2014 IL App (1st) 120531-U

No. 1-12-0531



SIXTH DIVISION
March 14, 2014

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. 10 CR 21695 |
| | ) | |
| OSCAR OROZCO, | ) | The Honorable |
| | ) | James B. Linn, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

**O R D E R**

¶1 *HELD*: The evidence was sufficient to demonstrate defendant had the requisite mental state to support his aggravated battery conviction. Defendant received effective assistance of counsel. One of defendant's aggravated battery convictions violated the one-act, one-crime rule and must be vacated.

¶2 Following a bench trial, defendant, Oscar Orozco, was convicted of aggravated battery with a deadly weapon (720 ILCS 5/12-4(b)(1) (West 2010)), aggravated battery in a public place (720 ILCS 5/12-4(b)(8) (West 2010)), and leaving the scene of a motor vehicle accident

involving personal injury (625 ILCS 5/11-401(a) (West 2010)), and sentenced to an aggregate 13-year prison term. On appeal, defendant contends: (1) the State failed to prove he had the requisite mental state to support his aggravated battery convictions; (2) his counsel was ineffective for asserting a theory of defense based on a misapprehension of the law governing intoxication instead of presenting an involuntary intoxication defense and for failing to correct the trial court's misapprehension of gang-related evidence; and (3) one of his aggravated battery convictions must be vacated under the one-act, one-crime rule where both convictions were based on the same act. Based on the following, we conclude that one of defendant's aggravated battery convictions must be vacated, and we affirm his remaining convictions for aggravated battery and leaving the scene of an accident involving injury.

¶3 FACTS

¶4 On November 15, 2010, at approximately 10 p.m., the victim, Francisco Almendarez,[1] and his friend, Oscar Perez, were at a gas station at 28th Street and Pulaski Road in Chicago, Illinois. The victim entered the gas station convenience store while Perez remained in the vehicle. While waiting, Perez observed defendant drive toward the gas station. The gas station was in Two-Six gang territory and defendant was an alleged member of the Latin Kings street gang. Defendant accelerated his vehicle into the gas station and struck the victim as he exited the convenience store. The victim was thrown from the vehicle and defendant fled the scene.

¶5 At trial, Perez testified that, on the night in question, he was with the victim, whom he considered to be a brother-in-law. Perez had known the victim for about six years. Both were former members of the Two-Six street gang. The victim and Perez's sister had three children together. Perez said he had been in the Two-Six gang from 1995 until 2005.

[1] We note that the parties provide different spellings of the victim's surname. This is the accurate spelling.

¶6 According to Perez, at approximately 9:55 p.m., he was driving when he saw the victim walking. Perez pulled his vehicle over and offered the victim a ride to the gas station located at 28th Street and Pulaski Road to purchase cigarettes. The victim accepted and Perez drove to the gas station. Perez parked his vehicle facing northbound in between two gas pumps. Perez described the area as well-lit. The victim then exited the vehicle and went inside the gas station store. Perez remained in the vehicle, "looking around" and "focusing on the area." Perez then observed defendant driving a dark-colored sports utility vehicle (SUV) about 20 to 25 feet away, travelling southbound on Pulaski Road. There was a passenger in the vehicle as well. Perez noticed defendant "looking around" "to see if he noticed anybody out there." Perez testified that defendant was looking toward the gas station at him.

¶7 Perez recognized defendant from his childhood when Perez lived in a Latin King neighborhood near 23rd Street and Central Park Avenue in Chicago, Illinois. Perez lived in the same neighborhood as defendant until 1987 or 1988 when defendant was "little." Perez testified that defendant was a member of the Latin Kings. According to Perez, 28th Street and Pulaski Road was known as a Two-Six neighborhood. Perez thought defendant was "out of place" near the gas station. Perez added that the Two-Six gang and the Latin Kings gang were long-time rivals engaged in "war." Perez, however, admitted that he never observed any prior confrontations between defendant and the victim.

¶8 Perez further testified that defendant drove toward the gas station, turning left from Pulaski Road and speeding up to avoid oncoming traffic. Perez then turned his attention toward the convenience store and observed the victim exit the store. The victim had his hands in his pocket and his head down. Perez reached to open the passenger side window in order to warn the victim to "watch out." The victim looked up at the oncoming SUV, which Perez

approximated was traveling at 30 miles per hour. According to Perez, defendant revved his engine when he entered the gas station and drove toward the victim. Defendant struck the victim with his vehicle, causing the victim to fly forward and bounce off the hood. Perez stated that defendant struck the victim on purpose and not by accident.

