2022 IL App (2d) 180950-U
No. 2-18-0950
Order filed June 29, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-719
SHARDON A. GAY,	)	Honorable Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Bridges and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was proved guilty beyond a reasonable doubt of possession with intent to deliver a controlled substance (15 or more grams but less than 100 grams of cocaine), (2) trial court did not err in allowing counsel for a potential witness to assert the witness' right not to testify pursuant to the Fifth Amendment, (3) trial court did not err in imposing extended-term sentence, (4) defendant failed to show that the State failed to properly disclose evidence within its possession tending to negate his guilt; (5) defense counsel was not ineffective, (6) defendant's conviction of violation of an order of protection is vacated under the one-act, one-crime rule. Affirmed in part and vacated in part.

¶ 2 Defendant, Shardon A. Gay, was found guilty by a jury of one count each of: (1) possession with intent to deliver a controlled substance (15 or more grams but less than 100 grams of cocaine)

(720 ILCS 570/401(a)(2)(A) (West 2012)), (2) possession of a controlled substance (15 or more grams but less than 100 grams of cocaine) (720 ILCS 570/402(a)(2)(A) (West 2012)), (3) possession with intent to deliver cannabis (more than 10 grams but not more than 30 grams) (720 ILCS 550/5(c) (West 2012)), (4) criminal trespass to residence (720 ILCS 5/19-4(a)(2) (West 2012)), (5) domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2012)), (6) interfering with the reporting of domestic violence (720 ILCS 5/12-3.5 (West 2012)), and (7) violation of an order of protection (720 5/12-3.4 (West 2012)). The trial court then sentenced defendant to a term of 18 years in the Department of Corrections on count I, with 6-year terms on counts III and IV to be served concurrently.[1] On counts V, VI, and VII, defendant was sentenced to concurrent terms of 364 days in jail, with credit for time served. Defendant now appeals both his convictions and his sentence.

¶ 3 I. BACKGROUND

¶ 4 The charges against defendant arose on March 16, 2013. Officer Jeffrey Oberts of the Rockford Police Department was dispatched to the home of Deirdre Barbary, the mother of defendant's children. Barbary had an active order of protection against defendant on that date that prevented defendant from contact with her and her home. After he was let into the house by Barbary's mother, Doris Ford, he saw defendant and Barbary arguing on a staircase landing. Oberts saw a plastic bag protruding from defendant's left coat pocket. Defendant stuck his hand into his pocket; Oberts grabbed his wrist and told him to remove his hand. Defendant pulled away and ran into the basement, where Oberts lost sight of him.

¶ 5 Within seconds, defendant walked back up the stairs, and Oberts handcuffed him and took him into custody. Oberts noticed that the plastic bag was no longer in defendant's pocket; he did

[1]Count II was merged with count I.

not see the bag on the landing and did not see defendant drop or throw the bag. After he took defendant out to the squad car, Oberts conducted a pat-down search of defendant and found that the plastic bag was no longer in defendant's coat pocket. Oberts went into the basement and found a clear plastic bag containing a rock-like substance and a green leafy substance on the floor of a utility room.

¶ 6 At trial, when shown the bag of drugs, Barbary testified that she had not seen them before and had not been in possession of them in March 2013. Ford testified that she had not seen the bag of drugs before Oberts showed it to her on March 16 and the drugs did not belong to her. Further, no one else had been present in the house that day other than defendant, Barbary, herself, and the police.

¶ 7 After being found guilty of all charges by the jury, defendant filed a series of posttrial motions and motions for reconsideration of his sentence. All motions were eventually denied by the trial court, and this appeal followed.

