FIFTH DIVISION
January 22, 2016

No. 1-13-3895

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. 12 C4 40510
	)	
JOHN PHILLIPS,	)	Honorable
	)	Noreen Valeria Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Where the charging instruments did not differentiate among the blows defendant struck to the victim, defendant's conviction for domestic battery and one of his convictions for aggravated battery are vacated under the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551, 566 (1977). The mittimus is corrected to reflect three days of presentence custody credit and the fines, fees, and costs order is modified to reflect $15 worth of $5-per-day presentence custody credit against the imposed fines. The State's argument that additional fines must be imposed is rejected as an impermissible *de facto* cross-appeal pursuant to *People v. Castleberry*, 2015 IL 116916, ¶¶ 20-24.

¶ 2 Following a bench trial, defendant John Phillips was convicted of two counts of aggravated battery and one count of domestic battery. He was sentenced to 30 months of

probation on the aggravated battery charges and a concurrent term of 12 months of conditional discharge on the misdemeanor domestic battery charge. On appeal, defendant contends that one of the aggravated battery convictions and the domestic battery conviction must be vacated in accordance with one-act, one-crime principles. Defendant further contends that the mittimus must be amended to reflect the correct number of days of presentence custody credit, and that the fines, fees, and costs order must be amended to reflect the correct total amount of charges.

¶ 3 For the reasons that follow, we vacate defendant's convictions and corresponding sentences for domestic battery and one count of aggravated battery, but remand to the trial court for a determination as to which count should be vacated. We further order correction of the mittimus and modification of the fines, fees, and costs order.

¶ 4 Defendant's conviction arose from the events of May 9, 2012, when he was arrested as the result of an incident involving his father, Calvin Phillips. Following arrest, the State charged defendant by information with two counts of aggravated battery. Count 1 alleged that defendant caused bodily harm to Phillips by "striking Calvin Phillips about the arms, and in committing the battery, [defendant] used a deadly weapon, to wit: a metal pipe." Count 2 alleged that defendant caused bodily harm to Phillips when defendant "struck him with a metal pipe, while they were on or about a public way." The State also charged defendant with domestic battery by misdemeanor complaint. The complaint alleged that defendant "caused bodily harm to Calvin Phillips, a household member of the defendant, in that said defendant struck Calvin Phillips in the left forearm two times with a metal pipe causing pain and swelling."

¶ 5 At trial, Hillside police officer Shane Mikicic testified that about 3:13 p.m. on the day in question, he responded to a dispatch call that a grandmother reported her grandson was trying to

strike her with a pipe. When Officer Mikicic arrived at the given location, the parking lot of an apartment complex, he saw defendant, who was carrying a metal pipe, walking toward Phillips, who was backed up against a vehicle. Officer Mikicic got out of his squad car and directed defendant to drop the pipe. After defendant complied, Officer Mikicic placed him in custody. Officer Mikicic then spoke with Phillips, as well as defendant's grandmother, Rosemary Curtis. Phillips showed the officer injuries on his left arm, specifically, two red lines on his forearm.

¶ 6 Calvin Phillips testified for the State that nothing happened to his arms on the day in question, and that if he had any redness on his forearm, it probably came from "playing football or something." He testified that he did not recall being present when his son was arrested and that he only learned about the arrest when Curtis told him about it. Phillips stated that he went to the Hillside police station, but insisted that while he spoke with Curtis at the station, he did not remember speaking to any police officers or an assistant State's Attorney (ASA). He denied recognizing the written statement he gave to the ASA at the police station, and although he acknowledged that the signature at the bottom of the statement looked like his, he did not remember signing the document.

¶ 7 When asked about the details of the statement, Phillips denied saying or did not remember saying that he heard defendant and Curtis yelling at each other; that he was about to get into his car when he saw defendant running toward him holding a long metal pipe; that defendant yelled, "What's up now, bitch?"; that defendant swung the pipe downward toward his head; that he raised his left arm to block the pipe; that defendant hit his left forearm with the pipe; that defendant swung at him over 20 times but only hit him twice in the left forearm; that as defendant swung the pipe, defendant said he needed "to hit him one time to push him out"; or

that defendant chased him with the pipe for about 10 minutes until the police arrived and made him drop the pipe.

¶ 8 Defendant's grandmother, Rosemary Curtis, testified for the State that on the date in question, she saw defendant with a pipe in the parking lot. She did not know exactly what happened, but she called the police because defendant "had a pipe after my son." Later in the day, Curtis went to the police station. Curtis testified that Phillips was at the station as well, and that the side of his hand or arm was bleeding.

