No. 2—09—0278
Order filed January 21, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 07—CF—4850
KAVIN SPIVEY, JR.,	)	Honorable Fred L. Foreman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: Trial court did not abuse its discretion by admitting prior consistent written statements of accomplices where evidence showed that defense counsel made inferences or charges that accomplices had motives to testify falsely and no evidence existed that accomplices' had motives to testify falsely when they provided statements.

Held: Where accomplice's testimony that defendant discharged a firearm at victim was corroborated by eyewitnesses, evidence was sufficient to find defendant guilty of attempt first degree murder making him eligible for extended term of imprisonment; defendant's conviction was affirmed.

Held: Where State failed to prove that either defendant or codefendants discharged handgun during offense, State failed to prove defendant guilty of armed violence predicated on vehicular invasion; defendant's conviction was reversed.

Held: Where prosecutor's comments were based on reasonable inferences deducible from the evidence, trial court heard testimony, reviewed evidence and record did not indicate that comments were a material factor in defendant's convictions or that they caused defendant substantial prejudice, comments did not warrant reversal.

Held: Where convictions based on allegations of identical acts as contained in indictment, discharging a firearm at victim, two of defendant's three convictions of attempt first degree murder were vacated as violative of one-act one-crime doctrine; only the most serious of the defendant's three convictions could stand.

Held: The one-act, one-crime doctrine was violated, where defendant's conviction of vehicular invasion as charged in the indictment was based on same conduct as conviction for armed violence; conviction for vehicular invasion was vacated.

Held: Where trial court's written order expressly stated that defendant was sentenced to 20 years' imprisonment for each count of armed violence, remand was not necessary to clarify oral pronouncement that did not make such a distinction.

Defendant, Kavin Spivey, Jr., appeals his convictions for two counts of attempt first degree murder (720 ILCS 5/8—4(a), 9—1(a)(1) (West 2006)), two counts of armed violence (720 ILCS 5/12—11.1(a), 33A—2(a) (West 2006)), armed robbery (720 ILCS 5/18—2(a)(2) (West 2006)), vehicular invasion (720 ILCS 5/12—11.1(a) (West 2006)), aggravated discharge of a firearm (720 ILCS 5/24—1.2(a)(2) (West 2006)), and being an armed habitual criminal (720 ILCS 5/2—1.7(a)(2) (West 2006)), and concurrent sentences of imprisonment of 36 and 20 years for the attempt first degree convictions, 20 years for each armed violence conviction, 20 years for armed robbery, 10 years for vehicular invasion, 10 years for aggravated discharge of a firearm, and 20 years for his conviction of being an armed habitual criminal.

On appeal, defendant argues: (1) the trial court abused its discretion by admitting into evidence the prior consistent written statements of codefendants; (2) the trial court erred by finding defendant guilty of attempt first degree murder as it was charged in count I of the indictment, which qualified him for the 20-year add-on sentence; (3) his conviction for armed violence as charged in

count III in the indictment alleging armed violence predicated on vehicular invasion must be reversed because the State failed to prove that either defendant or his codefendants discharged a handgun during the invasion of the victim's automobile; (4) the prosecutor made improper comments during closing and rebuttal argument; (5) his convictions for counts II (attempt first degree murder) and VII (aggravated discharge of a firearm) must be vacated because the convictions violate the one-act/one-crime doctrine; (6) his conviction for count VI (vehicular invasion) must be vacated because it violates the one-act/one-crime doctrine; and (7) his case must be remanded for resentencing on his conviction for armed violence predicated on vehicular invasion as charged in count IV. We affirm in part, reverse in part and vacate in part.

I. FACTS

A. Charges

Defendant was charged by an eight-count indictment alleging, *inter alia*, that defendant committed armed robbery and two counts of armed violence predicated on vehicular invasion against Kristie Kim and two counts of attempt first degree murder when he personally discharged a weapon at David Bryant. The alleged offenses occurred near Gurnee Mills shopping center on the morning of November 30, 2007.