¶ 8 II. ANALYSIS

¶ 9 Defendant first contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt of possession with intent to deliver a controlled substance (15 or more grams but less than 100 grams of cocaine). Where a defendant challenges a conviction based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Murray*, 2019 IL 123289, ¶ 19. As this standard of review " 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts,' " a reviewing court will not substitute its judgment for that of the trier of

fact on issues involving the weight of the evidence or the credibility of the witnesses. *Id.* quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). While these determinations by the trier of fact are entitled to deference, they are not conclusive; a criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id.*

¶ 10 In order to sustain a defendant's conviction for possession of a controlled substance with intent to deliver, the State must prove that (1) defendant had knowledge of the presence of the narcotics, (2) the narcotics were in defendant's immediate possession or control, and (3) defendant intended to deliver the narcotics. *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008).[2]

¶ 11 Defendant first argues that he could not be convicted of actual possession of the drugs because the only evidence against him was Oberts' testimony "that he did not see the Defendant with the drugs but found the drugs on the floor in the basement." According to defendant, the evidence of his actual possession was purely circumstantial and did not show that he had immediate and exclusive control over the drugs. Instead, the State was required to prove that defendant had constructive possession of the drugs.

¶ 12 First, we disagree that "constructive possession" is in any way applicable to the facts of this case. To establish constructive possession of contraband, the State must prove that the defendant (1) had knowledge of the contraband and (2) exercised immediate and exclusive control over the area where the contraband was found. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23. Constructive possession exists where a defendant has the intent and capacity to maintain dominion and control over contraband. *People v. Horn*, 2021 IL App (2d) 190190, ¶ 39. A defendant's control over the area where contraband is found gives rise to an inference that he had

[2]Defendant does not contest the issue of intent to deliver.

knowledge and possession of the contraband. *Id.* Here, not only was there no evidence that defendant exercised immediate and exclusive control over the basement where the contraband was found, the evidence showed that defendant had no authority to be there and was there in violation of a valid order of protection. Further, the evidence did not show that defendant had the intent and capacity to maintain dominion and control over contraband. He threw it away in an area in which he had no authority to be. The charges, the evidence, and the State's theory of the case did not involve constructive possession, and the State was not required to prove it.

¶ 13 Instead, this case involved actual possession. "Actual possession is the exercise by the defendant of present personal dominion over the illicit material and exists when a person exercises immediate and exclusive dominion or control over the illicit material, but does not require present personal touching of the illicit material." *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Actual possession may be proved by testimony that shows that the defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it or throwing it away. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). "Because possession is often difficult to prove directly, proving possession frequently rests upon circumstantial evidence." *Id.* When proof is based on circumstantial evidence, a trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; it is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Further, in weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *Id.*

¶ 14 We hold that sufficient circumstantial evidence existed for a reasonable jury to conclude that defendant was in actual possession of the cocaine before it was found in Barbary's basement.

Oberts saw a plastic bag protruding from defendant's left coat pocket when he first encountered defendant. Defendant tried to hide the bag by pushing it deeper into his pocket, then ran away when Oberts grabbed him. Defendant then returned, and the bag was no longer in his pocket or on his person. Within minutes, the bag of drugs was found on the floor in the room into which defendant had run.[3] Both Barbary and Ford testified that they had never seen the bag before and that the drugs were not theirs. Further, Ford testified that no one had been in the house that day other than Barbary, defendant, herself, and the police. Defendant's possession and disposal of the bag of drugs reasonably flow from this evidence. The jury was not required to raise to the level of a reasonable doubt other imagined possibilities, such as some unknown person at some unknown time left the drugs on the basement floor. While the evidence was circumstantial, the jury's decision was not so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. We find no error here.