¶9 After striking the victim, defendant continued driving and left the gas station. Perez followed. Defendant drove eastbound down 28th Street, which is a one-way street running westbound, and made a left turn onto Harding Avenue. Defendant then turned right, heading eastbound, down 27th Street. Perez never lost sight of defendant as defendant attempted to drive back to "his neighborhood." Perez did not want defendant "to get away," so Perez hit defendant's vehicle "pretty hard." Defendant, however, did not stop. When the vehicles approached 27th Street and Lawndale Avenue, Perez observed an officer parked on the northwest side of the street. Defendant ran a stop sign and the police officer pursued him. Defendant eventually was forced to stop because a vehicle in front blocked his path and the officer's vehicle was behind his vehicle. At that point, Perez notified the police officer that defendant struck the victim with his vehicle. Perez then returned to the gas station to check on the victim. Later, the police officer brought defendant to the gas station and Perez identified him as the assailant.

¶10 Perez admitted he had prior convictions for possession of drugs, possession of ammunition, and unlawful use of a weapon by a felon.

¶11 The victim testified consistently with Perez. The victim added that he heard Perez yell, "watch out, watch out" when he exited the gas station convenience store. In response, the victim looked to his left and noticed defendant driving a dark SUV toward him at "full force." Defendant hit the victim at "full speed" and fled the area. The victim landed on the ground, hitting his forehead and shoulder. The victim clarified that he heard Perez give the verbal

warning prior to hearing the engine of defendant's vehicle accelerate. The victim added that he could not see what defendant was wearing while driving toward him because "the only thing [he] could see at the time was [defendant's] face looking dead at [him] as [defendant] [was] looking over the steering wheel pressing the gas."

¶12 The victim further testified that, while receiving treatment on the scene in an ambulance, the police brought defendant back to the gas station. The victim identified him as the offender. The police also returned defendant' s passenger to the gas station, as well as defendant's SUV. The victim identified both, accordingly. The victim stated that he had never seen defendant prior to the date in question. According to the victim, the only "animosity" that could have existed between himself and defendant was that he "used to be a Two-Sixer and [defendant was] a member of the Latin Kings." The victim, however, stated that he had not known at the time of the incident that defendant was a Latin King. The victim admitted to having smoked PCP two days before the night of the incident. The victim drank one beer on the date of the incident.

¶13 Officer Torres[2] testified that he was on routine patrol on the date in question when he saw a vehicle that was travelling eastbound on 27th Street run a stop sign at Lawndale Avenue. Officer Torres followed the vehicle, engaging his emergency lights. The vehicle turned into an alley, but was forced to stop at the mouth of the alley due to a parked vehicle. Officer Torres exited his vehicle and approached the driver, later identified as defendant. An individual, later identified as Perez, informed Officer Torres that defendant "ran his friend over" at 28th Street and Pulaski Road. Officer Torres apprehended defendant. Meanwhile, the passenger in defendant's vehicle opened the door and fled on foot. After securing defendant, Officer Torres sent a flash message describing the passenger. Perez then left the area, advising Officer Torres that he

[2] Officer Torres' first name does not appear in the record.

wanted to check on his friend back at the gas station. Officer Torres waited for additional police assistance before transporting defendant back to the scene.

¶14 Once at the gas station, Officer Torres presented defendant to the victim and the victim identified defendant as the assailant. Officer Torres then transported defendant to the police station. Officer Torres inventoried defendant's car keys and later impounded defendant's blue SUV. He, however, testified that he did not "look through" the vehicle. Rather, he inserted the upper half of his body into the vehicle to retrieve the keys from the steering column. At that time, Officer Torres did not view any "beer cans" in the vehicle. According to Officer Torres, he did not know what was in the vehicle when he secured it. Officer Torres did not transport the vehicle. Officer Torres added that he did not smell any alcohol on defendant's breath and there was no indication that defendant had been drinking or was high.

¶15 Officer Hanson[3] testified that, on November 15, 2010, he received a flash message that someone had fled from a vehicle. Officer Hanson was approximately two blocks away from the designated area at the time. When he arrived, Officer Hanson observed an individual matching the description run into a backyard. Officer Hanson and his partner followed the individual, later identified as Emmanuel Reynosa, and apprehended him. Officer Hanson then transported Reynosa to the gas station for an identification. The victim identified Reynosa as the passenger in defendant's vehicle at the time in question. Reynosa was not charged. He was later released.