B. Bench Trial

During the bench trial Kristie Kim testified that on the morning of the incident she stopped at a gas station near Gurnee Mill shopping center. She bought some items in the gas station store and returned to her car, leaving the driver's door open and her wallet on her lap. Kristie heard someone say, "Excuse me, Miss, excuse me." A hand stopped her car door from closing and a man said, "This is a stick-up. Give me all the money that you have." When Kim asked the man if he was serious, he cursed at her and told her he had a gun, lifted his shirt and showed her the butt of a gun,

which was in the waistband of his pants. The man then grabbed Kim, pulling her out of the car and onto the ground. He took her wallet and ran north towards a Toys-R-Us store parking lot. As the man was robbing Kim, a second man was standing behind Kim's car. The second man also ran towards the Toys-R-Us store parking lot.

Kim told the police that the man who took her wallet had scruffy face hair and wore a faded, worn, gray hoodie. She could not remember the color of the hoodie worn by the second man. Both men were African-Americans. Kim could not identify defendant as the man who took her wallet in a photo lineup; rather, she identified someone else as the offender.

David Bryant testified that on the morning of the incident he was working at a gas station near the Gurnee Mills shopping center. A woman came in to buy cigarettes and left the store. Bryant saw two African-American men walk towards the woman. Bryant saw the men run away at a high speed. Bryant went outside. The woman told Bryant that she had been robbed. Bryant chased the two men who were running side-by-side through the Toys-R-Us parking lot. When Bryant reached the center of the parking lot one of the men, standing about 20 feet away at the northwest edge of the lot, took a gun from "his coat pocket, like under his jacket." The man shot at Bryant once, holding the gun sideways. Bryant dropped to the ground and Bryant heard another shot. The man who shot at Bryant wore a tan flannel jacket or coat. The second man wore a black hoodie. The two men ran to a van and rode off.

William Sutcliffe testified that the morning of the incident he was in the Steak n' Shake parking lot meeting his wife for breakfast when he saw two African-American men running across the Toy-R-Us parking lot. One of the runners wore a black or dark grey sweatshirt and the second runner wore a light gray sweatshirt. A third man was chasing them. The third man yelled, "get down, get down." When the runner who wore the black or gray sweatshirt reached a row of bushes

at the edge of the parking lot, he held a gun sideways and fired it at the third man or at the Toys-R-Us store. The two African-American men then ran off, got into a pickup truck and drove off.

Tamara Esp testified that on the morning of the incident she was working at the Steak n' Shake restaurant. The front door of the restaurant faced the Toys-R-Us parking lot. As Esp opened the front door for customers, she saw two people running through the parking lot and a third person chasing them. Both people being chased wore hoodies but only one wore a black hoodie. When the two men being chased reached the median strip in the northwest area of the parking lot, one of them ran away and the man who was wearing the black hoodie stopped, turned around and raised his arm. Esp did not hear anything.

Whitney Buckley testified that she was parked in the Toys-R-Us parking lot when the incident occurred. She saw two African-American men run really fast past her truck and a third man who was pursuing them, yelled "stop." One of the runners wore a dark hooded sweatshirt and the other runner wore a lighter gray sweatshirt. When the runner wearing the dark hooded sweatshirt got close to the street, he raised his arm straight out towards the third man. Buckley then heard two shots. The two African-American men then ran off.

