SUPREME COURT OF ILLINOIS

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September 27, 2017

In re: People State of Illinois, respondent, v. Elebert Fox, petitioner.
Leave to appeal, Appellate Court, First District.
122500

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 11/01/2017.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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2017 IL App (1st) 143966-U

No. 1-14-3966

Order filed June 7, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 20340
	)	
ELEBERT FOX,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The sentencing order should reflect a single conviction and sentence for the first degree murder conviction alleged in Count 10, and defendant's aggravated battery conviction is affirmed. Remanded for correction of the mittimus.

¶ 2 Following a bench trial, defendant Elebert Fox was found guilty of eight counts of first degree murder, one count of aggravated battery with a firearm, and two counts of unlawful use or possession of a weapon by a felon (UUWF). The trial court merged the murder counts and sentenced defendant to a total of 90 years in prison. On appeal, defendant contends that we

should vacate his conviction for aggravated battery with a firearm because it is a lesser-included offense of the felony murder offenses that were based on him murdering Webster Gater during the course of committing aggravated battery with a firearm of Twan Fox. Defendant further contends that we should vacate all but one of his first degree murder convictions, and he challenges the count numbers that are listed on the sentencing order. For the reasons below, we affirm defendant's conviction for aggravated battery (Count 30). With respect to the first degree murder convictions, we affirm the knowing first degree murder conviction alleged in Count 10, the felony murder convictions (Counts 4, 8, and 12) and the other knowing first degree murder convictions (Counts 6, 16, 20, and 24) are merged into Count 10, and we remand with directions for the trial court to correct the mittimus to reflect only one single first degree murder conviction and sentence in Count 10.

¶ 3 Defendant's conviction arose from a shooting incident that took place during the early morning hours of October 29, 2011, which led to the death of the victim, Webster Gater. On the day in question, while defendant and his brother, Twan Fox, were arguing outside in a gangway, defendant pointed a gun at Twan, shot him three times in the legs, and ran through the gangway. Defendant heard someone scream behind him, which startled him, so he turned around, shot his gun again at Gater, and ran. Gater died as a result of a gunshot wound to the head. After the incident, Twan was treated for three gunshot wounds and was diagnosed with a paralyzed foot. A .357 semiautomatic handgun was recovered from the sidewalk in the gangway. An expert in DNA field analysis testified that defendant's DNA could not be excluded from the DNA profile identified on the recovered handgun.

¶ 4 Following closing argument, the trial court found defendant not guilty on five attempted murder counts, three felony murder counts based on him committing the offense during the commission of attempted murder of Twan, nine intentional murder counts, and four knowing first degree murder counts. However, the trial court found defendant guilty of three counts of felony murder based on aggravated battery of Twan (Counts 4, 8, and 12), five counts of knowing murder (Counts 6, 10, 16, 20, and 24), one count of aggravated battery with a firearm (Count 30), and two counts of UUWF (Counts 31 and 32). At sentencing, the State discussed the counts and sentence as follows:

> "In front of you are a number of counts that you found him guilty on, but I think the main two counts are probably count ten, which is a murder count, and count 30, which is the aggravated battery of [*sic*] with a firearm count.
>
> On count ten, judge, to my calculations the defendant, the minimum is 45 years in the Illinois Department of Corrections, and maximum is life. On count 30, agg. batt. with a firearm is 6 to 30 years in the Illinois Department of Corrections."

¶ 5 Prior to the trial court pronouncing its sentence, it stated, "First of all [I] indicate that counts 4, 8, 10, 12, 15 [*sic*], 16, 19 [*sic*], 20, and 23 [*sic*] will merge. Those are all convictions I entered on the defendant for first degree murder." The trial court sentenced defendant to a total of 90 years in prison: 50 years for first degree murder; 30 years for discharging the weapon that proximately caused death; 10 years for aggravated battery with a firearm, to be served consecutively; and 10 years for UUWF to be served concurrently with the other sentences. This appeal followed.

¶ 6 On appeal, defendant contends that we should vacate his conviction and sentence for aggravated battery because it is a lesser-included offense of his felony murder offenses and that we should vacate all but one of his first degree murder convictions, as judgment and sentence can only be entered on the most serious offense when there are multiple convictions entered on one act. Defendant requests that we correct the mittimus to reflect one conviction for first degree murder and to accurately reflect the trial court's oral pronouncement of its not guilty findings on Counts 15, 19, and 23.

¶ 7 "[W]hen a defendant is charged in several counts with a single offense and multiple convictions have been entered, the 'one-act, one-crime' doctrine provides that judgment and sentence may be entered only on the most serious offense" (*People v. Smith*, 233 Ill. 2d 1, 20 (2009)), and "the less serious offense should be vacated" (*People v. Artis*, 232 Ill. 2d 156, 170 (2009)). To determine the most serious offense, we compare the relative punishments for each offense, as the legislature would mandate a greater punishment for the offenses it considers more serious. *Artis*, 232 Ill. 2d at 170. "[I]n situations where the degree of the offenses and their sentencing classifications are identical, this court has also considered which of the convictions has the more culpable mental state." *Id.* at 170-71.

