Illinois Official Reports

Appellate Court

People v. Jefferson, 2021 IL App (2d) 190179

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANK JAMES JEFFERSON III, Defendant-Appellant.
District & No.	Second District No. 2-19-0179
Filed	August 31, 2021
Decision Under Review	Appeal from the Circuit Court of Winnebago County, No. 16-CF-2488; the Hon. Brendan A. Maher, Judge, presiding.
Judgment	Affirmed in part and vacated in part.
Counsel on Appeal	James E. Chadd, Thomas A. Lilien, and Vicki P. Kouros, of State Appellate Defender's Office, of Elgin, for appellant. J. Hanley, State's Attorney, of Rockford (Patrick Delfino, Edward R. Psenicka, and Richard S. London, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE SCHOSTOK delivered the judgment of the court, with opinion. Justices Jorgensen and Brennan concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Frank James Jefferson III, appeals from his convictions of one count of home invasion (720 ILCS 5/19-6(a)(3) (West 2016) (armed with a firearm)), two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2016) (armed with a firearm)), and two counts of aggravated robbery (720 ILCS 5/18-1(a) (West 2016) (robbery while claiming to have a firearm)). First, he asserts that defense counsel provided ineffective assistance by failing to make evidentiary objections to questions that elicited hearsay answers tending to show his possession of a firearm. We reject this claim because defendant has not shown that the failure to make the objections prejudiced him. Second, defendant argues that his aggravated robbery convictions must be vacated under the one-act, one-crime rule because they are based on the same physical acts as the armed robbery convictions. The State confesses error on this point, and we accept its concession. We therefore vacate defendant's aggravated robbery convictions and otherwise affirm.

¶ 2 I. BACKGROUND

¶ 3 An October 2017 indictment alleged that defendant unlawfully entered a home on April 30, 2016, and robbed its two occupants, Zakia Tolon and Maurice Williams. The indictment contained two counts of home invasion (720 ILCS 5/19-6(a)(1), (a)(3) (West 2016) (one count alleged that defendant was armed with a bludgeon while the other alleged that he was armed with a firearm)), four counts of armed robbery (720 ILCS 5/18-2(a)(1), (a)(2) (West 2016) (two counts alleged that defendant was armed with a bludgeon and two counts alleged that he was armed with a firearm)), and two counts of aggravated robbery (720 ILCS 5/18-1(a), (b)(1) (West 2016) (defendant committed the robbery while indicating that he was armed with a firearm)).

¶ 4 Defendant had a bench trial. Identity was a primary issue at trial but not in this appeal.

¶ 5 The State's first witness was Erdal Kaya, an Illinois state trooper, who, in April 2016, was a Rockford police officer. On April 30, 2016, at about 6:17 p.m., Kaya responded to a call reporting a home invasion at Tolon's Rockford house. He arrived approximately two minutes after he received the dispatch. He found two people—Tolon and Williams—in front of the house. Both were "visibly shaken" and "very upset." Williams also appeared "mad."

¶ 6 Kaya testified that Tolon and Williams gave similar accounts of the incident. They claimed that there were three intruders. They gave Kaya physical descriptions of the intruders. Tolon and Williams also reported that "firearms were involved" but none were discharged. The intruders came in through the front door, but there was no forced entry. Tolon unhesitatingly named defendant, whom she knew through family events, as one of the intruders. She said that he had pointed his gun at her, lowered his bandana, and yelled at her. Kaya testified that Williams had initially provided a false name and birthdate.

¶ 7 Tolon testified that she lived in the Rockford house with her boyfriend, Clarence Tatum, and their daughter, who was five years old at the time. When the incident occurred, she was alone in the house with Williams, who had been hired to do electrical work at the house. Williams had finished some electrical troubleshooting and was mounting a television when "[t]hree men walked in with guns." All three had bandanas over their mouths. The person that

Tolon later identified as defendant pointed a gun at her and Williams as he came through the door. Because Williams had been in and out of the house, the front door was open and the screen door was not locked. The intruders told her and Williams to get down on the floor; she started praying because she thought that she was going to die. The intruders then searched the house. She recognized one of the intruders as defendant when he, still holding a gun, came close and pulled down his bandana to shout at her; in particular, she recognized his bright pink lips. She did not know defendant personally and was not certain where she had seen him before, but she knew who he was through Tatum. The intruders took her purse, which had her phone in it.