Travis Fleming, one of defendant's codefendants, testified that, on the way to Wisconsin with Hicks and defendant, defendant asked Fleming to stop at the Toys-R-Us store in the Gurnee Mills shopping center to by a gift. Defendant and Hicks got out of the truck but Fleming did not see where they went after they left the truck. Fleming then pulled his seat back and closed his eyes. After seven or eight minutes Fleming drove to the store's doors to indicate to defendant and Hicks that he was ready to leave. As Fleming approached the doors he saw defendant and Hicks running through the parking lot and picked them up. Fleming asked what was going on and defendant said, "just drive." After driving a while, Fleming again asked what had happened and defendant replied that

he "had to get him up off me." Later Fleming remarked that he had to pay $30 for gas and expenses and it costs $50 to $70 to fill up his truck. Defendant said "we don't have to worry about gas money." Defendant had a black leather wallet in his lap. Fleming found that unusual because defendant "don't carry a black leather wallet." Defendant was "flicking through it, pulling out different cards; a gift card and a Visa card. When they pulled into a gas station for gas, defendant paid for the gas with a credit card that he pulled out of the "black leather — leather purse, wallet thing." Later, while on the highway, defendant threw the wallet out the window. Earlier, defendant had thrown a gun out of the window. Fleming did not see a gun or hear gunshots that day. On the day of the incident defendant wore a dark-colored hoodie, Hicks wore a gray hoodie and Fleming wore a grey hoodie or sweater.

Fleming testified that he was originally charged with numerous offenses, related to the incident, all of which were dismissed, except for the armed robbery charge which was amended to a robbery charge. Fleming pled guilty to the robbery charge. In exchange for the prosecutor's leniency, Fleming agreed to testify against defendant. Fleming understood that he was to be sentenced after defendant's trial was over and that no promises had been made to him regarding his possible sentence. Fleming was hoping to be sentenced to probation. The police did not make any promises to Fleming before he provided his written statement, in fact, the police told Fleming that he could be charged with attempted murder and armed robbery, but he still decided to tell the police what had happened. At the time Fleming provided the police with his statement, he had no agreement with the State's attorney's office. The police did not tell Fleming what to say or write. Fleming had been in prison previously for a conviction for first degree murder and did not want to go to prison again. Fleming believed that without the State's plea deal he could have been sentenced to a prison term of between 26 to 50 years. He hoped that with the deal he would receive probation.

Fleming testified he and Hicks did nothing wrong on the day of the incident. Hicks was 16 years-old, the same age Fleming had been when he went to prison, and Fleming did not want to see anything bad to happen to Hicks. Over defense counsel's objection, the trial court admitted the written statement Fleming provided to police as well as Fleming's Miranda waiver form.

Codefendant, Lamar Hicks, testified that on the morning of the incident he was riding in Fleming's truck with Fleming and defendant. Hicks testified that he wore a gray hoodie and defendant wore a black or blue hoodie. Defendant woke him up while they were in a Toys-R-Us parking lot and told Hicks to come with him. They walked over to the Shell gas station. A woman was inside a car parked at a pump with the driver's door open. While Hicks stood at the rear of the car, defendant grabbed the women's arm and took her wallet. Hicks and defendant ran through the Toy-R-Us parking lot and a clerk from the gas station ran after them. Hicks heard two gun shots but did not stop running. Hicks turned and saw defendant holding a gun. He saw Fleming's truck in a different parking lot, ran to it and got in. Defendant also got into Fleming's truck and they drove off and continued on their way. They stopped for gas, but Hicks did not recall who paid for it.

Hicks testified that the police took him to the police station and told him he had been arrested for armed robbery and attempted murder. Hicks believed he was facing a "whole lot of years" in prison. At first, Hicks told police that he had never been in Gurnee. Then the police told Hicks that they knew he was not responsible for the offense and they thought it was defendant who was responsible. Hicks confirmed the officer's statement. The police also told Hicks that if he told the truth he would not go to jail and that if he did not tell them "what happened" he would be charged with attempted murder and armed robbery. Hicks testified that he gave his statement to police that defendant committed the offenses because the police told him that if he did so, he would not be charged. The plea deal Hicks made with the State was made after he spoke with the police officers

and after he provided his written statement. In exchange for Hicks's truthful testimony, consistent with his statement, the State dismissed some "serious" charges for Hicks and he faced "only one amended or lowered charge" and was eligible for probation. Hicks believed this was a good deal for him. Hicks testified because he was telling the truth and he did not want to lose the deal. Over defense counsel's objection, the trial court admitted the written statement Hicks provided to police as well as Hicks' Miranda waiver form.

