2014 IL App (2d) 130754-U
No. 2-13-0754
Order filed March 27, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Stephenson County.
Plaintiff-Appellee,	)	
v.	)	No. 04-CF-290
EDMOND W. ELLIS,	)	Honorable James M. Hauser,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: On remand for resentencing on defendant's attempted first-degree murder conviction, the trial court did not abuse its discretion in sentencing defendant to 25 years' imprisonment; the trial court properly ordered that sentence to be served consecutively to defendant's previously imposed 20-year sentence for armed robbery; defendant's sentence was not the result of judicial vindictiveness; defendant was not entitled to a three-year reduction in his sentence for any lack of admonishment about mandatory supervised release; and defendant's consecutive sentences did not violate the one-act, one-crime rule. The judgment of the trial court was affirmed.

¶ 2 *Pro se*[1] defendant, Edmond W. Ellis, appeals from the trial court's judgment after resentencing on his attempted first-degree murder conviction. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a 2004 robbery of a convenience store where the cashier was shot in the chest, defendant was charged by information with armed robbery (720 ILCS 5/18-2(a)(4) (West 2004)) and attempted first-degree murder (720 ILCS 5/8-4(a), 720 ILCS 5/9-1(a)(1) (West 2004)). A jury found defendant guilty of both counts. The trial court, Judge Charles R. Hartman, sentenced defendant to 45 years' imprisonment for the armed robbery (20 years plus a 25-year enhancement for personally discharging a firearm that caused great bodily harm[2] (720 ILCS 5/18-2(b) (West 2004))) to run concurrently with a 20-year sentence for the attempted first-degree murder. We affirmed defendant's convictions and sentences on direct appeal. *People v. Ellis*, Nos. 2-05-0452 & 2-05-0453 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5 In 2008, defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2008)), claiming that the 25-year enhancement for his armed robbery conviction was void. The trial court, Judge James M. Hauser, found that both of defendant's sentences were void.[3] The court vacated the sentences

[1] We granted appellate counsel's motion to withdraw and defendant's motion to proceed *pro se*.

[2] The enhancement factor was included both in the armed robbery count of the information and in the jury instructions on armed robbery.

[3] We explained the trial court's reasoning in *People v. Ellis*, 2012 IL App (2d) 110815, ¶ 7, n.4. In short, the attempted first-degree murder enhancement, which had been unconstitutional when defendant was originally sentenced (see *People v. Morgan*, 203 Ill. 2d

and conducted a new sentencing hearing. The court sentenced defendant to 20 years' imprisonment on the armed robbery conviction and 45 years' imprisonment on the attempted first-degree murder conviction (20 years plus a 25-year enhancement for personally discharging a firearm that caused great bodily harm (720 ILCS 5/8-4(c)(1)(D) (West 2004))). The sentences were to run concurrently. The sentencing order included a three-year term of mandatory supervised release.

¶ 6 Defendant appealed from his sentence for attempted first-degree murder. We vacated defendant's sentence, holding that the trial court erred in imposing an enhanced sentence for attempted first-degree murder when the enhancing factor was neither charged in the information for that offense nor submitted to the jury for that offense. *Ellis*, 2012 IL App (2d) 110815, ¶ 12. We remanded for resentencing on the attempted first-degree murder conviction, because the trial court had not indicated whether it would have imposed the same sentence even without the enhancement. *Ellis*, 2012 IL App (2d) 110815, ¶ 13.

¶ 7 On remand, Judge Hauser conducted another sentencing hearing on the attempted first-degree murder conviction. The court admitted into evidence an updated presentence investigation report. The parties offered no additional evidence. The State urged the court to make a finding that defendant had inflicted severe bodily injury and, because both of defendant's convictions were Class X felonies, asked the court to make defendant's sentences consecutive (see 730 ILCS 5/5-8-4(d)(1) (West 2012)). The State pointed out portions of the trial transcript

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470, 491 (2003)), was later ruled constitutional (see *People v. Sharpe*, 216 Ill. 2d 481 (2005)). Regarding armed robbery, the enhancement had been constitutional when defendant was originally sentenced but was later ruled unconstitutional (see *People v. Hauschild*, 226 Ill. 2d 63 (2007), *superseded by statute as stated in People v. Blair*, 2013 IL 114122, ¶ 27).