¶ 9 Curtis testified that at the police station, she met with an ASA and gave a statement. When shown the written statement in court, she acknowledged her signature on each page. However, when asked about the contents of the statement, she denied saying or did not recall saying that defendant was holding a silver steel pipe that was about 2 ½ feet long; that defendant said "come on bitch" to Phillips as Phillips was getting into his car; that defendant attacked Phillips with the pipe and swung it toward Phillips' head about five times; that when Phillips put his arm up, defendant hit it with the pipe; and that defendant swung the pipe toward her but missed. Curtis reiterated that she never saw defendant hit or swing at anyone with a pipe.

¶ 10 ASA Jim Pontrelli testified that on the day in question, he interviewed both Calvin Phillips and Rosemary Curtis. Phillips told the ASA that he heard defendant and Curtis yelling at each other; that just as he was getting into the car, he saw defendant running toward him holding a long metal pipe; that defendant yelled, "What's up now, bitch?" and swung the pipe downward toward his head; that he raised his left arm to block the pipe; that the pipe hit his left forearm; that defendant swung at him over 20 times but only hit him twice in the forearm; that while defendant was swinging the pipe, he said he needed to "hit him one time to put him out"; and that

defendant continued to chase him with the pipe for about 10 minutes until the police arrived at the scene and made him drop it.

¶ 11 ASA Pontrelli testified that Curtis told him she saw defendant holding a silver steel pipe that was about 2 ½ feet long; that as Phillips was getting into his car, defendant said "come on, bitch" to him; that defendant attacked Phillips with the pipe, swinging it downward toward his head; that when Phillips put his arm up, defendant hit it with the pipe; that defendant swung the pipe toward Phillips' head about 10 times; that defendant swung the pipe toward her but missed; and that defendant was still holding the pipe when the police arrived.

¶ 12 Defendant did not testify or present any witnesses.

¶ 13 Following closing arguments, the trial court found defendant guilty of domestic battery and both counts of aggravated battery. On the aggravated battery charges, the trial court sentenced defendant to 30 months of probation, 240 hours of community service, DNA indexing, anger management, and random drug drops. On the misdemeanor domestic battery charge, the court sentenced defendant to a concurrent term of 12 months of conditional discharge and anger management. The court also imposed $709 in fines and fees.

¶ 14 On appeal, defendant first contends that where the charging instruments did not differentiate among the blows he struck to his father, only one conviction can be affirmed under the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551, 566 (1977). The State concedes the issue, noting that although defendant failed to preserve the issue by objecting at trial and addressing it in a posttrial motion, one-act, one-crime violations are recognized under the second prong of the plain error rule. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004) ("an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of

the judicial process, thus satisfying the second prong of the plain error rule"). We agree with the parties that only one conviction for aggravated battery can be affirmed under the one-act, one-crime rule. Because only a conviction for the most serious offense may be sustained (see *People v. Donaldson*, 91 Ill. 2d 164, 170 (1982)), we vacate defendant's conviction for domestic battery and one of defendant's convictions for aggravated battery.

¶ 15 With regard to which aggravated battery conviction is to be vacated, we note that our supreme court has held that "[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). Here, count 1 charged defendant with aggravated battery premised on use of a deadly weapon, and count 2 charged defendant with aggravated battery premised on the battery occurring on or about a public way. Aggravated battery with a deadly weapon other than a firearm and aggravated battery on a public way are both class 3 felonies requiring a knowing mental state. 720 ILCS 5/12-3(a), 5/12-3.05(c), 5/12-3.05(f)(1), 5/12-3.05(h) (West 2012). Under these circumstances, we cannot determine which count is the more serious offense. Accordingly, we remand the matter to the trial court for that determination.

¶ 16 Defendant's second contention is that he is entitled to three days of presentence custody credit.[1] Under section 5-4.5-100(b) of the Unified Code of Corrections, defendants "shall be given credit *** for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2012). This statutory language is

[1] We note that in his opening brief, defendant contended he was also entitled to credit for 556 days he spent on presentence electronic monitoring. However, defendant abandoned this claim in his reply brief.

mandatory; therefore, a claim of error in the calculation of presentence custody credit cannot be waived. *People v. Purcell*, 2013 IL App (2d) 110810, ¶ 18; *People v. Dieu*, 298 Ill. App. 3d 245, 248-49 (1998) (citing *People v. Woodard*, 175 Ill. 2d 435, 456-57 (1997)). Here, the State concedes the issue. We accept the State's concession and order the clerk of the circuit court to correct the mittimus to reflect three days of presentence custody credit.