¶ 8 We review *de novo* the issues of whether a defendant was improperly convicted of multiple offenses based on the same act and whether one conviction is a lesser-included offense of another. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Issues involving the one-act, one crime doctrine may be reached under the second prong of the plain error doctrine, as the integrity of the judicial process is implicated. *Nunez*, 236 Ill. 2d at 493. Finally, pursuant to Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we have authority to directly order the clerk of the circuit court to

make corrections to a sentencing order, and therefore, remand is not necessary to correct a sentencing order. *People v. Walker*, 2011 IL App (1st) 072889-B, ¶ 40.

¶ 9 As an initial matter, we note that when the trial court issued its ruling, it found defendant not guilty of the first degree murder offenses alleged in Counts 15, 19, and 23, and it found him guilty of the first degree murder offense alleged in Count 24. However, at sentencing, the trial court incorrectly stated that Counts 15, 19 and 23 were included in the first degree murder counts that it merged, and it did not include Count 24 when it stated as follows: "First of all [I] indicate that counts 4, 8, 10, 12, 15, 16, 19, 20, and 23 will merge. Those are all convictions I entered on the defendant for first degree murder." Because the record indicates that the trial court intended to merge all the first degree murder counts of which it found defendant guilty, the first degree murder counts that merged are Counts 4, 8, and 12, the felony murder counts based on aggravated battery, and Counts 6, 10, 16, 20, and 24, the knowing murder counts. See *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007) (oral pronouncement of the trial court controls).

¶ 10 The trial court convicted defendant of multiple counts of first degree murder. However, these convictions were based on one physical act, namely the shooting and killing of Gater. Pursuant to the one-act, one-crime doctrine, the less serious offenses should be vacated. *Artis*, 232 Ill. 2d at 170. Here, the trial court expressly noted that the first degree murder counts merged. However, it did not indicate which count they merged into and which count it imposed sentence on as the most serious offense. Therefore, to determine which count the other counts merged into and which count the trial court imposed sentence on, we must determine which first degree murder count was the most serious, and if we cannot do so, we must remand. *Id.* at 177

("when 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").

¶ 11 First, defendant contends, and the State concedes, that Counts 4, 8, and 12, the felony murder counts, are less serious than the knowing murder offenses. We agree. Because Counts 4, 8, and 12 allege that defendant shot and killed Webster "during the commission of a forcible felony," namely the aggravated battery of Twan, these counts involve a less culpable mental state than the knowing first degree murder convictions under section 9-1(a)(2). *People v. Cortes*, 181 Ill. 2d 249, 282 (1998) ("A killing that occurs when acts are performed with intent or knowledge involves a more culpable mental state than does a killing that occurs in the course of a felony."); *People v. Walker*, 392 Ill. App. 3d 277, 287 (2009) ("felony murder requires no mental state, independent of the mental state of the predicate felony"). Therefore, because Counts 4, 8, and 12 are less serious than the knowing first degree murder convictions, the mittimus should not reflect convictions on these counts, as they merged into the most serious first degree knowing murder conviction. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 61 ("The effect of a trial court merging one conviction into another conviction is vacatur of the merged conviction."); *Walker*, 2011 IL App (1st) 072889-B, ¶ 39 ("When multiple murder convictions have been entered for the same act, only the conviction for the most serious charge should be reflected on the mittimus, and convictions on the less serious charges must be vacated.").

¶ 12 From the remaining first degree murder offenses, Counts 6, 10, 16, 20, and 24, we must determine which count contains the most serious offense.

¶ 13 We first examine the relative punishments for the offenses to determine which one is most serious. *Artis*, 232 Ill. 2d at 170. The sentencing range for first degree murder is 20 to 60

years. 730 ILCS 5/5-4.5-20(a) (West 2010). However, Counts 10 and 24 allege that defendant "personally discharged a firearm that proximately caused death." Therefore, these two charges were eligible for sentencing enhancements pursuant to section 5-8-1(a)(d)(iii) of the Unified Code of Corrections, which provides that "25 years or up to a term of natural life" shall be added to the prison term "if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, *** or death to another person[.]" 730 ILCS 5/5-8-1(a)(d)(iii) (West 2010). Accordingly, as Counts 10 and 24 were subject to the sentencing enhancement, the punishment for these offenses was greater than the punishment for the first degree murder offenses in Counts 6, 16, and 20. Thus, Counts 10 and 24 are more serious than the offenses in Counts 6, 16, and 20. See *Artis*, 232 Ill. App. 2d at 170. The mittimus should not reflect convictions or sentences for Counts 6, 16, and 20.

