2012 IL App (3d) 100803-U

Order filed March 19, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court) of the 12th Judicial Circuit,) Will County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-10-0803
v.	) Circuit No. 08-CF-2888
	)
DERRICK BOYD,	) Honorable) Richard C. Schoenstedt,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction for theft is vacated under the one-act, one-crime doctrine.

¶ 2 Following a jury trial, the defendant, Derrick Boyd, was found guilty of identity theft (720 ILCS 5/16G-15(a)(3) (West 2008)), theft of property exceeding $300 (720 ILCS 5/16-1(a)(1)(A), (b)(4) (West 2008)), and theft (720 ILCS 5/16-1(a)(1)(A), (b)(2) (West 2008)). The defendant appeals, arguing that: (1) his multiple convictions were improper under the one-act, one-crime

doctrine; and (2) the imposition of an extended-term sentence on the Class 4 felony theft conviction was improper because he was only to receive an extended term for the most serious offense for which he was convicted. We vacate the defendant's conviction for theft (Class 4 felony) and otherwise affirm.

¶ 3 FACTS

¶ 4 By way of indictment, the defendant was charged with: (1) Identity Theft (Class 3 felony) based on allegations that he "knowingly and with the intent to commit or to aid and abet another in committing a felony theft, obtained a personal identification document of another, namely a Visa credit card"; (2) Theft (Class 3 felony) based on allegations that he "knowingly obtained unauthorized control over property of Kathleen Patton, to wit: a Coach purse containing [currency and gift cards], having a total value exceeding $300.00 ***, intending to deprive Kathleen Patton permanently of the use and benefit of said property"; and (3) Theft (Class 4 felony) based on allegations that he had previously been convicted of theft and "knowingly obtained unauthorized control over property of Kathleen Patton, to wit: a brown Coach purse, with the intent to deprive Kathleen Patton permanently of the use and benefit of said property[.]"

¶ 5 Evidence at the defendant's jury trial indicated that, on November 24, 2008, the defendant took the purse of Assistant State's Attorney Kathleen Patton from courtroom 400 of the Will County courthouse. The defendant had the purse when he and an individual accompanying him, Antonette Altier, left the courtroom. In the courthouse elevator, the defendant asked Altier to hold the purse, and she put the purse over her shoulder. The defendant and Altier drove to a Target store and sorted through the purse. The defendant gave Altier a Visa credit card that was discovered in the purse and instructed her to purchase certain items with the Visa card. Altier

returned to the car with the items she purchased with the Visa card. Subsequently, the defendant sold the items and gave Altier $200. The defendant was convicted of Identity Theft, Theft (Class 3 felony) , and Theft (Class 4 felony) and sentenced to concurrent extended-term sentences of 10, 10, and 6 years of imprisonment, respectively. The defendant appeals.

¶ 6 ANALYSIS

¶ 7 I. One-Act, One-Crime

¶ 8 The defendant contends that his multiple convictions were improper under the one-act, one-crime doctrine. The defendant concedes that he did not raise this issue before the trial court but requests that we review the issue for plain error. Under the plain error rule, a reviewing court may consider errors when either: (1) the evidence is closely balanced; or (2) the error is so serious that the defendant was denied a substantial right. *People v. Herron*, 215 Ill. 2d 167 (2005). Our supreme court has held that a violation of the one-act, one-crime rule results in a surplus conviction and sentence and affects the integrity of the judicial process, and thus satisfies the second prong of the plain error doctrine. *People v. Harvey*, 211 Ill. 2d 368 (2004); *People v. Nunez*, 236 Ill. 2d 488 (2010). Therefore, we will consider whether any of the defendant's multiple convictions must be vacated under the one-act, one-crime doctrine.

¶ 9 Under the one-act, one-crime doctrine, a defendant may not be convicted of multiple offenses based on precisely the same physical act. *People v. King*, 66 Ill. 2d 551 (1977); *People v. Miller*, 238 Ill. 2d 161 (2010). An "act" is "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566. Multiple convictions are permissible where the offenses share a common act but are not based upon identical acts, so long as none of the offenses are lesser included offenses. *People v. Rodriguez*, 169 Ill. 2d 183 (1996); *Miller*, 238

Ill. 2d 161.