¶16 Detective Christopher Ross testified that he investigated the offense. Initially, Detective Ross went to the hospital to interview the victim. Detective Ross then went to the police station to interview defendant. He also interviewed the gas station owner, Fred Feliciano. Feliciano indicated that he was not at the gas station during the time in question; however, he offered the police access to the gas station surveillance video. In addition, Detective Ross performed a

[3] Officer Hanson's first name does not appear in the record.

"cursory-type search" of defendant's vehicle. According to Detective Ross, he did not observe any beer bottles nor did he observe any alcohol odor. Detective Ross did notice damage to the front of the vehicle "as if it had struck something." Detective Ross testified that an evidence technician took photographs of the SUV.

¶17 The trial court subsequently considered defendant's motion for a directed finding. The motion was granted as to count I for attempted first degree murder and denied as to the three remaining counts, namely, two counts of aggravated battery and one count of leaving the scene of an accident. Defense counsel was granted a continuance to secure Reynosa as a defense witness. In support of the requested continuance, defense counsel provided an offer of proof that Reynosa would testify that he was drinking with defendant on the evening in question and the incident was a drunken accident. Reynosa appeared on a subsequent court date; however, defendant was not present so the case was continued. The case was repeatedly continued with a warrant issued for Reynosa due to his failure to appear. Eventually, the trial court decided that Reynosa was a circumstantial witness and the case would no longer be continued.

¶18 Defendant testified that, on the date in question, he was driving around and drinking "Four Loko"[4] with his friend, Reynosa.[5] According to defendant, Four Loko since has been banned. On the date in question, defendant consumed about two or three cans of Four Loko. Defendant stated that the cans were "16 [or] 20 ounces." According to defendant, the Four Loko beverages made him feel "drunk and kind of hyper at the same time." He said he was "driving kind of drunk with loud music and *** just riding around, and on Pulaski [he] cut through the gas station [to avoid the red light], and [he] was speeding." Defendant testified that he "cut

[4] The trial court took notice that it is "like alcohol and Red Bull combo."

[5] The record reveals defendant pronounced his name as "Emmanuel Ramos."

through the gas station and some dude came out and [he] accidently struck him." According to defendant, he could not avoid hitting the victim because he would have hit a gas pump or the convenience store. Defendant testified that he chose to cut through the gas station nearest the store because he observed people near the other gas pumps. Defendant said he did not observe the victim prior to striking him. After defendant struck the victim, he fled because he panicked.

¶19 Defendant testified that a police vehicle pulled him over approximately five blocks away from the gas station after defendant failed to abide by a stop sign. Defendant was removed from his vehicle and arrested. Defendant stated that there were four Four Loko cans in his vehicle, two to three in the front passenger side floor and one in the back seat. Defendant was not asked to perform any field sobriety tests.

¶20 Defendant testified that he did not know the victim. Defendant did not recognize the victim as a gang member or as a rival gang member. Defendant admitted that he did not attempt to slow down as he sped through the gas station. Defendant said he did not intend to strike the victim; rather, the victim "jumped in front" of him.

¶21 The trial court found defendant guilty of two counts of aggravated battery and one count of leaving the scene of a motor vehicle accident involving personal injury. In so finding, the trial court stated:

> "Court heard the evidence in this case. I saw a video which I recall vividly and what happened in this case is that the defendant, not by any particular pre-planned and not because he was clouded because he was voluntarily intoxicated, which wouldn't be a defense in any event, but he saw a person from another gang and impulsively decided to do something about it; and he moved his car and tried to strike that person and hurt him as much as he possibly could and

> then get out of there as soon as he could until he was stopped by the police. No question about the fact that it is absolutely intentional on his part."

The court denied defendant's motion for a new trial. Defendant was sentenced to 10 years' imprisonment for the aggravated battery counts and a consecutive sentence of 3 years' imprisonment for leaving the scene of an accident. This appeal followed.

¶22 DECISION

¶23 I. Sufficiency of the Evidence

¶24 Defendant contends the State failed to prove beyond a reasonable doubt that he was guilty of aggravated battery where the evidence did not support a finding that he acted intentionally or knowingly when he struck the victim. Defendant contends his actions were reckless at best and, therefore, his convictions should be reversed or reduced to reckless conduct.