¶ 8 As soon as the intruders left, Tolon called Tatum on Williams's phone. She was more comfortable calling Tatum than calling 911. Nevertheless, because the police arrived shortly after she spoke to Tatum, she believed that Tatum had called 911. She spoke to the police and told them that men with guns had come into the house.

¶ 9 Williams testified that he was a self-employed electrician. Tolon hired him to do some troubleshooting and to change some interior lighting. When he arrived, Tolon, Tatum, and their child were present. Tatum left for work shortly before noon, and Tolon later took the child to stay with a family member. After Williams finished his electrical work, Tolon asked him to mount a television on the wall in the living room. Just as Williams finished with the television, "one gentleman and then immediately two other gentlemen came through the door[,] all of them brandishing firearms." They yelled at Williams and Tolon to get on the ground and demanded keys, phones, and Tolon's purse. One of the intruders told them, "I'm going to put a bullet in you if you don't shut the F up." The intruders took Williams's wallet from his back pocket. However, they did not take his phone because he had unclipped it from his side and slid it under a couch. The intruders told Williams and Tolon to count to 100 before moving. They then ran out. Williams waited until he heard car doors shut and an engine start before he moved. He ran to the front door and saw a dark green sedan with a temporary license plate driving away. He believed that the car was a Saturn or a Dodge Neon. Williams then grabbed his phone, unlocked it, and gave it to Tolon. He believed that she placed a call to Tatum.

¶ 10 Williams testified that, when the police arrived, he provided an accurate description of what he had seen and heard. However, because he was "rattled," he gave his name as "Anthony Hunt" and provided an incorrect birth date. He was afraid of being arrested. He also falsely told the police that he had to leave to catch a flight. He agreed that he had driven his truck on the day of the incident even though his license was suspended.

¶ 11 The State's remaining evidence related to identification, including Tolon's identification of a second suspect after seeing a person on television who she believed was one of the intruders.

¶ 12 Defendant moved for a directed finding. As to the counts alleging that he was armed with a firearm, defendant contended that the State failed to prove that he had a genuine firearm. The court denied the motion, relying on case law holding that circumstantial evidence, such as witnesses' observations, can suffice to establish that an object is a firearm.

¶ 13 Defendant called Kaya as his first witness. The questioning focused on inconsistencies between Williams's and Tolon's statements to Kaya and their in-court testimony. Counsel also asked Kaya whether he had spoken to Tatum, and Kaya replied that he had. When counsel asked whether Tatum "[had] a suspect in mind," the State interposed a hearsay objection. The

court overruled the objection, and Kaya testified that Tatum suspected defendant. When counsel asked Kaya what reasons Tatum had for suspecting defendant, the State again objected on hearsay grounds, and this time the court sustained the objection. Counsel did not ask Kaya any questions about firearms.

¶ 14 On cross-examination, the State asked Kaya in detail what Williams reported about each suspect. For example:

"Q. When Mr. Williams gave you a description of the three suspects did he identify one of them has [*sic*] being Frank Jefferson?

A. Mr. Williams, no.

Q. Did he identify suspect one as a black male, late teens to early 20s?

A. Yes.

Q. And he had given a height description and [a] weight description?

A. Yes.

Q. And he said that that individual had a dark hooded shirt and the red bandana covering his face?

A. Yes.

Q. And unknown colored pants and was armed with a black semi-automatic handgun?

A. Yes."

The State repeated this line of inquiry for the other two intruders, and Kaya confirmed that Williams reported that each was armed with a black semi-automatic handgun.

¶ 15 The State followed a similar pattern for Tolon's statements:

"Q. Did [Tolon] immediately identify to you that Frank Jefferson was suspect No. 1?

A. Yes.

Q. And did she tell you that Frank Jefferson was a black male with brown eyes and a dark complexion?

A. Yes.

Q. She indicated that he was about 23 years old?

A. Yes.

Q. And on that date did she tell you that he was approximately 5 [feet,] 9 [inches,] and 150 pounds?

A. Yes.

Q. That he had a cleaned shaved face and was wearing a red bandana over his face?

A. Yes.

Q. She gave you a clothing description and stated that he was armed with a black semi-automatic handgun?

A. Yes.

Q. And you stated that at the time that she was providing these descriptions, you had to really pull that information from her?

