

SECOND DIVISION
MAY 29, 2012

1-11-0095

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 3177
)	
ANTHONY TOLIVER,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction and sentence for unlawful restraint did not violate the "one-act, one-crime" rule where the physical act that was the basis for the unlawful restraint conviction was sufficiently distinct from the other acts in defendant's criminal conduct and where unlawful restraint is not a lesser-included offense of attempted murder, home invasion, or aggravated criminal sexual assault.

¶ 2 Following a 2007 bench trial, defendant Anthony Toliver (also known as Tolliver) was convicted of attempted first-degree murder, home invasion, aggravated criminal sexual assault, and unlawful restraint. Defendant was sentenced to 25 years of imprisonment for aggravated criminal sexual assault, to be served consecutively to concurrent prison terms of 25 years each for attempted

murder and home invasion and one year for unlawful restraint. Defendant contends on appeal that his unlawful restraint conviction violates the "one-act, one-crime" rule as it is based upon the same physical act as his other convictions for greater offenses. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 Defendant was charged with attempted first-degree murder for choking Regine (or Regina) S. while threatening to kill her, home invasion based upon striking Regine, and home invasion based upon sexually assaulting her. He was charged with four counts of aggravated criminal sexual assault: (1) by causing bodily harm "to wit: bloody nose, swollen eye, and bruises to her body"; (2) with the use of force or threats of force endangering Regine's life by choking, hitting, and kicking her while threatening to kill her; (3) by commission during the course of a home invasion; and (4) by commission during the course of attempted first-degree murder. Defendant was also charged with criminal sexual assault and unlawful restraint, the latter charge alleging that defendant "detained" Regine.

¶ 4 The evidence at trial was, in relevant part, that defendant kicked open the locked back door of Regine's apartment, tore a telephone from the wall, and beat her with it. He dragged her through the apartment by her hair as he punched her in the face and told her she was "going to die tonight," after which he forced her to perform a sexual act upon him, and again struck her face repeatedly. The police were summoned by neighbors in response to screams and loud noises from Regine's apartment. When the police officers came to Regine's front door, defendant grabbed Regine around her neck from behind, put his hands over her mouth, and told her to be quiet. When the officers entered the apartment, defendant jumped on Regine's back and ignored the officers' commands to

get off her back, so that the officers had to pry him away from Regine before arresting him. As a result of defendant's attack, Regine had blood clots in and swelling around both eyes, a swollen and bloody nose, chunks of hair torn out, and was generally bruised and sore. On this evidence, defendant was found guilty on all counts.

¶ 5 Following arguments in aggravation and mitigation, defendant was sentenced to concurrent prison terms of 25 years each for two counts of aggravated criminal sexual assault, to be served consecutively to concurrent prison terms of 25 years each for attempted murder and two counts of home invasion, with no sentence imposed on the other counts of conviction.

¶ 6 On direct appeal (*People v. Tolliver*, No. 1-07-3466 (2009)(unpublished order under Supreme Court Rule 23)), we rejected defendant's contention that there was insufficient evidence of his intent to kill in order to convict him of attempted murder, and affirmed defendant's conviction and sentences for attempted first-degree murder (count 1), one count of home invasion (count 2) and aggravated criminal sexual assault (count 4). However, as defendant committed only one unlawful entry of a home and one act of sexual assault, one count each of home invasion (count 3) and aggravated criminal sexual assault (count 5) was vacated. We remanded the matter "for a determination by the trial court of which of the[] remaining, unsentenced convictions" – two counts of aggravated criminal sexual assault (counts 6 and 7), one count of criminal sexual assault (count 8), and one count of unlawful restraint (count 9)– "may stand, and what sentence or sentences to impose upon those remaining convictions."

¶ 7 Upon remand, the trial court determined that the two aggravated criminal sexual assault counts (counts 6 and 7) and single count of criminal sexual assault (count 8) were redundant of the

aggravated criminal sexual assault (count 4), which was affirmed on appeal and thus, sentences were not imposed on those counts. However, the trial court found that the unlawful restraint conviction (count 9) "does not merge, is not part of the one-act, one-crime" claim, and imposed a concurrent one-year prison sentence. This appeal followed.

¶ 8 Defendant contends on appeal that his unlawful restraint conviction violates the one-act, one-crime rule as it is based upon the same physical act as his other convictions.