Lisa Cepolski testified that on the morning of the incident she was walking out of Toys-R-Us towards her van which was parked in the middle of the store's parking lot, when an African-American man ran past her. Moments later, a second African-American man ran past her. Both men wore grey sweatshirts but they were different tones of grey; neither sweatshirt was black or very dark. When she reached her van, a third man told her to get down. One of the runners, who was now at the edge of the parking lot, raised his arm and fired a gun. After a few moments, Cepolski drove away from the scene.

Gurnee Police Officer Jesus Gonzalez testified that, about two weeks after the incident, he and another officer interviewed both Hicks and Fleming. Officer Gonzalez testified that no deal had been made in exchange for either Hicks' or Fleming's statement.

C. Trial Court's Findings and Sentencing

The trial court found defendant guilty of two counts of attempt first degree murder as charged in counts I and II of the indictment and sentenced him to 36 and 20 years' imprisonment, respectively. Defendant was found guilty of three counts of armed violence as charged in counts III, IV and V in the indictment and was sentenced to 20 years for each conviction. The trial court found defendant guilty of vehicular invasion and aggravated discharge of a firearm as charged in count VI and VII of the indictment and sentenced him to 10 years' imprisonment for each conviction.

Defendant was found guilty of being an armed habitual criminal as charged in count VIII of the indictment and sentenced to 20 years' imprisonment. The trial court ordered all sentences to be served concurrently.

II. ANALYSIS

A. Codefendants' Prior Consistent Statements

Defendant argues that the trial court abused its discretion by admitting into evidence the prior consistent written statements of codefendants, Fleming and Hicks.

Prior consistent statements are admissible to rebut a charge or inference that, *inter alia*, the witness is motivated to testify falsely, so long as the witness told the same story before the motive came into existence. *People v. Lambert*, 288 Ill. App. 3d 450, 453 (1997).

Defendant argues that the admission of Fleming's and Hicks' written statements were erroneous because: a) during cross-examination, defense counsel made no charge or inference that either Fleming or Hicks were motivated to testify falsely; and b) Fleming's and Hicks' motives to testify falsely existed at the time they made their prior consistent written statements and, thus, the exception to the rule barring prior consistent statements did not apply. We disagree with defendant because the trial court's decisions to admit Fleming's and Hicks' written statements were not an abuse of discretion.

1. Charges/Inferences by Defense Counsel

The record reveals that defense counsel's cross-examinations of both Fleming and Hicks attempted to show that they feared being charged with attempt murder and armed robbery if they did not provide written statements that defendant committed the crimes. During cross-examination of Fleming, defense counsel asked, "Was one scenario [the police] gave you, well, you could be charged with attempt murder, armed robbery, things like that?" Fleming answered, "I believe so."

Defense counsel later asked Fleming, "They told you all that before you started making statements, is that right?" Fleming answered, "Yes."

During cross-examination of Hicks, defense counsel asked, "Did [the police] say anything about what charges you – what would happen to the charges?" Hicks replied, "They said if I don't tell them what happened, I'm going to be charged with attempt murder and armed robbery." Defense counsel then asked Hicks, "So, before you began making any statements you understood that a statement where you would not be charged or you could not give a statement and you'd be charged with these things, is that right?" Hicks replied, "Right." Thus, there was sufficient evidence that defense counsel made inferences or charges that Fleming and Hicks had a motive to testify falsely. See *People v. Gacho*, 122 Ill. 2d 221, 249 (1988)

2. Motive to Testify Falsely

Defendant argues that the trial court erred by admitting Fleming's and Hicks' prior consistent written statements because their motives to testify falsely existed at the time they provided the statements. Defendant supports his argument with Flemings' testimony during cross-examination, that, before Fleming provided his written statement, the police told him that if he cooperated, they would talk to prosecutors for him. Further, during cross-examination, Hicks testified that he provided his written statement because police officers told him that they knew he "didn't do anything and they knew [defendant] did it and if I tell the truth, I won't go to jail. **** [I]f I don't tell them what happened, I'm going to be charged with attempt murder and robbery."