in which Dr. Barry Barnes, the emergency room doctor who treated the convenience store's cashier, testified about the victim's injuries. The State also noted that the original sentencing judge, Judge Hartman, had determined that an aggregate sentence of 45 years' imprisonment was appropriate for defendant's convictions. The State suggested that the court could "get to it in several different ways." The State recommended that the court sentence defendant to 25 years' imprisonment on the attempted first-degree murder, to run consecutively to the previously-imposed 20-year sentence on the armed robbery conviction—for an aggregate sentence of 45 years' imprisonment. The court confirmed with the State, by reviewing the trial transcript, that the bullet had lodged in the victim's spine, where it was still located.

¶ 8 Defendant, appearing *pro se*,[4] contended that consecutive sentencing would be improper because the appellate court did not mention consecutive sentencing when it remanded for resentencing on the attempted first-degree murder conviction. Defendant asserted that, because Judge Hartman originally found that a 20-year sentence on the attempt conviction was fair, any sentence greater than 20 years on resentencing would be improper. Defendant related that he did not "understand how [he could] get consecutive sentences."

¶ 9 The trial court stated that it reviewed the trial transcript, "[p]arts of it many times," and defendant's criminal history. The court noted that the victim had offered no resistance to defendant, who announced a "holdup," fired a bullet into the ceiling, and removed money from the cash register. The court addressed defendant, stating, "And rather than departing and leaving, you then at close range shot the clerk in the chest, and that gentleman then sustained the

[4] Defendant was represented by counsel when the hearing commenced, but he informed the court that he wanted to discharge the Stephenson County Public Defender. Defendant also indicated that he wished to proceed *pro se* and was prepared to do so.

injuries as described by Dr. Barnes at the trial. And that bullet that you fired into this gentleman's chest is still lodged in his chest today. The jury made a finding on their [*sic*] verdict that the—that you caused great bodily harm." The court found that defendant caused severe bodily injury. The court sentenced defendant to 25 years' imprisonment for his attempted first-degree murder conviction, to run consecutively to defendant's previously-imposed 20-year sentence for armed robbery. The court also ordered a three-year term of mandatory supervised release.

¶ 10 The trial court denied defendant's motion to reconsider the sentence. Defendant timely appeals.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues that the 25-year sentence on his attempted first-degree murder conviction was improper because it was longer than the sentence previously imposed, it was consecutive to his sentence for armed robbery, and it was the result of the trial court's vindictiveness. Defendant further contends that he is entitled to have his sentence reduced by three years because the trial court did not admonish him that he was subject to mandatory supervised release. Defendant's final contention is that his consecutive sentences for attempted first-degree murder and armed robbery violate the one-act, one-crime doctrine.

¶ 13 Defendant initially contends that the trial court improperly increased his sentence for the attempted first-degree murder conviction from 20 to 25 years' imprisonment. In general, "[t]he imposition of sentence is a matter of judicial discretion, and the trial court's sentencing decision is entitled to great deference and weight." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977); *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 14. Thus, we review a defendant's sentence for an abuse of discretion. *Andrews*, 2013 IL App (1st) 121623, ¶ 14. If the sentence imposed is

within statutory limits, it will be disturbed only if it varies greatly with the intent and spirit of law. *People v. Hill*, 2012 IL App (5th) 100536, ¶ 26. Here, defendant's 25-year sentence for attempted first-degree murder, a Class X felony (720 ILCS 5/8-4(c)(1) (West 2012)) was within the statutory range of 6 to 30 years (730 ILCS 5/5-4.5-25(a) (West 2012)). Defendant makes no argument that his sentence was at variance with the intent and spirit of the law.

¶ 14 However, a trial court on resentencing is limited by section 5-5-4 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-4 (West 2012)). "[T]he purpose of section 5-5-4 of the Code is to ensure the due process rights set forth in [*North Carolina v.*] *Pearce*[, 395 U.S. 711 (1969),] by preventing vindictiveness in resentencing a defendant for having exercised his appeal rights or his right to file a post-judgment motion." *People v. Woolsey*, 278 Ill. App. 3d 708, 710 (1996). Section 5-5-4(a) provides in relevant part that the resentencing court "shall not impose a new sentence for the same offense *** which is more severe than the prior sentence *** unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing." 730 ILCS 5/5-5-4(a) (West 2012); *People v. Moore*, 359 Ill. App. 3d 1090, 1092 (2005).