¶ 9 A conviction and sentence is erroneous under the one-act, one-crime rule only where more than one offense is carved from the same physical act, or where there are multiple acts and multiple counts of conviction when some of the convicted offenses are, by definition, lesser-included offenses. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). Conversely, 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 are permitted. *Id.* An "act" is any overt or outward manifestation that will support a different offense. *Id.* The one-act, one-crime rule involves a two-step analysis: first, whether the defendant's conduct involved multiple acts or a single act; and second, if the conduct involved multiple acts, whether any of the offenses are lesser-included offenses. *Id.*

¶ 10 We determine whether one offense is a lesser-included offense of another when the defendant was formally charged with both offenses by using the abstract elements approach, under which the statutory elements of the two offenses are compared. *Id.* at 166, 173-74. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is a lesser-included offense of the second. *Id.* at 166. Stated

another way, for one offense to be a lesser-included offense of another, it must be impossible to commit the greater offense without necessarily committing the lesser offense. *Id.* at 166.

¶ 11 A person commits unlawful restraint when he "knowingly without legal authority detains another." 720 ILCS 5/10-3(a) (West 2010). A person commits attempted first-degree murder when, with the intent to kill another, he takes a substantial step towards causing the death of another. 720 ILCS 5/8-4(a), 9-1(a) (West 2010). A person commits home invasion when he knowingly enters the dwelling place of another while he knows or should know that one or more persons is present, and either uses force or the threat of force on any occupant while armed or injures any occupant. 720 ILCS 5/12-11(a) (West 2010). A person commits aggravated criminal sexual assault when he commits an act of sexual penetration, and either uses force or threat of force; knows that "the victim was unable to understand the nature of the act or was unable to give knowing consent"; is a family member of the victim who is under 18 years old; or holds "a position of trust, authority, or supervision in relation to the victim," who is at least 13 years old but under 18 years old, with aggravating factors including the display or use of a weapon; the causing of bodily harm; the administration of a controlled substance "to the victim without his or her consent, or by threat or deception, and for other than medical purposes"; or that the victim is over 60 years old or physically handicapped. 720 ILCS 5/12-13(a), 12-14(a) (West 2010).

¶ 12 Here, defendant's conduct involved multiple acts: he broke in the victim's apartment door, dragged her by her hair, forced her to commit a sexual act, grabbed her by the neck and mouth and told her to be quiet, and pounced on her back. While it is true that defendant struck her multiple times with a telephone and his fist during many of these acts, and that all of his actions were closely-

related as part of his overall attack upon the victim, nonetheless, as stated above, multiple closely-related acts are still multiple acts, rather than the same physical act. We find that defendant had already committed acts constituting each of the other offenses for which he was convicted by the time the police knocked on the door and defendant restrained the victim by her neck and mouth to keep her quiet and away from the police officers. Thus, it could not be said that such unlawful act was inherent in the offenses of home invasion, attempted murder or aggravated criminal sexual assault, which had already been committed by defendant by that point of the attack. We consider it significant that, on initial appeal before this court, we found ample basis for the attempted murder conviction without specifically referring to the fact that defendant grabbed the victim by the neck and mouth while telling her to be quiet. See *Tolliver*, No. 1-07-3466, at 6-7. Therefore, we consider the act of grabbing the victim by the neck and mouth while telling her to be quiet—an act which defendant did as a result of the arrival of the police at the door, and which interrupted the sexual assault rather than being a part of it—to be a sufficiently distinct act that supports a separate offense from attempted murder, home invasion, and aggravated criminal sexual assault.

¶ 13 As to whether unlawful restraint, with which defendant was formally charged, constitutes a lesser-included offense of any of the other convictions, we conclude that it does not. Detention is not a statutory element of attempted murder, home invasion, or aggravated criminal sexual assault. It is certainly possible to commit attempted murder without restraining or detaining the victim. It is possible to commit home invasion without detaining a victim, as where a perpetrator breaks into an occupied home, shoots an occupant, and flees. It is also possible to commit aggravated criminal sexual assault without restraining or detaining the victim, as where the perpetrator surreptitiously

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uses a controlled substance to render the victim unconscious. We conclude that defendant's conviction and sentence for unlawful restraint does not violate the one-act, one-crime rule.

¶ 14 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 15 Affirmed.