The facts in this case are similar to those in *People v. Titone*, 115 Ill. 2d 413, 423 (1986). In *Titone*, our supreme court held that the trial court did not err by admitting a witness's prior consistent statement given after the police told the witness that she would not be charged if she gave the statement. *Titone*, 115 Ill. 2d at 423. There was nothing in the record indicating that the witness

was offered any deal or threatened by the police in order to elicit the [prior inconsistent] statement." *Lambert*, 288 Ill. App. 3d at 456, quoting *Titone*, 115 Ill. 2d at 423. The supreme court held that, based on the record, it was "unable to say that in admitting the statement the [trial] court erred." *Titone*, 115 Ill. 2d at 423.

In this case, there was ample evidence to support the trial court's decision to admit Fleming's and Hicks' written statements. Fleming testified that, before he provided the police with his written statement, the police made no promises to him and there was no agreement between him and the State's attorney office. Further, Hicks testified that the deal he made with the State's attorney's office was made after Hicks provided his written statement to the police. In addition, Detective Gonzalez testified that no deal had been made in exchange for either Fleming's or Hicks' written statements. Thus, the record reveals that, similar to *Titone*, neither Fleming nor Hicks had been "offered any deal or threatened by the police in order to elicit the [prior consistent] statement[s]." See *Titone*, 115 Ill. 2d at 423. Thus, based on this record, we cannot say that the trial court abused its discretion by admitting Fleming's and Hicks' prior consistent written statements. See *Titone*, 115 Ill. 2d at 423.

Defendant cites *People v. Tidwell*, 88 Ill. App. 3d 808 (1980), to support his argument. In *Tidwell*, the appellate court held that the admission of a witness's prior consistent statement was reversible error. *Tidwell*, 88 Ill. App. at 811. At trial, the witness testified that he had not received any deal in exchange for his testimony; thus, there was no inference that his testimony was recently fabricated or that he had a motive to testify falsely. *Tidwell*, 88 Ill. App. at 811. Accordingly, the *Tidwell* court reasoned that the exception for barring prior consistent statements was not met. *Tidwell*, 88 Ill. App. at 811. This case is factually distinguishable from *Tidwell*. In this case defense counsel inferred that Fleming and Hicks had motives to testify falsely because they feared being

charged with crimes if they did not provide the police with written statements that defendant committed the crimes. Thus, *Tidwell* is not applicable to this case.

Defendant also argues that the trial court's error was not harmless and was not waived. Because we have already determined that the trial court did not err by admitting the witness's prior consistent written statements, we need not address these arguments.

B. Sufficiency of the Evidence

1. Attempt First Degree Murder

Next, defendant argues that the trial court erred by finding defendant guilty of attempt first degree murder as it was charged in count 1 of the indictment, which qualified him for the 20-year add-on sentence and which the trial court imposed under section 8—4(c)(1)(C) of the Criminal Code of 1961 (Code). Section 8—4(c)(1)(C) of the provided:

> "(C) an attempt to commit first degree murder during which the person *personally discharged a firearm* is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court." (Emphasis added.) 720 ILCS 5/8—4(c)(1)(C) (West 2006).

Defendant argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt because the only proof that he personally discharged a handgun at Bryant was the uncorroborated, inherently unreliable testimony of codefendants Hicks, who was the only other possible shooter, and Fleming. Defendant points out that Hicks, who testified that defendant shot at Bryant, was an unreliable witness because he was an accomplice and had negotiated "a remarkably lenient agreement [with the State] that allowed him to plead guilty to a single count of ordinary robbery and receive only a juvenile disposition." In addition, defendant attacks the credibility of Hicks based on inconsistencies between the testimony of Hicks and that of other witnesses.