¶ 15 In making his section 5-5-4 argument, defendant compares the original 20-year sentence on his attempted first-degree murder conviction imposed by Judge Hartman with the 25-year sentence, his third sentence, currently at issue in this appeal. Defendant's original sentences were vacated by Judge Hauser when he granted defendant's section 2-1401 petition. The relevant comparison is between the current 25-year sentence for attempted first-degree murder at issue here (defendant's third sentence) and the 45-year sentence for attempted first-degree murder imposed by Judge Hauser (defendant's second sentence). See *People v. Sanders*, 356 Ill. App. 3d 998, 1003-04 (2005) (in the defendant's appeal from his second resentencing,

comparing the sentence imposed at the defendant's second resentencing with the sentence imposed at his first resentencing). In imposing defendant's second sentence, Judge Hauser arrived at the 45-year sentence for the attempted first-degree murder by starting with a 20-year base and, albeit improperly, adding a 25-year enhancement. Defendant's third sentence, 25-years' imprisonment, was well below the 45-year sentence previously imposed by Judge Hauser on the attempted first-degree murder conviction. That the current 25-year sentence is greater than the previous 20-year base sentence is of no consequence. See *People v. Barnes*, 364 Ill. App. 3d 888, 897 (2006) (noting that, although the defendant's attempted murder sentence had component parts of 10 years plus a required 15-year enhancement, it was a "single 25-year sentence"). Accordingly, because the new 25-year sentence was not more severe than the prior 45-year sentence, the trial court did not violate section 5-5-4(a).

¶ 16 Defendant frames his argument in terms of the propriety of our order in *Ellis*, 2012 IL App (2d) 110815, asserting that we should not have remanded for resentencing. Presumably, defendant simply would have had us excise the improper enhancement and leave him with a 20-year sentence for attempted first-degree murder. Defendant's argument fails because he did not challenge our prior order, either by filing a petition for rehearing in this court, or by filing a petition for leave to appeal in the supreme court. The propriety of our previous order is not at issue in this appeal.

¶ 17 Moreover, defendant's attempt to distinguish *People v. Herron*, 2012 IL App (1st) 090663, upon which we relied to support remand, fails. According to defendant, *Herron* is different from the present case because, in *Herron*, the court remanded for resentencing after holding that the previous sentence was invalid (*Herron*, 2012 Il App (1st) 090663, ¶¶ 30-31). Defendant compares the invalid sentence in *Herron* with the allegedly valid 20-year sentence

originally imposed by Judge Hartman. However, both sentences originally entered by Judge Hartman (including the 20-year sentence for attempted first-degree murder) were vacated by Judge Hauser when he granted defendant's section 2-1401 petition.[5] As noted above, the original sentencing order is not at issue in this appeal. Therefore, defendant's argument is unavailing. Similarly, defendant's reliance on *People v. Douglas*, 371 Ill. App. 3d 21 (2007), in support of his position that the original sentence was valid is without merit. See *Douglas*, 371 Ill. App. 3d at 25 (rejecting the State's request to remand for resentencing where the sentencing court imposed a valid sentence, despite the fact that a statutory enhancement was not included).

¶ 18 Defendant next argues that the trial court erred in ordering the 25-year sentence on his attempted first-degree murder conviction to run consecutively to the previously imposed 20-year sentence for his armed robbery conviction. Defendant asserts that the trial court abused its discretion in making a finding of severe bodily injury and ordering defendant to serve his sentences consecutively, because it should have deferred to the original sentencing court's judgment that the sentences run concurrently. Defendant cites no relevant authority in support of his position. Again, defendant's focus on the original sentence imposed by Judge Hartman is misplaced as it was not at issue on remand.

¶ 19 Section 5-8-4 of the Unified Code (730 ILCS 5/5-8-4 (West 2012)) governs the imposition of consecutive sentences. That section includes a provision for mandatory consecutive sentences if one of the offenses for which the defendant was convicted was first-degree murder or a Class X or Class 1 felony and "the defendant inflicted severe bodily injury."