A. Yes, I did.

Q. And that was because she was traumatized?

A. Yes."

Kaya stated that Tolon told him that the other two intruders each had a "black semi-automatic handgun." When the State asked if Tolon had used exactly those words, Kaya responded:

> "Um, it was like—he had a gun that's what they said. And generally if people don't know what kind of gun I kind of point at mine. Does it look like mine? Did it have a wheel on it? If they were familiar with handguns. And they were like, they were just like yours, semi- automatic handgun."

Defendant had no questions for Kaya on redirect.

¶ 16 Defendant then called Bryce Davis of the Rockford police to testify about Tolon's identification of photographs. Afterward, when defendant called 911 operator Nicole Nowling to testify, the State objected. Defense counsel informed the court that Nowling would testify that Tatum alone made a 911 call about the intruders. Counsel stated that her purpose in calling Nowling was to show "collusion" between Tolon and Tatum to implicate defendant; the suggestion was that Tatum gave Tolon the idea to implicate defendant. The court permitted Nowling to testify about Tatum's call but not the absence of other 911 calls.

¶ 17 Just before the defense rested, the court asked defense counsel whether her choice not to call Tatum was deliberate trial strategy. When she stated that it was, the court asked defendant separately whether he had been informed of the strategy and whether he accepted it. Defendant answered both questions affirmatively. The defense then rested. In its closing argument, the defense again focused on collusion between Tolon and Tatum to implicate defendant.

¶ 18 The court made extensive comments during its oral ruling. It determined that Tolon's identification of defendant was credible and that defendant was armed with a firearm during the incident. Thus, the court found defendant not guilty of the home invasion and armed robbery counts referencing a bludgeon. The court found defendant guilty on the remaining counts.

¶ 19 Defendant moved for a new trial, arguing that (1) the trial court erred in finding that defendant was armed with a firearm; (2) the court improperly placed the burden on defendant to demonstrate that an object that appeared to be a gun was not an actual firearm; and (3) he had newly discovered evidence that tended to discredit Tolon. After hearing argument, the court ruled against defendant on all claims except the new-evidence claim. The court held an evidentiary hearing on that claim. Defendant presented the testimony of defendant's nephew, Terrence Jefferson, who claimed that Tolon had told him that she had not seen defendant's full face. Jefferson also testified that Tatum had offered to cease pursuing the case in exchange for money from Jefferson. The court ultimately denied the motion.

¶ 20 The court sentenced defendant to five concurrent terms of imprisonment: two terms of 27 years each for home invasion; one term of 27 years for armed robbery; and two terms of 15 years for aggravated robbery. Defendant moved for reconsideration of the sentence, the court denied the motion, and defendant timely appealed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant raises two claims of error. First, he argues that defense counsel was ineffective for failing to object when the State's cross-examination of Kaya elicited testimony

from Tolon and Williams that defendant and the other intruders were armed with "black semi-automatic handgun[s]." He contends that this testimony was objectionable both because it was beyond the scope of the direct examination of Kaya and because it was hearsay. Second, he contends that we must vacate his aggravated robbery convictions because they are based on the same physical acts as the armed robbery convictions and thus are inconsistent with one-act, one-crime principles.

¶ 23 The State responds that defendant forfeited the ineffectiveness claim by not raising it in his posttrial motion. The State further argues that, because defense counsel's direct examination of Kaya went to Tolon and Williams's ability to observe the physical characteristics of the intruders, counsel opened the door to whether Tolon and Williams were able to observe that the intruders wielded firearms. The State also contends that defendant cannot show prejudice because, even if counsel successfully objected to the State's cross-examination, there would have been ample evidence to prove beyond a reasonable doubt that defendant was armed with a firearm. To support its contention that the trial court would have found defendant guilty regardless of the State's line of inquiry, the State relies on the court's comments in denying the motion for a directed finding. The State also asserts that, to the extent that any evidence was improperly admitted, we should presume that the court did not consider it. On the one-act, one-crime issue, the State concedes the error and joins with defendant in asking us to vacate the aggravated robbery convictions.

¶ 24 In reply, defendant points out that the State has not addressed his contention that the testimony elicited on the cross-examination of Kaya was inadmissible hearsay, and he thus suggests that the State has conceded that the evidence was improper hearsay. He further contends that the State has improperly conflated the standard for establishing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), with the standard for ruling on a motion for a directed finding at the close of the State's case-in-chief.