Defendant argues that he could not have been the shooter because Kristie Kim testified that the man who robbed her had scruffy facial hair and that after he took her wallet he could not immediately flee because her car door was in his way, thus, Kristie's robber could only have been defendant. Defendant also argues that the other witnesses did not corroborate Hicks identification of defendant as the shooter because they differed on the color of the shooter's hoodie or sweatshirt.

When considering a challenge to the sufficiency of the evidence of a defendant's guilt, it is not the function of this court to retry the defendant. *People v. Smith*, 177 Ill. 2d 53, 73 (1997). Rather, on review, a conviction will not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *People v. Doll*, 371 Ill. App. 3d 1131, 1135 (2007). 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. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). We must allow all reasonable inferences in favor of the prosecution that are supported by the record. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009).

Although "the testimony of an accomplice witness has inherent weaknesses and should be accepted only with caution and suspicion," such testimony, "whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the [trier of fact] of the defendant's guilt beyond a reasonable doubt." *People v. Tenney*, 205 Ill. 2d 411, 429 (2002). Further, a single witness's testimony is sufficient to convict if the testimony is positive and the witness is credible. *People v. Island*, 385 Ill. App. 3d 316, 346 (2008). The testimony of an eyewitness will be found insufficient to support a finding of guilt only if no reasonable person could accept the testimony beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004).

Having heard Hicks' and Fleming's testimonies, the trial court was fully aware of their alleged infirmities. The trial court knew of Hicks' and Fleming's plea agreements with the State. Further, the trial court knew that, as accomplices, Hicks' and Flemings testimonies were subject to suspicion and, therefore, should have been viewed with caution. See *People v. Salinas*, 383 Ill. App. 3d 481, 500 (2008) ("In a bench trial, the trial judge is presumed to know and properly apply the law").

Regarding the alleged unreliability of Hicks' testimony, other evidence presented at trial corroborated Hicks' testimony. Hicks testified that he wore a grey hoodie and that defendant, who shot at Bryant, wore a black or blue hoodie. This was corroborated by three eyewitnesses, Esp, Sutcliffe, and Buckley, who testified that the shooter wore a black or dark hoodie or sweatshirt. Further, Fleming testified that defendant wore a dark-colored hoodie. Thus, the trial court could have reasonably inferred from this testimony that defendant was the shooter. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 230 (2009) (stating that is the trial court's responsibility to, *inter alia*, draw reasonable inferences from basic facts to ultimate facts). Therefore, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant personally discharged a weapon at Bryant.

Defendant cites *People v. Ash*, 102 Ill. 2d 485 (1984), *People v. Wilson*, 66 Ill. 2d 346 (1977), and *People v. Gnat*, 166 Ill. App. 3d 107 (1988), to support his argument that reversal is warranted when a conviction is based on uncorroborated accomplice testimony. These cases are distinguishable from the case at bar. In the cases cited by defendant, the appellate courts reversed the defendants' convictions because there was no corroboration of the accomplices' testimony that the defendants committed the offenses. *Ash*, 102 Ill. 2d at 493-94 ("In addition, testimony which supposedly corroborated [the accomplice] described only certain events surrounding the crime but

not who committed it"); *Wilson*, 66 Ill. 2d at 350 (" [the accomplice's] testimony pointed to Who did it, but the testimony of the complainant and the policeman simply helped determine What occurred"); *Gnat*, 166 Ill. App. 3d at 112 ("Thus, we conclude that there was no corroboration for [the accomplice's] testimony that defendant supplied the drugs"). In contrast to the cases cited by defendant, in this case three eyewitnesses corroborated Hicks' when they testified that a man wearing a dark hoodie shot at Bryant. Thus, none of the cases cited by defendant are applicable to this case.