[5] Although the record reveals that defendant filed a notice of appeal from the February 26, 2010, trial court order granting defendant's section 2-1401 petition, defendant withdrew his appeal.

730 ILCS 5/5-8-4(d)(1) (West 2012).[6] Here, it is undisputed that both of defendant's convictions were for Class X felonies. At defendant's third sentencing hearing, the trial court made a finding that defendant caused severe bodily injury. We will reverse a trial court's determination of severe bodily injury for purposes of consecutive sentencing only if it is against the manifest weight of the evidence. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Deleon*, 227 Ill. 2d at 332.

¶ 20 Our review of the record reveals that the trial court's determination that defendant inflicted severe bodily injury was not against the manifest weight of the evidence. Dr. Barry Barnes, the emergency room physician who treated the convenience store's cashier, testified that the victim sustained a gunshot wound to the chest and presented in "some degree of distress" despite being "awake, alert, [and] oriented." The victim's lung was collapsing, and Dr. Barnes had to insert a chest tube to drain air and blood from the space between the chest wall and the collapsing lung. The tube had to remain in the victim for three days; the victim lost a total of just under a quart of blood. The victim was hospitalized for four days. Dr. Barnes testified that he could not locate an exit wound. An x-ray revealed that the bullet had lodged near the victim's vertebral column but was not so close to the spinal cord as to cause concern.

¶ 21 At the third sentencing hearing, the trial court indicated that it had reviewed the trial transcript, "[p]arts of it many times." The court noted the injuries suffered by the victim, as described by Dr. Barnes at trial, and that the bullet was still lodged in the victim's chest. On this

[6] The 2004 version of the statute, in effect at the time of the offense and defendant's original sentencing hearing, included the same provision. 730 ILCS 5/5-8-4(a)(1) (West 2004).

record, the court's finding that defendant caused severe bodily injury was not against the manifest weight of the evidence. See *Deleon*, 227 Ill. 2d at 332-33 (holding that the trial court's finding of severe bodily injury was not against the manifest weight of the evidence where the defendant fired a gun at the victim from three feet away and the bullet struck through the chest); *People v. Primm*, 319 Ill. App. 3d 411, 414-15 (concluding that the severe-bodily-injury finding was not against the manifest weight of the evidence where the defendant shot the victim in the back of the thigh, even though the victim was able to flee the scene). Accordingly, the court properly imposed consecutive sentences pursuant to section 5-8-4 of the Unified Code.

¶ 22 Defendant asserts that Judge Hauser relied on a hypothetical question posed to Dr. Barnes to find severe bodily injury. The State asked Dr. Barnes, "Now, if there was—if there was no treatment of this injury, could that be life-threatening?" Dr. Barnes replied, "Definitely could be life threatening." Nothing indicates that the trial court relied on this portion of the testimony at all, let alone exclusively. Moreover, defendant offers no authority for the proposition that an injury must be life threatening in order to be severe. Indeed, the fact that the victim required medical attention is relevant in a determination of severe bodily injury. See *People v. Gonzalez*, 351 Ill. App. 3d 192, 207 (2004) (characterizing the victims' injuries as "far less severe" where neither of them sought medical treatment).

¶ 23 Defendant next argues that his sentence was the result of the trial court's vindictiveness. Section 5-5-4 of the Unified Code was enacted to ensure a defendant's due process rights by preventing vindictiveness in resentencing. *Woolsey*, 278 Ill. App. 3d at 710. Whether due process has been violated is a question of law reviewed *de novo*. *People v. Totzke*, 2012 IL App (2d) 110823, ¶ 17.

¶ 24 As discussed above, defendant's 25-year sentence for attempted first-degree murder was within the statutory range and was properly ordered to run consecutively to his 20-year sentence for armed robbery. Furthermore, defendant's sentence did not run afoul of section 5-5-4 of the Unified Code. Nonetheless, in support of his position that his sentence was the result of judicial vindictiveness, defendant calls our attention to the following comments made by the State in its rebuttal argument at the second sentencing hearing as recorded in the July 19, 2011, report of proceedings.

> "He [defendant] wants to keep the benefits of the attempt murder, but he doesn't want the consequences of the other things that took place. In other words, he says, 'Well, he can't change it now. The attempt murder was the attempt murder at the time.' But yet, when the armed robbery changed, that was just fine. So he's trying to accept all the benefits of coming back down but none of the consequences of it."