¶25 A challenge to the sufficiency of the evidence requires a reviewing court to determine "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 the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Williams*, 388 Ill. App. 3d 422, 429 (2009). In order to overturn a judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶26 An individual commits an aggravated battery when, in committing a battery, he "intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement." 720 ILCS 3/12-4(a) (West 2010). Intent can be established through proof of the surrounding circumstances, including the character of the assault and other matters from which intent may be inferred. *People v. Pulgar*, 323 Ill. App. 3d 1001, 1012 (2001). An individual intends, or acts intentionally or with intent, to accomplish or engage in the requisite conduct as defined by the statute, when his conscious objective or purpose is to accomplish that result or engage in that conduct. 720 ILCS 5/4-4 (West 2010). An individual knows, acts knowingly, or with knowledge of "the nature and attendant circumstances" of his conduct when he "is consciously aware that his *** conduct is of that nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists." 720 ILCS 5/4-5(a) (West 2010). An individual knows, acts knowingly, or with knowledge of "the result of" his conduct when he "is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2010). In comparison, an individual acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow *** and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2010).

¶27 Whether an individual acted knowingly, intentionally, or recklessly, may be inferred based on the circumstances. *People v. Schmidt*, 392 Ill. App. 3d 689, 702. " '[I]nferences as to defendant's mental state are a matter particularly within the province of the jury.' " *Schmidt*, 392 Ill. App. 3d at 702 (quoting *People v. DiVincenzo*, 183 Ill. 2d 239, 252-53 (1998). In other words, whether defendant had the requisite mental state to support his conviction is a question of

fact for the trier of fact and will not be disturbed on review unless a reasonable doubt exists as to defendant's guilt. *People v. Maggette*, 195 Ill. 2d 336, 354 (2001).

¶28 Defendant argues the State failed to prove he had the requisite criminal intent where the evidence demonstrated he was already speeding toward and into the gas station when the victim exited the convenience store. Defendant did not know the victim was inside the store prior to striking him. Rather, defendant was drunk, sped through the gas station to avoid traffic, and did not see the victim before striking him. Moreover, defendant argues that he and the victim did not know one another nor whether either had any gang affiliations and, therefore, the trial court erred in finding he intentionally struck the victim because they were in rival gangs. The State responds that the evidence demonstrated defendant intended to strike the victim with his vehicle. The State essentially argues defendant was looking for trouble in the rival gang territory. When defendant observed Perez waiting in his vehicle in the gas station, he turned into the gas station. Once the victim exited the convenience store, defendant sped directly toward him. After striking and injuring the victim, defendant fled the scene, further demonstrating his criminal intent.

¶29 Based on our review of the record, we do not find a reasonable doubt as to defendant's guilt. The evidence established that the victim and Perez had been members of the Two-Sixer street gang. Although defendant never testified regarding any gang affiliation, Perez testified that defendant grew up in a Latin Kings neighborhood and was a member of that gang. The two gangs historically were at "war." When defendant was on the street 20-25 feet away from the gas station in Two-Sixer territory, Perez observed him looking around the area. Perez recognized defendant from childhood and said defendant was "out of place." Defendant looked toward the gas station and accelerated to turn in. Defendant sped into the gas station as the victim exited the convenience store. The victim said he heard Perez shout "watch out" and then

heard defendant's engine accelerate again while defendant stared at him, bearing down with "full force." When the victim came into view, defendant did not attempt to brake or avoid striking him. Rather, defendant accelerated and hit the victim. Then, defendant sped away from the scene. Defendant was chased by Perez and Officer Torres, only stopping because he encountered a road block.

¶30 Even discounting the gang-related testimony, it is clear that defendant made no effort to avoid striking the victim once he "beat" the traffic light on Pulaski Road by entering the gas station. There was no evidence to demonstrate that defendant merely intended to cut through the gas station. Instead, the testimony from Perez and the victim provided that defendant accelerated when he saw the victim. Our review of the surveillance video from the gas station confirms as much. Contrary to defendant's testimony that he chose to drive through the lane closest to the convenience store between the store and a row of gas pumps, the surveillance tape reveals that defendant drove through the second lane from the convenience store, which had gas pumps on either side. This was the same lane where Perez sat in his vehicle waiting for the victim to return. More importantly, the surveillance tape reveals there were no individuals or vehicles in the vicinity other than Perez's vehicle and the victim. Therefore, defendant's argument that he had no ability to avoid striking the victim is false. Defendant could have proceeded in the same eastbound direction after entering the gas station in order to drive through, as was his stated intent. Instead, review of the surveillance tape shows defendant made a sharp left turn and accelerated directly toward the victim after entering the gas station. Indeed, the victim had exited the convenience store, walked across the lane closest to the convenience store, and entered the second lane where Perez's vehicle was situated when defendant accelerated and hit him. See *Pulgar*, 323 Ill. App. 3d at 1013 (finding the defendant intended to hit the victim where the

evidence established that, after voicing racial insults to the victim and his friend, the defendant drove his vehicle in the same direction of the victim as he attempted to escape the scene and the defendant accelerated and struck the victim when the victim began crossing the street).