Defendant also argues that Fleming's testimony was not reliable enough to corroborate Hicks' testimony. Because three other witnesses adequately corroborate Hicks' testimony, we need not address this issue.

Defendant also cites *People v. Peterson*, 273 Ill. App. 3d 412 (1995) and *People v. Lopez*, 72 Ill. App. 3d 713 (1979), for the proposition that a conviction must be reversed where the State can prove only that one of two similar-looking men present at the scene fired a gun, but the State cannot prove beyond a reasonable doubt which of the two men actually fired the weapon. These cases are factually distinguishable because, in this case, there were eyewitnesses who saw a man wearing a dark hoodie or sweatshirt shoot at Bryant and Hicks and Fleming testified that defendant wore a dark hoodie on the night of the shooting. Thus, neither case cited by defendant is controlling.

2. Armed Violence Predicated on Vehicular Invasion

Defendant argues that his conviction for armed violence as charged in count III in the indictment alleging armed violence predicated on vehicular invasion, must be reversed because the State failed to prove that either defendant or his codefendants discharged a handgun during the invasion of Kristie Kim's automobile. The State agrees that it presented no evidence supporting the conviction of this offense.

Count III of the indictment charged that defendant, Hicks and Fleming committed armed violence (720 ILCS 5/12—11.1(a) (2006)) in that they:

> "[P]ersonally discharged a firearm, a pistol, while performing acts prohibited by Illinois Compiled Statutes, 720 ILCS 5/12—11.1(a), in that said defendants, knowingly, by force and without lawful justification, reached into the interior of a 1994 Nissan owned by Kristie Kim, while said motor vehicle was occupied by Kristie Kim, with the intent to commit therein a theft, in violation of 720 ILCS 5/33A—2(b)".

Because the record contains no evidence that either defendant, Hicks or Fleming, discharged a firearm while the theft of Kim was being committed, defendant was not proven guilty beyond a reasonable doubt. Therefore, his conviction for armed violence predicated on vehicular invasion as charged in count III in the indictment is reversed.

C. Prosecutor's Comments

Next, defendant argues that the prosecutor made improper comments during closing and rebuttal argument. Defendant challenges the prosecutor's comments that Kim's testimony that the robber carried a gun, established that defendant was the likely robber and that defendant was the likely shooter. Defendant argues that there was no basis in the record that only one of the robbers had a gun or that the gun Kim saw was real.

The record reveals that the prosecutor's comments were based on reasonable inferences deducible from the evidence presented at trial. See *People v. Simms*, 192 Ill. 2d 348, 396 (2000). Further, the trial court heard all the testimony and reviewed all the evidence. Thus, it was able to assign weight to the testimony as it saw fit, and we operate under the rebuttable presumption that the trial court relied only on proper argument and evidence in making its decision. See *People v. McCullum*, 386 Ill. App. 3d 495, 509 (2008). In addition, reversal is not warranted because even if

the prosecutor's comments were improper, the record does not indicate that the comments were a material factor in defendant's convictions or that they caused defendant substantial prejudice. *McCullum*, 386 Ill. App. 3d at 509.

D. One-Act,One-Crime

1. Discharge of a Firearm

Defendant argues that his convictions for counts II (attempt first degree murder) and VII (aggravated discharge of a firearm) must be vacated because the convictions violate the one-act/one-crime doctrine. The State agrees with defendant.