As noted above, what happened at the second sentencing hearing is not at issue in this appeal, which involves only the third sentencing hearing.

¶ 25 In any event, the State's comments at the second sentencing hearing do not evince prosecutorial vindictiveness, let alone support a conclusion that the trial court acted vindictively. The State's comments were in response to defense counsel's argument that the court should resentence defendant to 20 years on the attempted first-degree murder conviction without the at-that-point constitutional 25-year enhancement. (In other words, defendant sought the imposition of the same sentence originally imposed by Judge Hartman when the attempted first-degree murder enhancement was unconstitutional.) Defense counsel also had argued that defendant's sentence on the armed robbery conviction should be no more than 20 years, and that it could not include the 25-year enhancement previously imposed by Judge Hartman, because it was no

longer constitutional (though it had been at defendant's original sentencing). The State was pointing out that the law had changed with respect to both of the offenses of which defendant was convicted. As the State put it, the law was "just an exact flip." Rather than trying to punish defendant for successfully challenging his original sentence, the State was simply arguing that defendant could not pick and choose portions of law favorable to him.

¶ 26 In further support of his judicial vindictiveness argument, defendant next directs our attention to the report of proceedings from June 13, 2013. On that date, the case came on for defendant's third sentencing hearing, at issue here. Defense counsel informed the court that defendant wished to address the court directly. Without an objection from the State, the court allowed defendant to do so. Defendant stated that he wanted a substitution of judge, because defense counsel had informed him that the court "was not going to alter what the sentence [was]" and that he "should look forward to appealing it." Defendant said that he was afraid that the court and counsel had "talk[ed] about this stuff," that they were "[n]ot going by the law," and that he was suffering the consequences of having appealed. The court advised defendant that it had planned on "conduct[ing] the sentencing hearing from anew" and had no preconceived idea of what sentence it would impose. The court explained that if defendant wanted to file a motion for substitution of judge, the court would stop the proceedings until that was resolved. The court further informed defendant that it was not offended by appeals. Defense counsel explained that he did not know what sentence the court was going to impose but that he had to anticipate a possible appeal and advise defendant accordingly as to the steps necessary to perfecting an appeal. The court passed the case to allow defense counsel to consult with defendant. Defense counsel informed the court that defendant wished to proceed *pro se*. The court suggested rescheduling the sentencing hearing to allow defendant to consider his options; defendant agreed.

Two weeks later, defendant appeared with counsel and informed the court that he wished to proceed *pro se*. The sentencing hearing was then conducted with defendant representing himself.

¶ 27 Defendant's subjective speculative and unsubstantiated claims of fear of retaliation are not borne out by the record and do not compel the conclusion that the trial court acted vindictively. The trial court complied with section 5-5-4: defendant's individual sentences were reduced (from 45 to 25 years for attempted first-degree murder) or unchanged (20 years for armed robbery), and his aggregate sentence (45 years) remained the same. Accordingly, due process was satisfied. See *People v. Kilpatrick*, 167 Ill. 2d 439, 443 (1995) (stating that, under *Pearce* (395 U.S. at 725), due process requires that vindictiveness play no part in resentencing); *People v. Moore*, 359 Ill. App. 3d 1090, 1092-94 (2005) (holding that resentencing complied with section 5-5-4 where the defendant's individual terms were reduced and, despite the imposition of consecutive sentences, the aggregate was unchanged).

¶ 28 Defendant's penultimate contention is that he is entitled to a three-year reduction in his sentence, because the trial court, Judge Hartman, did not admonish him about mandatory supervised release (MSR) and because defendant's original sentence did not include a term of MSR. Defendant concedes that MSR is mandatory. See 730 ILCS 5/5-8-1(d)(1) (West 2012).

¶ 29 Defendant's argument is belied by the record. At the September 30, 2004, preliminary hearing and arraignment, the trial court explicitly advised defendant that he was subject to "three years parole" on both the offense of armed robbery and on the offense of attempted first-degree murder. MSR is synonymous with parole. 730 ILCS 5/5-8-1(d)(1) (West 2012) (requiring that "the parole or mandatory supervised release term shall be written as part of the sentencing order"); *People v. McChriston*, 2014 IL 115310, ¶ 18; *People v. Lee*, 2012 IL App (4th) 110403,

¶ 38. Moreover, defendant's second sentence included a three-year MSR term; thus, contrary to defendant's contention, he was put on notice of it prior to the order from which he now appeals.