¶ 15 Defendant next contends that the trial court erred when it failed to require a potential defense witness to personally state whether he intended to assert his right not to testify pursuant to the Fifth Amendment. On the day of trial, the State informed the trial court and defendant that it had contacted Eric Arnquist, the attorney for subpoenaed potential defense witness Jamie Key, who informed the State that Key "would be taking the Fifth and would not be testifying." Key had purportedly provided an affidavit (which is not part of the record on appeal) in which he stated

[3]Defendant argues that, because Oberts did not search the basement before he took defendant outside to the squad car, he could not show that the bag of drugs was on the floor before he took defendant outside. We note that, even had Oberts found the bag before he took defendant outside, it would not disprove that the bag was on the floor before defendant entered the basement.

that he had left the bag of drugs, for which defendant had been charged, on Barbary's basement floor. Defense counsel stated, "I believe that it's still—if, in fact, he's going to be called as a witness, he still has to invoke it if I'm going to be able to—." The trial court then ordered Key brought over from the Winnebago County jail, saying, "We'll bring him over. He has to do that outside of the presence of the jury." Defense counsel replied, "That's correct, Judge, but it's something that I have the ability, [*sic*] so I can preserve the record." When asked by the trial court if he was "not satisfied with [Key's] attorney simply saying that he's had that conversation with him," defense counsel stated, "I'll discuss it with my client, Judge, and if it's possible,—***—we can do it that way."

¶ 16 Arnquist then told the trial court that he represented Key on a first degree murder charge in another courtroom. He had spoken to Key at the jail the night before:

> "I addressed kind of the issue. I went over his rights with him, explained his right to remain silent, and he instructed me that he wished to invoke his Fifth Amendment right to remain silent on this matter."

The court then asked Arnquist to leave his cell phone number so that he could be called when Key was brought to the courtroom. The State asked if defense counsel could "make that determination now," as it would affect questioning of other witnesses. Counsel then stated, "Judge, if I can have a couple minutes with my client—***—and discuss that with him—***—I might be able to." After a short recess, the following colloquy took place:

> "[Defense Counsel]: Judge, we will rely—and just so it's made part of the record, that if, in fact, and I don't know if they'll [*sic*] be a stipulation, that if, in fact, Jamie Key was put on the stand and called to testify, pursuant to his counsel's representation he would be taking the Fifth.

> THE COURT: Well, I'm fine for that to be part of the record, as counsel has indicated, so I'm fine with that just being part of the record.
>
> [ASA] HARRISON: Just this part of the record, that's fine."

Neither party called Key to testify at trial.

¶ 17 Defendant now argues that an assertion by Key's "alleged" counsel that Key would invoke the Fifth Amendment if called to testify "was insufficient to safe guard [*sic*] Defendant['s] right to call witnesses on his behalf." However, not only did defense counsel not object to the acceptance of the assertion as sufficient, thereby forfeiting the issue on appeal, counsel agreed to it. As counsel testified at the hearing on defendant's Third and Final Amended Motion for New Trial, when asked why he did not call Key to testify even though he knew that Key would not testify:

> "Well, that was the procedure that was utilized by the Court. And *we agreed at that time that he was going to take the Fifth*. And I believe, if I'm correct in my recollection, that that wouldn't be presented in front of the jury regarding that statement; *it would be provided by stipulation*." (Emphases added.)

¶ 18 A stipulation is defined as "any agreement made by the attorneys engaged on opposite sides of a cause, (especially if in writing.)" The Law Dictionary, https://thelawdictionary.org/stipulation/ (last viewed June 7, 2022). It is "an agreement between parties or their attorneys with respect to business before a court, and courts look with favor upon stipulations designed to simplify, shorten, or settle litigation." *People v. Buford*, 19 Ill. App. 3d 766, 770 (1974). Stipulations relating to evidence are to be construed to ascertain and give effect to the intention of the parties, and proof of the stipulated facts is unnecessary, because the stipulation is substituted for proof and dispenses with evidence. *Id.*

¶ 19 After speaking with defendant, defense counsel agreed to rely on Arnquist's representation that, if Key was put on the stand and called to testify, he would be taking the Fifth. He also agreed that he would further stipulate to that at trial if necessary. "[A] defendant is barred from claiming error in the admission of improper evidence where the defendant procured, invited, or acquiesced to the admission. *People v. Alvarado*, 2013 IL App (3d) 120467, ¶ 11. Thus, defendant's agreement with the procedure and stipulation to the evidence preclude him from asserting this claim on appeal.