¶ 25 A. Forfeiture of the Ineffectiveness Claim

¶ 26 The ineffectiveness of trial counsel may properly be raised for the first time on appeal. See, *e.g.*, *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24. The reviewing court, however, may abstain from deciding an ineffectiveness claim on direct appeal if the record is not properly developed. See *People v. Veach*, 2017 IL 120649, ¶ 46. Here, the record is adequate for us to consider defendant's ineffectiveness claim. Accordingly, we proceed to the merits of the claim. Because the claim is raised for the first time on appeal, our consideration of the issue is equivalent to a *de novo* review. See *Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 27 B. The *Strickland* Prejudice Standard
and the Standard for Motions for a Directed Finding

¶ 28 Defendant accuses the State of conflating the *Strickland* prejudice standard with the criteria for deciding a motion for a directed finding at the close of the State's case-in-chief. As we explain, the standards are distinct, and we apply the *Strickland* standard alone in this context.

¶ 29 "A claim that a defendant was denied his constitutional right to effective assistance of counsel is generally governed by the familiar two-pronged test established in *Strickland* [citation]": "a defendant must establish that his counsel's performance fell below an objective

standard of reasonableness and that he was prejudiced by counsel's deficient performance." *People v. Brown*, 2017 IL 121681, ¶ 25. Counsel's performance is measured by "an objective standard of competence under prevailing professional norms." *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

> "The court must *** determine whether, in light of all the circumstances, [counsel's] identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

¶ 30 "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. This is because the "purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 691-92. The *Strickland* Court said:

> "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test [citation] and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. ***
>
> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. ***
>
> *** The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 693-94.

Based on these observations, the Court decided upon the following test for prejudice:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Strickland*, 466 U.S. at 694.

¶ 31 In deciding a motion for a directed finding, the trial court must determine if, "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. Williams*, 2017 IL App (1st) 152021, ¶ 26. "The defendant, in moving for a directed finding, admits the truth of the facts stated in the prosecution's evidence for purposes of the motion, and the trial judge does not pass upon the weight of the evidence or witness credibility in testing the sufficiency of the evidence to withstand a motion for a directed finding." *Williams*, 2017 IL App (1st) 152021, ¶ 26. The minimum amount of evidence sufficient for a charge to survive a

motion for a directed finding is the minimum constitutionally sufficient to support a conviction. See *Williams*, 2017 IL App (1st) 152021, ¶ 26.

¶ 32 Defendant is correct that a trial court's rationale for denying a motion for a directed finding at the close of the State's case-in-chief says little about whether *later-introduced* evidence might have been the source of *Strickland* prejudice when the trial court took the case for decision at the close of the defendant's proofs. While a defendant may claim ineffectiveness specifically in the handling of a motion for a directed verdict or a directed finding (see *People v. Berrier*, 362 Ill. App. 3d 1153, 1166-68 (2006)), defendant's claim here concerns whether counsel's performance later, during the defense case, impacted the court's ultimate findings of guilt. Here, we hold that defendant has failed to demonstrate a reasonable probability that counsel's objections would have been successful. Thus, we need not and do not decide whether, if successful, the objections would have impacted the outcome of the trial.

¶ 33 C. Ineffectiveness in Failing to Object During Cross-Examination

¶ 34 Counsel's failure to object to the State's questions about Williams's and Tolon's descriptions of the guns cannot be prejudicial unless such objections would have had a proper basis. Defendant asserts that the questions were objectionable on two bases: (1) the responses called for inadmissible hearsay and (2) the questions went beyond the scope of direct examination. Defendant further suggests that the State has conceded that the questions called for inadmissible hearsay by failing to argue any basis on which the testimony would be admissible. We address the two possible bases for objection in turn.

¶ 35 1. Failure to Make a Hearsay Objection

¶ 36 Initially, we must decide whether, despite the State's decision not to argue the matter, we can address the merits of whether the testimony at issue was improper hearsay. We conclude that we can.