¶31 Defendant's argument that he was merely reckless where he was speeding, drunk, and listening to loud music was not supported by the evidence. *Cf. Schmidt*, 392 Ill. App. 3d at 706 (finding the defendant's conduct in injuring four family members who were using a cross walk was reckless, not knowing, where the evidence showed he was traveling at a "very high rate of speed" to evade the police, lost control of the vehicle, and could not slow down after running a stop sign). Officer Torres apprehended defendant after evading capture and did not observe any signs of drunkenness. Moreover, Officer Torres did not observe any beer cans in defendant's vehicle, and no beer cans were found when the vehicle was impounded. Due to the lack of physical evidence, whether defendant had been drinking was a credibility determination made by the trial court. *Williams*, 388 Ill. App. 3d at 429. The trial court resolved inconsistencies in the evidence in favor of the victim and determined that defendant had the requisite intent to support his convictions. *Maggette*, 195 Ill. 2d at 354.

¶32 In sum, the evidence demonstrated that defendant intended to strike the victim or at least knew the result of his conduct because it was practically certain the victim would be hit by defendant's vehicle when he drove directly at the victim with increased speed once the victim exited the gas station convenience store. See 720 ILCS 5/4-4, 5/4-5(b) (West 2010). We, therefore, conclude the evidence was sufficient to support defendant's conviction for aggravated battery.

¶33 II. Ineffective Assistance of Counsel

¶34 Defendant next contends his trial counsel was ineffective for presenting a defense of voluntary intoxication when no such defense exists instead of presenting a defense of involuntary intoxication and for failing to correct the court's misapprehension of gang-related evidence.

¶35 To present a successful claim of ineffective assistance of trial counsel, a defendant must allege facts demonstrating that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome of the trial, *i.e.*, that the defense counsel's deficient performance rendered the result of trial unreliable or the proceeding fundamentally unfair. *Id*. at 694. A defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). However, if a defendant cannot demonstrate sufficient prejudice, a court need not decide whether counsel's performance was deficient. *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶36 Defendant argues that his counsel based his defensive theory on a misapprehension of the law governing voluntary intoxication, which is not an available defense,[6] instead of presenting evidence or argument that defendant's intoxication was involuntary. The State responds that defense counsel did not present an affirmative defense of voluntary intoxication, but rather argued that the State could not establish the requisite mental state for aggravated battery because defendant was intoxicated. In other words, defendant could not have intentionally or knowingly struck the victim because he was intoxicated.

[6] The defense of voluntary intoxication was repealed in 2002. Pub. Act 92-466 §5, eff. Jan. 1, 2002.

¶37 An attorney's decision regarding what theory of defense to pursue is a matter of trial strategy. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007); *People v. Labosette*, 236 Ill. App. 3d 846, 856 (1992). It is well-established that matters of trial strategy generally are immune from claims of ineffective assistance of counsel. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Whether a counsel's actions were reasonable must be evaluated from the counsel's perspective at the time of the alleged error, without hindsight, in light of the totality of the circumstances and not solely based on isolated acts. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010).

¶38 We conclude that defendant has failed to overcome the presumption that his counsel's trial strategy was sound. Our review of the record does not support defendant's argument that his counsel presented the unavailable defense of voluntary intoxication. The record does not contain any pleading listing voluntary intoxication as an affirmative defense. Moreover, the transcript demonstrates that defense counsel argued the State could not establish the requisite mental state to support an aggravated battery conviction because defendant was intoxicated and merely reckless in his actions. Defense counsel pursued the defense that defendant's ingestion of the Four Lokos beverages negated his ability to engage in intentional or knowing behavior. Based on the evidence, the defense was sound. Defendant, therefore, cannot establish his counsel's performance was unreasonable.

¶39 However, even assuming, *arguendo*, that defense counsel was deficient for presenting arguments in support of defendant's reckless conduct, defendant cannot establish he suffered prejudice as a result of defense counsel's failure to present the affirmative defense of involuntary intoxication. Defendant argues that he was involuntarily intoxicated because the Four Lokos beverages were falsely advertised, in that the alcohol content was much more potent than promised.