¶ 30 Defendant's final argument is that his sentences violate the one-act, one-crime doctrine. Our supreme court explained that analysis under the one-act, one-crime doctrine involves a two-step process. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). The first question is whether the defendant's conduct involved multiple acts or a single act. *Miller*, 238 Ill. 2d at 165. An act consists of " 'any overt or outward manifestation which will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996) (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). If defendant's conduct consisted of a single act, multiple convictions are improper. *Miller*, 238 Ill. 2d at 165. If the defendant's conduct involved multiple acts, the court must then decide whether any of the offenses are lesser-included offenses. *Miller*, 238 Ill. 2d at 165. Whether multiple convictions violate the one-act, one-crime doctrine is a question of law, which we review *de novo*. *People v. Young*, 362 Ill. App. 3d 843, 852 (2005).

¶ 31 Here, the evidence established that defendant entered the convenience store armed with a firearm, announced a robbery, fired a shot into the ceiling, and took money from the cash register. The evidence further showed that, as defendant exited the building, he fired a shot into the cashier's chest. Those overt manifestations support the offense of armed robbery. The act of shooting the victim also supported the offense of attempted first-degree murder. Thus, as the trial court found at defendant's second sentencing hearing, even though the act of shooting the victim was common to both offenses, defendant's conduct involved multiple acts.[7] *People v.*

[7] In support of his contention that he was convicted of both offenses based on the same act, defendant cites *People v. Harvey*, 366 Ill. App. 3d 119 (2006). In *Harvey*, the court held that the defendant's convictions of armed robbery and aggravated battery were both based on the

Lobdell, 121 Ill. App. 3d 248, 252 (1983) ("A person can be guilty of two offenses when a common act is part of both offenses or part of one offense and the only act of the other offense.").

¶ 32 The second step of the one-act, one-crime analysis requires us to determine whether either offense is a lesser included of the other. We employ the abstract elements approach. *Miller*, 238 Ill. 2d at 175 (holding that the abstract elements approach, not the charging instrument approach, is the correct approach when both offenses at issue were included in the charging instrument). Under the abstract elements approach, we compare the statutory elements of the two offenses. *Miller*, 238 Ill. 2d at 166. "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 deemed a lesser-included offense of the second." *Miller*, 238 Ill. 2d at 166.

¶ 33 The statutory elements of armed robbery as charged here (720 ILCS 5/-18-2(a)(4) (West 2004)) are that defendant knowingly took property from the person or presence of another, that defendant did so by the use of force or threat of force, and that defendant personally discharged a firearm that caused great bodily harm to another person. To prove attempted first-degree murder, the State must show that the defendant had the intent to kill and that the defendant took a substantial step toward killing the intended victim. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 31; 720 ILCS 5/8-4(a) (West 2004). Because armed robbery includes the element of knowingly taking property, while attempted first-degree murder does not, and attempted first-

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same act of shooting the victim in violation of the one-act, one-crime doctrine. *Harvey*, 366 Ill. App. 3d at 122. We find *Harvey* unpersuasive, because, in reaching its holding, the court relied on the State's concession and provided no analysis.

degree murder includes the element of intent to kill, while armed robbery does not, neither offense is a lesser-included offense of the other. Accordingly, defendant's convictions of armed robbery and attempted first-degree murder do not violate the one-act, one-crime doctrine.

¶ 34 Nonetheless, defendant maintains that both of his convictions were carved from precisely the same physical act of taking a firearm and shooting the victim. According to defendant, in the information charging him with armed robbery and attempted first-degree murder, the State did not differentiate the shot he fired at the victim when defendant was leaving the store from the shot he fired into the ceiling when he entered the store. Defendant argues that the State's failure to apportion the offenses among the two gunshots violated our supreme court's holding in *People v. Crespo*, 203 Ill. 2d 335 (2001).