¶ 20 Defendant next contends that his sentence must be vacated and that he must be resentenced. According to defendant, the trial court improperly applied the extended-term guidelines of section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(1) (West 2016)) when it sentenced defendant to a term of 18 years in prison for possession with intent to deliver a controlled substance.

¶ 21 The State argues that defendant has forfeited this issue on appeal because he failed to raise it at the sentencing hearing. To preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). According to the State, defendant failed to object at his sentencing hearing to the imposition of an extended-term sentence; in fact, defendant conceded that he would be eligible for an extended term. At sentencing, the trial court repeatedly stated that defendant faced from 6 to 60 years in prison on the charge in question. At one point, the following colloquy took place:

> "THE COURT: Okay. And Count [I] is 6 to 60 years on that Class X sentencing. Count [II] will be merged into Count [I]. Count [III], Count [IV], Count [V], Count [VI], and Count [VII] will each be separate sentences but they will all be served concurrently

with the sentence in Count [I]. That's my understanding. If anybody has anything they would like to say about that, then now is the time to do that.

[ASA] HARRISON: No, I agree.

[Defense Counsel] TAYLOR: I think that your Honor has phrased that correctly."

¶ 22 Defendant concedes that defense counsel failed to object during the court's determination and pronouncement of sentencing." However, he argues that "the forfeiture rule is loosened because defendant's [*sic*] should not be required to interrupt the judge during pronouncement of sentence and point out that he or she was wrong." First, we note that defendant cites no authority for this proposition. Second, as we just saw, the trial court gave the State and defense counsel the opportunity to comment on the court's understanding of the sentencing possibilities, including the extended-term range on count I; defense counsel stated that the court had "phrased that correctly." No one was required to interrupt the trial court.

¶ 23 Defendant also argues, after the State raised the issue in its brief, that he has satisfied the requirements necessary for review of this contention as "plain error." The plain-error doctrine is a narrow and limited exception to forfeiture. *Hillier*, 237 Ill. 2d at 545. To be granted relief under this rule, a defendant must first show that a clear or obvious error occurred. *Id.* In the context of sentencing, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Id.* Under both prongs of the plain-error doctrine, the defendant bears the burden of persuasion. *Id.* If the defendant fails to meet his burden, his procedural default will be honored. *Id.*

¶ 24 Here, aside from citing in his reply brief to the requirements of pleading plain-error, defendant only posits that his arguments in his opening brief "fulfilled his burden of proof under

plain error." We find this minimal argument to be inadequate to invoke the application of a plain-error analysis. Therefore, we find that defendant has forfeited this claim, and we will not address it.

¶ 25 Defendant next contends that the State failed to disclose evidence in its possession tending to negate his guilt, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Pursuant to *Brady*, the State must disclose evidence favorable to the accused and material that goes either to guilt or to punishment. *People v. Jarrett*, 399 Ill. App. 3d 715, 727 (2010). This includes evidence that is known to police investigators, but not to the prosecutor. *Id*. To sustain a claim under *Brady*, a defendant must show that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching, (2) the evidence was suppressed by the State either willfully or inadvertently, and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *Id.* at 727-28. "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id.* at 728.

¶ 26 This claim relates to a purported recording of a telephone call made from the jail by Jamie Key to Barbary in which Key admits that the drugs found in Barbary's home belonged to him, not defendant. According to defendant, on July 21, 2014, defense counsel served the State with additional discovery, including an affidavit by Key admitting that the found drugs were his. This affidavit is not part of the record on appeal. On July 24, the State filed a supplemental answer to defendant's motion for discovery that listed "Key/Jail Phone Call Log and CD" from various dates.[4] This filing was prepared on July 22. However, defendant now claims that his attorney did not receive this discovery material until September 15, 2014, the day before trial.

[4]Neither the log nor the CD is part of the record on appeal.