¶40 Pursuant to the statute defining involuntary intoxication, "[a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such conduct is *involuntarily* produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or conform his conduct to the requirements of the law." (Emphasis added.) 720 ILCS 5/6-3 (West 2010). Involuntary actions have been commonly defined as actions " 'springing from accident or impulse rather than the conscious exercise of the will' " and " '[n]ot resulting from a free and unrestrained choice; not subject to the control by the will.' " *People v. Hari*, 218 Ill. 2d 275, 292 (2006) (quoting Webster's Third New International Disctionary 1191 (1993), and Black's Law Dictionary 833 (7th ed. 1999).

¶41 We conclude that the involuntary intoxication defense was wholly unsupported by the evidence in this case. Common sense dictates that ingesting beverages containing alcohol will cause the consumer to encounter effects of varying magnitudes based on a multitude of factors. Unlike the defendant in *Hari*, defendant cannot support a claim that the Four Lokos beverages caused some unforeseeable reaction. If defendant became intoxicated as a result of drinking the beverages, then the Four Lokos provided the precise effect caused by ingesting alcohol. Whether defendant intended to became as intoxicated as he did on the date in question does not amount to involuntary intoxication. Defendant willingly consumed the alcoholic beverages, knowing they contained alcohol. *Cf. Hari*, 218 Ill. 2d at 293 (finding the defendant could raise the involuntary intoxication defense because he presented some evidence at trial *vis a vis* his doctor that he suffered from unwarned and unknown adverse side effects caused by a combination of prescribed medication and over-the-counter medication). The fact that later information revealed the Four Lokos beverages were more potent than originally advertised does not negate defendant's voluntary decision to consume beverages containing alcohol and then proceed to

drive his vehicle. While he may have been unwarned about the alcohol content, any potential adverse side effects may not be considered unknown. See *People v. McMillan*, 2011 IL App (1st) 100366, ¶28.

¶42 Turning to his second ineffective assistance claim, defendant contends that he was denied effective assistance when his counsel failed to correct the trial court's misapprehension that he intentionally struck the victim because they were members of rival gangs. We conclude that defendant cannot establish he suffered prejudice. As discussed when reviewing defendant's sufficiency of the evidence contention, even discounting the gang-related testimony, the evidence demonstrated that defendant entered the gas station with his vehicle and accelerated directly toward the victim in order to hit him. The surveillance video confirmed the testimony provided by Perez and the victim, while negating defendant's testimony that the accident could not have been avoided. Accordingly, defendant was not prejudiced by the trial court's reliance on the gang-related evidence as motivation for committing the aggravated battery.

¶43 In sum, defendant failed to support his claims for ineffective assistance of counsel.

¶44 III. One-Act, One-Crime Rule

¶45 Defendant finally contends, and the State concedes, that one of his aggravated battery convictions must be vacated as a violation of the one-act, one-crime rule.

¶46 The one-act, one-crime rule prohibits multiple convictions and sentences where more than one offense is carved from the same physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996) (citing *People v. King*, 66 Ill. 2d 551, 556 (1977)). Pursuant to the one-act, one-crime rule, a judgment and sentence may only be entered on the most serious offense. *People v. Smith*, 233 Ill. 2d 1, 20 (2009). In determining which offense is the most serious, reviewing courts are instructed to consider the plain language of the statute. *In re Samantha V.*, 234 Ill. 2d 359, 379

(2009) ("common sense dictates that the legislature would prescribe greater punishment for the offense it deems the more serious"). If the punishments are identical, reviewing courts are to consider which offense has the more culpable mental state. *Id.* However, "[w]hen 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." *People v. Artis*, 232 Ill. 2d 156, 177 (2009).

¶47 In this case, defendant's aggravated battery convictions were carved from the same physical act of striking the victim with his vehicle in violation of the one-act, one-crime rule. Aggravated battery with a deadly weapon other than by discharge of a firearm and aggravated battery on the public way are both class 3 felonies requiring mental states of intentional or knowing. 720 ILCS 5/12-4(b)(1), 5/12-4(b)(8), 5/12-4(e)(1), 5/12-3 (West 2010). We, therefore, cannot determine under these circumstances which is the more serious offense. Accordingly, we remand the matter to the trial court for that determination.

¶48 CONCLUSION

¶49 We affirm one of defendant's aggravated battery convictions, as well as his conviction for leaving the scene of a motor vehicle accident. We remand this cause to the trial court to vacate the least serious of defendant's aggravated battery convictions as a violation of the one-act, one-crime rule.

¶50 Affirmed in part; reversed in part; remanded with directions.