¶ 17 Third, defendant contends that he is entitled to $15 worth of $5-per-day presentence custody credit against the fines imposed by the trial court. Specifically, defendant seeks credit against the following fines: the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2012); the $5 Youth Diversion / Peer Court fine (55 ILCS 5/5-1101(e) (West 2012)); the $5 Drug Court fine (55 ILCS 5/1101(f) (West 2012)); and the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2012)). Under section 110-14(a) of the Code of Criminal Procedure of 1963, an offender who has been assessed one or more fines "shall be allowed" a $5-per-day credit for time spent in custody as a result of the offense for which the sentence was imposed. 725 ILCS 5/110-14(a) (West 2012). Our supreme court has held that because a defendant's statutory right to a *per diem* credit is conferred in mandatory terms, normal waiver rules do not apply and the right is cognizable on appeal. *Woodard*, 175 Ill. 2d at 457; see also *People v. Caballero*, 228 Ill. 2d 79, 88 (2008) (holding that claims for $5-per-day credit may be raised at any time and stage of court proceedings, and that if the basis for granting such credit is clear and available from the record, an appellate court may grant the relief requested). Here, the State agrees that defendant should be given a total of $15 credit against these fines. We accept the parties' position. Accordingly, we order the clerk of the circuit court to modify the fines, fees, and costs order to reflect this credit.

¶ 18 Finally, we address an issue raised by the State for the first time in its appellate brief. The State asserts that defendant should be assessed two mandatory fines that were not imposed by the trial court: a $100 Violent Crime Victim Assistance fine (725 ILCS 240/10(b) (West 2012)); and a $40 Criminal / Traffic Conviction Surcharge / LEADS Fund fine (730 ILCS 5/5-9-1(c) (West 2012)). In his reply brief, defendant does not contest the applicability of these two fines, but does challenge the dollar amount. Specifically, defendant asserts that the Violent Crime Victim Assistance fine should only be $8, as it should be calculated based on an older version of the statute that was in effect on the day of the offense. See 725 ILCS 240/10(b) (West 2010). Defendant further asserts that the Criminal / Traffic Conviction Surcharge / LEADS Fund fine, which is calculated by adding $10 for every $40 in other fines or fraction thereof, should only total $20. See 730 ILCS 5/5-9-1(c) (West 2012).

¶ 19 Based on our supreme court's recent decision in *People v. Castleberry*, 2015 IL 116916, ¶¶ 20-24, we find that we may not increase the amount of fines at the request of the State. In *Castleberry*, our supreme court observed that Supreme Court Rule 604(a) sets forth with specificity those instances where the State may appeal in a criminal case, and that the rule does not permit the State to appeal a sentencing order. *Id*. ¶ 21 (citing Ill. S. Ct. R. 604(a) (eff. July 1, 2006)). The *Castleberry* court reasoned that because the rule does not authorize the State's appeal of sentencing orders, the State also may not cross-appeal a sentencing order or bring a *de facto* cross-appeal of a sentencing order by attacking it in its response brief " 'with a view either to enlarging [its] own rights thereunder or of lessening the rights of [its] adversary.' " *Id*. ¶¶ 21-23 (quoting *United States v. American Ry. Express Co*., 265 U.S. 425, 435 (1924)).

¶ 20 Here, the State is not seeking to sustain the trial court's judgment, but rather, to "lessen[ ] the rights" of defendant by having additional fines imposed upon him. As such, the State's argument is an impermissible *de facto* cross-appeal challenging defendant's sentence. *Castleberry*, 2015 IL 116916, ¶ 23. The State's attempt to "piggyback" an appeal on defendant's appeal is a practice that is not allowed. *Id*. (citing *People v. Newlin*, 2014 IL App (5th) 120518, ¶ 31 (rejecting the State's attempt to unilaterally raise an issue concerning the circuit court's failure to impose mandatory fines)). Accordingly, we reject the State's argument.

¶ 21 For the reasons explained above, we vacate defendant's conviction and sentence for domestic battery; vacate one of defendant's two convictions and sentences for aggravated battery but remand to the circuit court for a determination of which count; order correction of the mittimus to reflect three days of presentence custody credit; and order modification of the fines, fees, and costs order to reflect $15 worth of $5-per-day presentence custody credit against the imposed fines.

¶ 22 Affirmed in part, vacated in part, and remanded; mittimus corrected; fines, fees, and costs order modified.