¶ 37 To be sure, "the rules of waiver and forfeiture apply not only to a defendant on appeal, but also to the State." *People v. Kindelspire*, 2018 IL App (3d) 150803, ¶ 25. While the State may be deemed to have conceded a point by failing to address it, we are not required to accept the concession. *People v. Bailey*, 375 Ill. App. 3d 1055, 1068-69 (2007); *People v. Bywater*, 358 Ill. App. 3d 191, 195 (2005), *rev'd on other grounds*, 223 Ill. 2d 477 (2006). Certainly, if, as our supreme court has recognized, a reviewing court has the authority to *sua sponte* consider an unbriefed basis for reversal when "a clear and obvious error exists" in the record (*People v. Givens*, 237 Ill. 2d 311, 325 (2010)), then a court likewise has the authority to recognize, unassisted by the appellee, an obvious lack of merit in a *briefed* issue. Defendant's claim lacks merit.

¶ 38 When a defendant " 'procures, invites or acquiesces in the admission of evidence,' " he or she may not then complain that its admission was improper. *People v. Payne*, 98 Ill. 2d 45, 50 (1983) (quoting *People v. Burage*, 23 Ill. 2d 280, 283 (1961)). In *People v. Bost*, 80 Ill. App. 3d 933, 949 (1980), the defendant contended that the State had violated his confrontation rights by eliciting on cross-examination his hearsay testimony regarding statements made by a nontestifying declarant. The *Bost* court concluded that the State's examination would have been improper had not defense counsel, on direct examination of the defendant, inquired about hearsay statements by the same declarant on essentially the same subject. *Bost*, 80 Ill. App. 3d

at 949-50. But, given that counsel "initiated the inquiry" on direct examination, defendant could not "complain that the State responded to his improper questioning." *Bost*, 80 Ill. App. 3d at 950.

¶ 39 Here, on direct examination of Kaya, defendant solicited testimony of hearsay declarations made by Williams and Tolon. Having elicited that testimony, defendant cannot complain that further statements from the same conversations were improper hearsay.

¶ 40 The principle we apply is kindred to the invited-error doctrine, under which "a party may not request to proceed in one manner at trial and then later contend on appeal that the course of action was in error." *People v. Wilber*, 2020 IL App (2d) 180024, ¶ 17. Here, in his direct examination of Kaya, defendant relied on the admissibility of Williams's and Tolon's hearsay statements to Kaya. For defendant to insist that further statements from Williams and Tolon to Kaya were inadmissible hearsay when elicited on cross-examination is inconsistent at a fundamental level.

¶ 41 2. Failure to Make a Beyond-the-Scope Objection

¶ 42 Defendant also claims that counsel should have objected on the ground that the State's cross-examination of Kaya as to Tolon's and Williams's description of the guns carried by the intruders exceeded the scope of their direct examination. We disagree.

¶ 43 "Generally, cross-examination is limited in scope to the subject matter of direct examination of the witness and to matters affecting the credibility of the witness." *People v. Terrell*, 185 Ill. 2d 467, 498 (1998). Cross-examination on any subject that "tends to explain, discredit, or destroy the witness' direct testimony" is generally permissible. *Terrell*, 185 Ill. 2d at 498. When an objection to the scope of cross-examination is made at trial, a reviewing court should not disturb the trial court's ruling "unless it is a clear abuse of discretion which results in manifest prejudice to the defendant." *Terrell*, 185 Ill. 2d at 498.

¶ 44 The parties here dispute the subject of defense counsel's direct examination of Kaya. Defendant asserts that the purpose was "to impeach Tolon and Williams regarding their ability and opportunity to observe the suspects in the house and their descriptions of the suspects' physical characteristics, including the color of their mask coverings, as told to the police at the scene."

¶ 45 The State contends that its questions to Kaya were within the scope of direct examination because Tolon's and Williams's ability to "observe the suspects in the house" necessarily "included their ability to observe the firearms that the suspects, including defendant[,] were carrying." The State thus contends that defense counsel's questions concerning some details of the intruders' appearances, such as the colors of their masks, opened the door to all questions about Williams's and Tolon's observations of the intruders' appearances, including what the intruders had in their hands.

¶ 46 In reply, defendant argues that defense counsel called Kaya to impeach Tolon's and Williams's testimony about their reports to the police "at the scene." Counsel did so, according to defendant, by pointing out discrepancies between (1) what Kaya testified Tolon and Williams told him and (2) what Tolon and Williams testified they told Kaya. "For instance, while Williams testified in court that the offenders placed a cushion on his head and threatened to shoot him, according to Kaya, Williams did not report any of this to police at the scene."