¶ 27 However, the record does not support defendant's claim that the evidence was not received until September 15. Defendant cites to the report of proceedings for that date, but the only packets of material that were mentioned as being turned over that day were two packets entitled "Everywhere Funding Receipts," jail reports involving amounts of money placed on the commissary books of defendant and Key while in the jail. No mention of telephone records or recordings is made at that time.

¶ 28 Defendant also cites to counsel's testimony at the hearing on defendant's Third and Final Amended Motion for New Trial, where, in response to the question, "After you turned [Keys'] Affidavit over to me, did you receive anything from me about Jamie Key," counsel responded, "Yes. *At some point* I received from your office a Discovery Response regarding jail phone calls that had been made and also entries regarding Mr. Key's account with the jail." (Emphasis added.) When asked if he received the jail-call recordings and commissary records on the day of trial, counsel responded, "I received them. Whether it was on the day of trial, I don't know. I can't recall what day it was." Similarly, counsel could not remember if he listened to the recordings before trial. Counsel did not testify that he received the phone records and the commissary records at the same time, let alone that they were the day before trial. All he testified to was that he received those items of evidence after he had turned over Keys' affidavit, which means after July 21.

¶ 29 Even defendant's own testimony at the hearing fails to support his claim that this evidence was turned over on the day before trial. When asked if he had listened to "an incriminating audio confession," defendant answered:

> "Yes. But it was after trial because it came—it was turned over to the court the day of trial. And from my understanding, that there wasn't any incriminating evidence or any

> evidence for the Court, and [defense counsel] Mr. Jazwiec and I listened to that recording after trial."

Defendant at various times described the timing of the turnover of the evidence as "the first day of trial if I'm not mistaken. At the latest, it was the second day" and "either right prior to or maybe shortly after" jury selection. He agreed that he could not "recall exactly when in the sequence of events" the evidence was received.

¶ 30 The record on appeal does not support defendant's factual claim that the evidence was suppressed or undisclosed by the State. The common law record shows that the evidence was disclosed on July 24. The report of proceedings for defendant's alleged date of disclosure makes no mention of the evidence. Defense counsel's testimony regarding the issue is, at best, indeterminate and vague. Defendant's own testimony is similarly vague and contradictory and does not align with his claims here. As defendant's factual allegations are not supported by the record, we need not address the questions of law applicable to a *Brady* allegation. We find no error here.

¶ 31 Defendant next contends that the cumulative effect of numerous trial counsel failures denied him the effective assistance of counsel and a fair trial. To establish a claim of ineffective assistance of counsel, a defendant must satisfy the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The test is composed of two prongs: deficiency and prejudice. *Strickland*, 466 U.S. at 687. First, the defendant must prove that counsel's performance was so deficient, and counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). "A court measures counsel's performance by an objective standard of competence under prevailing professional norms." *Id.* To establish deficient performance, a defendant must overcome the strong presumption that

counsel's challenged action or inaction might have been the product of sound trial strategy. *Id.* To establish prejudice, the defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* This prong of *Strickland* entails more than an "outcome-determinative" test; the defendant must show that counsel's deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Id.* at 317-18. A defendant must satisfy both prongs of the *Strickland* test; failure to establish either proposition is fatal to the claim. *Id.* at 318.

¶ 32 Defendant first argues that counsel was ineffective for failing to object and move for a continuance when the State proffered the phone logs and CD recordings related to Key on the day before trial. However, as we have already concluded, the record does not support defendant's allegation that the evidence was not turned over until the day before trial. See *supra* ¶¶ 25-30. Instead, the record shows that the evidence was turned over almost two months before trial. Thus, there was no reason for counsel to object or ask for a continuance, and counsel's inaction was neither deficient nor in error.

