois Domestic Violence Act of 1986 [750 ILCS 60/214]." 720 ILCS 5/12-7.4(a)(3) (West 2010). However, defendant was charged in two counts for the same conduct, and not for the different conduct specified in subsections 5/12-7.4(a)(1) and (a)(3).

¶57 Defendant was charged in the first count for aggravated stalking in count 9 of the indictment for the following:

> "knowingly and without lawful justification on at least two separate occasions followed or placed Vivian Moffett under surveillance, to wit: on January 28, 2008 [defendant] went to Vivian Moffett's residence and on August 16, 2008, [defendant] went to Vivian Moffett's residence, and [defendant] transmitted a threat to Vivian Moffett of immediate or future bodily harm, and in conjunction with committing the offense of stalking [defendant] caused bodily harm to Vivian Moffett, to wit: [defendant] struck Vivian Moffett about the face and body in violation of Chapter 720 Act 5 Section 12-7.4(A)(3) of the Illinois Compiled Statutes, 1992."

¶58 Count 10 charged defendant with the following:

> "knowingly and without lawful justification on at least two separate occasions followed or placed Vivian Moffett under surveillance, to wit: on January 28, 2008 [defendant] went to Vivian Moffett's residence and on August 16, 2008, [defendant] went to Vivian Moffett's residence, and [defendant] transmitted a threat to Vivian Moffett of immediate or future bodily harm, and in conjunction with committing the offense of stalking [defendant] caused bodily harm to Vivian Moffett, to wit: [defendant] struck Vivian Moffett about the face and body in violation of Chapter 720 Act 5 Section 12-7.4(A)(3) of the Illinois Compiled Statutes, 1992."

¶59 Under our *de novo* review, we conclude that the one-act, one-crime rule was violated. The State concedes that the one-act, one-crime rule was violated in this case, and that one of defendant's convictions for aggravated stalking should be vacated. However, there is no difference in the punishment between the two subcategories of offenses within the statutory provision for aggravated stalking, as section 12-7.4(b) provides that aggravated stalking generally is a Class 3 felony. See 720 ILCS 5/12-7.4(b) (West 2010). Thus, we must consider which offense requires the more culpable mental state. *In re Samantha V.*, 234 Ill. 2d at 379.

¶60 Neither defendant nor the State make any argument regarding which count requires a more culpable mental state and should be vacated. Count 9 charged that defendant "transmitted a threat to Vivian Moffett," while Count 10 charged that defendant "placed Vivian Moffett in reasonable apprehension of immediate or future bodily harm." The aggravated stalking statute itself does not specify any different mental state for offenses under subsections 5/12-7.4(a)(1) and (a)(3). 720 ILCS 5/12-7.4(a)(1), (a)(3) (West 2010). The statutory provision on stalking also

does not specify and differing mental state that would apply. A person commits aggravated stalking when he or she commits the offense of stalking and one of the other acts described in the subsections of the aggravated stalking statute. See 720 ILCS 5/12-7.4 (West 2010). The terms "knowingly" and "without lawful authority" in the stalking statute modify the conduct of transmitting a threat of immediate or future bodily harm, sexual assault, confinement or restraint or placing victim in immediate apprehension of immediate or future bodily harm. *People v. Nakajima*, 294 Ill. App. 3d 809, 818 (1998). Thus, we have no statutory basis upon which we can conclude which is the more serious offense, subsection 5/12-7.4(a)(1) or subsection 5/12-7.4(a)(3). Therefore, we remand to the trial court also for the trial court to determine which count was the less serious offense, and order that conviction vacated. *People v. Steppan*, 322 Ill. App. 3d 620, 634 (2001).

¶61 CONCLUSION

¶62 We conclude first that the physical evidence, under the appropriate standard of review, supports the court's finding of defendant's guilt on the offense of home invasion beyond a reasonable doubt. Second, the State committed incomplete impeachment in its questioning of Bernice Moffett, but the error was harmless because the case was tried before the court, not a jury, and five other witnesses testified that defendant had moved out. Third, the trial court erred in not addressing defendant's ineffective assistance of counsel claim as required. Fourth, because the State failed to file a written petition for an order of protection the court's subject matter jurisdiction was never invoked and the order is void. Finally, we also determine that one of defendant's convictions for aggravated stalking must be vacated because it violates the one-act,

one-crime rule and the less serious offense must be vacated.

¶63 Therefore, we affirm defendant's conviction for home invasion, but reverse and vacate the order of protection. We remand for the circuit court to conduct an inquiry and make a ruling on defendant's *pro se* ineffective assistance of counsel claim. We also remand for the circuit court to determine which aggravated stalking conviction was the less serious offense and order that the less serious conviction be vacated.

¶64 Affirmed in part and vacated in part; remanded with instructions.