¶ 14 The next issue is whether Count 10 or Count 24 is the most serious offense. Defendant contends that Count 24 is the most serious offense, but the State argues that it is Count 10. Because these counts were subject to the same sentencing range, to determine the most serious offense, we must examine which offense has the most culpable mental state. *Artis*, 232 Ill. 2d at 170-71. Both Counts 10 and 24 allege that defendant violated section 9-1(a)(2) of the Code, which provides that "[a] person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death *** (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9-1(a)(2) (West 2010). Count 10 and 24 contain the same allegation and mental state, and provide as follows:

"HE, WITHOUT LAWFUL JUSTIFICATION, SHOT AND KILLED WEBSTER GATER WHILE ARMED WITH A FIREARM, KNOWING THAT SUCH ACT CREATED A STRONG PROBABILITY OF DEATH OR GREAT BODILY HARM TO WEBSTER GATER AND DURING THE COMMISSION OF THE OFFENSE HE PERSONALLY DISCHARGED A FIREARM THAT PROXIMATELY CAUSED DEATH[.]"

While Counts 10 and 24 contain the same allegation, prior to sentencing, the record indicates that the State informed the trial court that Count 10 and Count 30, the aggravated battery count, were the "main two counts." Specifically, the State informed the trial court as follows: "In front of you are a number of counts that you found him guilty on, but I think the main two counts are probably count ten, which is a murder count, and count 30, which is the aggravated battery of [*sic*] with a firearm count." The State then informed the trial court that the minimum sentence for Count 10 was 45 years in prison. Defense counsel did not take issue with the State's position. Where the State requested sentence on Count 10 rather than Count 24 and defendant did not object, we conclude that judgment and sentence should be entered on Count 10. Therefore, the mittimus should reflect a single conviction and sentence for Count 10.

¶ 15 In reaching our conclusion, we note defendant's argument that Count 24 is the most serious because it contains the following additional language: "The State shall seek an extended term sentence in that the murdered individual was actually killed by the defendant during the course of an underlying felony: aggravated battery with a firearm on Twan Fox[.]" However, the record does not indicate that the State requested the extended term sentence or that the trial court imposed an extended term sentence. Therefore, we conclude that this additional language in

Count 24 is inapplicable when determining whether Count 24 is a more serious offense than Count 10.

¶ 16 In addition, because the felony murder convictions (Counts 4, 8, and 12) are merged into the conviction of Count 10, as the most serious murder conviction, and because the conviction for aggravated battery against Twan is not a lesser-included offense of the knowing murder offense in Count 10, defendant's conviction and sentence for aggravated battery in Count 30 was proper. *Betance-Lopez,* 2015 IL App (2d) 130521, ¶ 61 (noting that the count that was merged into another count was "vacated by operation of law"); P*eople v. Griffin*, 375 Ill. App. 3d 564, 572 (2007) ("Consequently, although armed robbery is a lesser-included offense of felony murder, it is not a lesser-included offense of intentional murder. [citation.] Accordingly, defendant's armed robbery conviction and sentence were proper.").

¶ 17 Finally, defendant contends that the mittimus incorrectly reflects that he was convicted of Counts 15, 19, and 23. Here, the trial court orally pronounced that defendant was not guilty of counts 15, 19, and 23. Our review of the sentencing order reveals that the order provides that defendant was convicted of Counts 15 and 19, but Count 23 does not appear on the order as defendant contends. "When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls." *Jones*, 376 Ill. App. 3d at 395. Because the trial court orally pronounced that defendant was not guilty of Counts 15 and 19, the mittimus should not reflect these convictions for murder. However, because we have already determined that the mittimus should only list one murder conviction and sentence – on Count 10 – defendant's request that the mittimus should be corrected to reflect he was found not guilty on the murder charges in Counts 15 and 19 is moot.

¶ 18 For the reasons explained above, defendant's convictions for first degree murder (Count 10) and aggravated battery (Count 30) are affirmed, and his convictions for felony murder (Counts 4, 8, and 12) and the other knowing murder counts (Counts 6, 16, 20, and 24) are merged into Count 10. Accordingly, the mittimus should reflect convictions and sentences for aggravated battery (Count 30), UUWF (Count 31),[1] and the first degree murder offense alleged in Count 10. Therefore, we remand with directions for the trial court to correct the mittimus to accurately reflect these convictions. See *Smith*, 233 Ill. 2d at 29.

¶ 19 Affirmed in part; remanded with directions.

[1] The trial court found guilty of two counts of UUWF (Counts 31 and 32). While the record does not appear to indicate that the trial court merged these counts, the mittimus reflects that defendant was convicted of the UUWF offense alleged in Count 31. On appeal, neither party takes issue with this conviction.