¶ 33 Defendant next argues that counsel was ineffective for failing to object and argue that Keys' attorney could not properly assert Keys' Fifth Amendment right not to testify. Defendant argues only that Keys' unsolicited affidavit, in which he claimed that the drugs found in Barbary's basement were his, "would have been a strong reason for defense counsel to urge the court to revisit Mr. [Keys'] Attorney asserting the 5th on Mr. [Keys'] behalf." However, as we have stated, a defendant must overcome the strong presumption that counsel's challenged action or inaction might have been the product of sound trial strategy. See *Easley*, 192 Ill. 2d at 317. At the hearing on defendant's Third and Final Amended Motion for New Trial, the following colloquy took place:

"Q. Okay. What are the—what, if any, other reasons are there why Jamie Key was not called as a witness?

[Defense Counsel]. At the end of the day, I still would've had to make that decision whether or not I thought it would have been helpful or hurtful to his case. Because when you have a statement by a person that, um, is a—something to help your client, there is always the spectrum whether or not it's being told truthful or not.

Q. Sure.

A. Some of the other evidence that came up would have led me to believe that it might not have been truthful and accurate, and, if so, I would not have presented that evidence for that reason.

Q. So—but you made a decision in this case. Was it based on trial strategy of deciding that you didn't feel that the information was sufficiently reliable to warrant putting it in, or was it—was it based on something else?

A. Correct. It would have been a mixture of both. But it kind of got taken out of my hands when he refused to testify under the Fifth Amendment."

¶ 34 Here, counsel explained that he questioned the truthfulness of Keys' evidence and whether it would help or hurt defendant's case. The lack of veracity of this evidence was already an issue of trial strategy, and this strategy affected counsel's reaction to the issue of whether Keys needed to be brought in to assert his right not to testify himself or whether they could enter into a stipulation that Keys would do so. This decision not to object (indeed, to stipulate) to the acceptance of Arnquist's representation that Keys planned to invoke his Fifth Amendment right not to testify was clearly the product of sound trial strategy. Therefore, we find no error here.

¶ 35 Defendant finally contends that the trial court erred in entering convictions for both criminal trespass to a residence and violation of an order of protection where he was alleged to have made only one entry into Barbary's home. Defendant asks that we review this issue under the plain-error doctrine. The State notes that defendant failed to raise this issue in the trial court and agrees that the conviction of violation of an order of protection should be vacated under the one-act, one-crime rule.

¶ 36 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; thus, such a violation satisfies the second prong of the plain-error doctrine. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Therefore, we will consider whether defendant's violation of an order of protection conviction must be vacated under the one-act, one-crime rule.

¶ 37 The one-act, one-crime doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161,165 (2020).

> "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *Id.*

¶ 38 Here, the State charged defendant with one count of criminal trespass to residence, alleging that defendant "knowingly and without authority, entered the residence of Deirdre Barbary*** at a time when said defendant knew or had reason to know that one or more persons were present in that residence." The State also charged defendant with one count of violation of an order of protection in that "defendant having been served with notice of the contents of an order of

protection***did knowingly commit an act which was prohibited by the order of protection in that said defendant was inside the protected residence of Deirdre Barbary *** which violated the order." The evidence at trial involved only one entrance by defendant into Barbary's home on March 16, 2013. Entering Barbary's home and being inside her home are the same act; defendant was charged for that singular act under two theories. Multiple convictions are improper.

¶ 39 "[I]f a defendant is convicted of two offenses based upon the same single physical act, the conviction for the less serious offense must be vacated." *People v. Johnson*, 237 Ill. 2d 81, 97, (2010). Here, defendant was convicted of criminal trespass to residence, a Class 4 felony (see 720 ILCS 5/19-4(b)(2) (West 2012), and violation of an order of protection, a Class A misdemeanor (see 720 ILCS 5/12-3.4(d) (West 2012). Thus, the Class A misdemeanor offense of violation of an order of protection must be vacated.

¶ 40 III. CONCLUSION

¶ 41 For these reasons, the judgment of the circuit court of Winnebago County is affirmed except as to defendant's conviction on count VII (violation of an order of protection), which is vacated.

¶ 42 Affirmed in part and vacated in part.