Defendant argues that when "[t]he defense *** elicited from Kaya that Williams reported that the offender wearing the red bandana was [5 feet, 2 inches, tall], whereas Tolon reported that the red bandana wearer was [5 feet, 9 inches, tall]," it was also asking questions in the same vein. Thus, "the defense's examination of Kaya was limited to whether the complainants had reported any impediments to their ability to observe and to their descriptions of discrete physical features of the offenders."

¶ 47 We agree with the State's characterization of the direct examination of Kaya. Defendant may have asked only about Tolon's and Williams's recollections of the *clothing and physical features* of the intruders, but the broader subject of the examination was how descriptions given at the scene compared to later testimony. Whether Tolon and Williams told Kaya that the intruders carried firearms was certainly relevant to that comparison. "The scope of cross-examination does not refer to the actual material discussed during direct examination, but rather to the subject matter of the direct examination." *Beard v. Barron*, 379 Ill. App. 3d 1, 17-18 (2008). Moreover,

> "[a]lthough cross-examination is generally limited to the subject matter inquired into on direct examination, this rule has been modified to the extent that it is proper on cross-examination to develop all circumstances within the knowledge of the witness that explain, qualify, discredit or destroy his direct testimony, even if such examination constitutes new matter that aids the cross-examiner's case." *People v. Stevens*, 2014 IL 116300, ¶ 16.

Here, of course, it was the credibility of Tolon and Williams that was being tested through the questions to Kaya, but the principle from *Stevens* still applies.

¶ 48 Defendant argues here that he suffered *Strickland* prejudice because, "[h]ad counsel objected, the trial court would have been *compelled* to curtail the State's cross-examination and prohibit the admission of the out-of-court statements." (Emphasis added). We disagree. The matter fell squarely within the trial court's discretion. The most defendant can reasonably argue is that, had counsel objected to the State's line of inquiry, the court *might* have ruled in defendant's favor. A possibility is not a reasonable probability under *Strickland*. See *People v. Patterson*, 192 Ill. 2d 93, 114 (2000) (defendant did not show prejudice under *Strickland* where he did not attempt to explain why, when the issue was a matter for the trial court's discretion, the outcome would have been different if defense counsel raised that issue). Defendant has thus failed to satisfy his burden on appeal, which is to affirmatively show error. See *Healy v. Bearco Management, Inc.*, 216 Ill. App. 3d 945, 958 (1991) ("The party prosecuting the appeal bears the burden of showing affirmatively the errors assigned on review."); see also *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-32 (1976) (the burden of persuasion *remains with* the appellant despite the appellee's failure to file a brief); *People v. Kirkpatrick*, 240 Ill. App. 3d 401, 406 (1992) ("as the appellant, defendant has the burden of showing error").

¶ 49 D. One-Act, One-Crime Issue

¶ 50 Defendant argues that his convictions for aggravated robbery must be vacated under the one-act, one-crime rule because they are based on the same physical acts as the armed robbery convictions. He further argues that, although he did not raise the issue below, we may address the issue as plain error. The State confesses error on the issue, and we accept the confession.

Under the one-act, one-crime rule, as formulated in *People v. King*, 66 Ill. 2d 551, 566 (1977), "a criminal defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act." *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Further, the issue may be considered as a second-prong plain error, as "a surplus conviction and sentence affects the integrity of the judicial process." *Harvey*, 211 Ill. 2d at 389. Here, the State explains:

> "The [armed robbery and aggravated robbery counts] alleged the same physical act, namely that [defendant] took property from Zakia Tolon and Maurice Williams ***. At trial, the State did not argue, nor prove, that there were separate physical acts nor did it introduce evidence of separate physical acts with respect to these charges. *** As such, the People agree that this Court should vacate defendant's convictions for aggravated robbery."

We agree with the parties. We vacate the aggravated robbery convictions and sentences because aggravated robbery is a less serious offense. See *People v. Garcia*, 179 Ill. 2d 55, 71 (1997) ("When multiple convictions of greater and lesser offenses are obtained for offenses arising from a single act, a sentence should be imposed on the most serious offense and the convictions on the less serious offenses should be vacated."); 720 ILCS 5/18-2(b) (West 2016) ("Armed robbery in violation of subsection (a)(1) is a Class X felony."); 720 ILCS 5/18-1(c) (West 2016) ("Aggravated robbery is a Class 1 felony.").

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm defendant's home invasion and armed robbery convictions and vacate his aggravated robbery convictions and sentences.

¶ 53 Affirmed in part and vacated in part.