¶ 35 In *Crespo*, in relevant part, the defendant was charged with, and convicted of, one count of armed violence predicated on aggravated battery, one count of aggravated battery based on using a deadly weapon, and one count of aggravated battery based on causing great bodily harm. *Crespo*, 203 Ill. 2d at 342-43. Each of these counts of the indictment recited that the defendant stabbed the victim with a knife. *Crespo*, 203 Ill. 2d at 342-43. The supreme court acknowledged that the State properly could have charged the defendant with all three counts because the victim sustained three stab wounds. *Crespo*, 203 Ill. 2d at 342. However, because the State had not differentiated the three stab wounds in the indictment, it essentially charged the defendant with the same conduct under different theories of criminal culpability. *Crespo*, 203 Ill. 2d at 342. The court concluded that "to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair." *Crespo*, 203 Ill. 2d at 343.

¶ 36 The present case is unlike *Crespo*, where all three counts at issue were based on the defendant's stabbing the victim. In the instant case, the armed robbery count was charged as follows:

> Defendant "did commit the offense of **ARMED ROBBERY in violation of 720 ILCS 5/18-2(a)(4)** in that said defendant while armed with a dangerous weapon, a firearm, knowingly took property, that being an undisclosed amount of United States Currency, from the presence of [the victim] by the use of force, the defendant having personally discharged a firearm that caused great bodily to [the victim]."

The attempted first-degree murder count read:

> Defendant "did commit the offense of **ATTEMPT (FIRST DEGREE MURDER) in violation of 720 ILCS 5/8-4(a)** in that said defendant with the intent to commit the offense of first degree murder in violation of [720 ILCS 5/9-1(a)(1)], performed a substantial step toward the commission of that offense in that he, without authority, knowingly took a firearm and with the intent to kill [the victim], shot [the victim] with the firearm."

¶ 37 Defendant is correct that both counts included the act of shooting the victim. However, both offenses were "not carved from th[at] same physical act." *Crespo*, 203 Ill. 2d at 340 (quoting *King*, 66 Ill. 2d at 566). The armed robbery count, as the jury was instructed, included three elements: (1) defendant knowingly took property from the victim's person or presence, (2) defendant used force or threatened the use of force, and (3) defendant during the commission of the offense personally discharged a firearm that proximately caused great bodily harm to another person. The jury could have found that the State proved the second element, use or threat of force, with the evidence that defendant entered the store with a firearm and fired a shot into the

ceiling. The jury further could have found that defendant's act of shooting the victim established the third element, personally discharging a firearm and causing great bodily harm. Regarding the attempted first-degree murder count, the jury was instructed as to two elements: (1) defendant performed an act that constituted a substantial step toward the killing of an individual, and (2) defendant did so with the intent to kill the individual. The jury could have found that the State proved the first element with evidence that defendant shot the victim. Although the act of shooting the victim satisfied one element of each of the offenses, both offenses were not carved from that single act; additional different acts were required to satisfy the elements for each offense. Thus, that the same act of discharging a firearm in shooting the victim was included in both counts of the information does not compel the opposite conclusion that defendant's convictions violated the one-act, one-crime doctrine. *Rodriguez*, 169 Ill. 2d at 188 (explaining that the defendant could be guilty of both aggravated criminal sexual assault and home invasion even though a common act, threatening the victim with a gun, was part of both offenses).

¶ 38 As a final note, we observe that the "main concern for the court in *Crespo* was that the State waited until the appeal to apportion the actions of the defendant to several crimes." *People v. Span*, 2011 IL App (1st) 083037, ¶ 87. Here, the State argued in closing to the jury that defendant:

> "walked into the store, shot a shot into the ceiling, told—announced that it was a stickup. The clerk, Bud, puts his arms up, says he's afraid. He comes back there and, with the—with the threat of a gun in his hand, takes money from the persons or—person or presence of Bud, and leave—right there and then he shoots Bud in the chest. No question. No argument. Nothing. Armed robbery, period. End of story."

With respect to the attempted first-degree murder charge, the State argued to the jury that defendant "walked up after he had already stolen money, put a gun to [the victim's] chest, and shot." The record reveals that, in the trial court, the State apportioned the two gunshots to the offenses, with the shot to the victim being common to both offenses.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Stephenson County.

¶ 41 Affirmed.