The purpose of the one-act, one-crime rule is to prevent the State from carving out multiple offenses from the same culpable conduct. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). The rule provides that a defendant may not be convicted of multiple crimes based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). For multiple convictions to be sustained, the indictment must indicate the State's intent to treat the defendant's conduct as multiple acts. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

In this case, the language of counts I, II and VII are all based on defendant discharging a firearm at Bryant. In count I (attempt first degree murder) the State alleged that "defendant personally discharged a firearm, being a pistol, at David Bryant." In count II (attempt first degree murder) the State alleged that "defendants [defendant, Hicks and Fleming] discharged a firearm, being a pistol, at David Bryant." In count VII (aggravated discharge of a firearm) the State alleged that defendants "knowingly discharged a firearm in the direction of another person, being David Bryant." The indictments did not indicate the State's intent to apportion defendant's conduct by charging defendant for the two gunshots fired as separate offenses. See *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009). Thus, the one-act, one-crime doctrine was violated in this case and the

convictions for counts II and VII, the less serious offenses, must be vacated; defendant's sentence for his conviction for count I is the greatest (36 years) of the three offenses and will stand. See *Samantha V.*, 234 Ill. 2d at 379.

2. Vehicular Invasion

Defendant argues that his conviction for vehicular invasion charged in count VI of the indictment must be vacated because vehicular invasion was the predicate offense for the armed violence convictions as charged in counts III and IV. The State agrees with defendant that defendant's conviction of count VI for vehicular invasion violates the one-act, one-crime doctrine. The single physical act of reaching into Kim's automobile with the intent to commit a theft, while Kim occupied the automobile was the basis for all three counts and convictions. Thus, multiple convictions were improper and defendant's conviction for vehicular invasion as charged in count VI is vacated. See *King*, 66 Ill. 2d at 566.

E. Sentencing

Defendant argues that his case must be remanded for resentencing on his conviction for armed violence predicated on vehicular invasion as charged in count IV in the indictment because the court may have mistakenly believed the minimum sentence was 20 years' imprisonment, not 15 years. Defendant points out that count IV was a less serious offense than that alleged in count III of the indictment. In count IV the State alleged that defendant, Hicks and Fleming committed the offense of vehicular invasion while armed with a dangerous weapon in violation of 720 ILCS 5/33A—2(a) (West 2006). In contrast to count IV, in count III, the State alleged that defendant and codefendants, Hicks and Fleming, committed the acts of vehicular invasion while discharging a firearm in violation of 720 ILCS 5/12—11.1(a). The minimum sentence for a conviction of count IV was *15* years' imprisonment. 720 ILCS 5/33A—3(a) (West 2006). The minimum sentence for

a conviction of count III was *20* years. 720 ILCS 5/33A—3(b—5) (West 2006). Defendant notes that when the court sentenced defendant in open court it stated that he would serve 20 years for armed violence, but it did not specify whether the term was for the conviction for count III or count IV. Defendant argues that it would not make sense for the trial court to sentence defendant to the same term, 20 years, where count IV involved the mere possession of a firearm and count III involved the discharge of a firearm. Thus, the court may have mistakenly believed the minimum sentence was 20 years and not 15.

When a trial court's written order of judgment is more specific than its oral pronouncement the written order will be enforced if it is consistent with the sense and meaning of the trial court's oral pronouncement. *People v. Smith*, 242 Ill. App. 3d 399, 403 (1993). In this case, the trial court announced the sentences for the convictions of both counts of armed violence. However, when the trial court wrote and then signed its order, it was more specific; it expressly imposed sentences of 20 years' imprisonment for defendant's convictions of counts III and IV. Thus, the trial court's written order will be enforced. See *Smith*, 242 Ill. App. 3d at 403. Further, defendant does not argue, and we cannot say, that the trial court abused its discretion, that defendant's sentence exceeded the statutory limits or that it is "manifestly disproportionate" to the offense. See *People v. Romero*, 387 Ill. App. 3d 954, 978 (2008). Thus, remand is not warranted.

In conclusion, defendant's conviction and sentence for armed violence based on count III is reversed. Defendant's convictions and sentences for the following offenses are vacated, attempted first degree murder (count II), vehicular invasion (count VI), and aggravated discharge of a firearm (count VII). The remaining convictions and sentences are affirmed.

Affirmed in part, reversed in part and vacated in part.