¶ 10 Therefore, under the one-act, one-crime doctrine, a court must determine: (1) whether the defendant's conduct supporting multiple convictions consisted of the same physical act, or multiple acts; and (2) if the conduct involved multiple acts, whether any of the offenses are lesser included offenses. *King*, 66 Ill. 2d 551; *Miller*, 238 Ill. 2d 161. Whether a defendant has been improperly convicted of multiple offenses based upon the same physical act and whether a charge encompasses another charge as a lesser included offense are questions of law that are reviewed *de novo*. *Nunez*, 236 Ill. 2d 488.

¶ 11 A. Theft (Class 3 felony) and Theft (Class 4 felony)

¶ 12 The defendant argues that all three of his convictions were based upon the same physical act of taking the purse. In this case, the defendant's two convictions for Class 3 felony theft and Class 4 felony theft were based upon the same physical act. As the State concedes, the Class 4 offense is a lesser included offense of the Class 3 offense. Where one offense is a lesser included offense of the other, the less serious offense must be vacated. See *People v. Johnson*, 237 Ill. 2d 81 (2010). Therefore, the defendant's Class 4 felony conviction for theft must be vacated.

¶ 13 B. Theft (Class 3 felony) and Identity Theft – Same Physical Offense

¶ 14 We now turn to the defendant's argument that his conviction of identity theft was based on the same physical act as his conviction for theft–the taking of Patton's purse. A person commits theft when he knowingly "[o]btains or exerts unauthorized control over property of the owner" and "[i]ntends to deprive the owner permanently of the use or benefit of the property[.]" 720 ILCS 5/16-1(a)(1)(A) (West 2008).

¶ 15 A person commits identity theft when he or she knowingly:

"[O]btains, records, possesses, sells, transfers, purchases, or manufactures any personal identification information or personal identification document of another with intent to commit or to aid or abet another in committing any felony theft or other felony." 720 ILCS 5/16G-15(a)(3) (West 2008).

¶ 16 In this case, the defendant committed the physical act for the theft when he took the purse and its contents from the court, intending to deprive Patton permanently of the use or benefit of the purse and its contents. He later committed the physical act for identity theft when he obtained Patton's Visa card from the purse and transferred it to Altier with the intent to commit, aid, or abet her in fraudulently obtaining items from the Target store. The act of taking the purse from the courtroom was a separate act from the defendant taking the credit card from the purse and giving it to Altier with instruction to commit another crime.

¶ 17 C. Theft (Class 3 felony) and Identity Theft – Lesser Included Offense

¶ 18 In determining that the defendant had committed separate physical acts for the offenses of theft and identity theft, we now turn to the second stage of the analysis to determine whether either of the convictions are a lesser included offense of the other. In this case, the defendant had been charged with both of the offenses in the indictment. The abstract elements approach is applied to determine whether one charged offense is a lesser included offense of another. *Miller*, 238 Ill. 2d 161. Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. *Id.* If all the elements of one offense are included within a second offense, the first offense is a lesser included offense of the second. *Id.* In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense. *Id.*

¶ 19 Here, all of the elements of theft are not included in identity theft. Theft requires a person

to take control of the property of another, intending to permanently deprive that person of its use. 720 ILCS 5/16-1(a)(1)(A) (West 2008). On the other hand, a person can commit identity theft by obtaining personal identification information or documentation for a short period of time, having never intended to deprive the owner of its permanent use or benefit. 720 ILCS 5/16G-15(a)(3) (West 2008). As such, it is possible to commit identity theft without committing theft. Accordingly, we find that theft is not a lesser included offense of identify theft, and the defendant's theft (Class 3 felony) conviction must stand.

¶ 20 II. Extended-Term Sentences

¶ 21 In the alternative, the defendant had argued that the extended-term sentence on his Class 4 felony theft conviction was unauthorized under section 5-8-2 of the Unified Code of Corrections because he had also been sentenced to extended-term sentences on his Class 3 felony convictions. See 730 ILCS 5/5-8-2 (West 2008) (providing that an extended-term sentence may be imposed for the most serious class of offense for which the defendant was convicted). Due to the above disposition vacating the defendant's Class 4 felony theft conviction, the defendant's argument is moot.

¶ 22 CONCLUSION

¶ 23 We vacate the defendant's conviction for theft (Class 4 felony), and otherwise affirm the judgment of the circuit court of Will County.

¶ 24 Affirmed in part and vacated in part.