

Where state charged stabbing of victim as one act in aggravated battery based on great bodily harm count of indictment, and aggravated battery while armed with dangerous weapon, as well as armed violence, three strikes of knife to victim could give rise to only one conviction. A careful review of the indictment in this case reveals that the counts charging defendant with armed violence and aggravated battery do not differentiate between the separate stab wounds. Rather these counts charge defendant with the same conduct under different theories of criminal culpability. The armed violence count of the indictment charged defendant with committing aggravated battery against Arlene while he was armed with a knife that had a blade of over three inches. Nowhere in these charges does the State attempt to apportion these offenses among the various stab wounds.

The aggravated battery counts charged defendant as follows:

"He, intentionally or knowingly without legal justification caused bodily harm to Arlene Guerrero while using a deadly weapon, to wit: A knife by stabbing Arlene Guerrero with said knife, in violation, of Chapter 720, Act 5, Section 12-4-B(1), of the Illinois Compiled Statutes 1992, as amended, and He, in committing a battery on Arlene Guerrero intentionally or knowingly without legal justification caused great bodily harm to said Arlene Guerrero he stabbed Arlene Guerrero with a knife, in violation, of Chapter 720, Act 5, Section 12-4-A of the Illinois Compiled Statutes, as amended."

Therefore, convictions for aggravated battery is vacated.

State could have sustained three separate convictions had it charged each strike of knife as separate offense. In People v. Dixon, 91 Ill. 2d 346 (1982), Illinois Supreme Court looked to People v. King, 66 Ill. 2d 551 (1977) interpreting the definition of an "act" narrowly. There, it rejected the argument that striking the victim several times with a club constituted a continuous beating and therefore a single physical act. Rather, it held that the separate blows, although closely related, constituted separate acts which could properly support multiple convictions with concurrent sentences.

**THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. HECTOR CRESPO, Appellant.**

Opinion filed February 16, 2001. Docket No. 86556–Agenda 9–November 1999.

JUSTICE FREEMAN delivered the opinion of the court:

Defendant, Hector Crespo, was convicted of the first degree murder of Maria Garcia in a jury trial in the circuit court of Cook County. The jury also convicted him of one count of armed violence, one count of aggravated battery based on intentionally or knowingly causing great bodily harm, and one count of aggravated battery using a deadly weapon, all in connection with the stabbing of Garcia's daughter, Arlene. The circuit court sentenced defendant to a 75-year term of imprisonment for the murder and to a 30-year term for armed violence. The court also imposed a five-year term for aggravated battery after stating that the two aggravated batteries were merged. All of the prison terms were to be served concurrently.

Defendant appealed his convictions. He maintained that his conviction for aggravated battery could not stand because it was based on the same single act as the armed violence charge. He also argued that the trial court erred in refusing to give the jury an instruction on second degree murder. The appellate court affirmed defendant's convictions and ordered the circuit clerk to amend the mittimus to reflect that defendant was convicted of first degree murder, armed violence, and one count of aggravated battery. No. 1-97-3057 (unpublished order under Supreme Court Rule 23). Defendant filed a petition for leave to appeal, arguing only that his conviction for aggravated battery should be vacated because it stemmed from the same physical act as the armed violence charge. We allowed defendant's petition (177 Ill. 2d R. 315(a)) and now reverse, in part, the judgment of the appellate court.

## Background

The facts giving rise to defendant's convictions are not in dispute. Defendant and the murder victim, Maria Garcia, lived together with their infant son and Garcia's daughters. On June 25, 1995, defendant, after consuming alcohol and cocaine throughout the day, returned home at around 9:15 p.m. According to Garcia's daughter, Arlene, shortly after defendant's arrival home, he and her mother began to argue over money and the fact that defendant was wearing a gold necklace that belonged to Garcia. As the argument intensified, Garcia asked defendant to leave the house. Defendant refused, and Garcia told Arlene to call the police. Arlene called 911 and told the dispatcher that she wanted her stepfather escorted from the home because he was getting violent. After the 911 call was made, defendant locked himself in a bedroom.

Defendant eventually began to leave the house through a back door. At that time, Garcia told him "don't leave you coward." Garcia told defendant that she wanted police to "escort him out." Defendant replied that he was not afraid of police and that he was not "a coward." The two then argued more, and moved into the kitchen near some drawers. Defendant attempted to reach into a drawer where knives were kept, but Garcia closed it. A few minutes later, defendant pulled out a knife about eight inches long. Garcia again tried to shut the drawer, but defendant hit her in the head with his fist. The two began to fight. When Arlene tried to intercede, defendant stabbed her three times in rapid succession., once in the right arm, and twice in the left thigh. After defendant stabbed Arlene, defendant turned to Garcia and grabbed her by the hair. He then stabbed her. As defendant stabbed Garcia, Arlene ran out of the house, calling for help.

According to neighbors, Arlene ran from her house screaming for help. Police officers responded to the scene and found Arlene hysterical. She told them that her stepfather had stabbed her and that her mother and younger brother were still in the house. Police found Garcia lying on the kitchen floor in a pool of blood. Witnesses told police that defendant had fled the scene.

Garcia died as a result of the injuries inflicted by defendant. The autopsy revealed that she had sustained multiple stab wounds to the neck, chest, and abdomen. Arlene was treated for her wounds at the hospital, where approximately 20 staples were needed to close the three stab wounds.

Police arrested defendant in July 1995, and a grand jury returned an indictment against him several weeks later. Specifically, the indictment charged defendant with two counts of first degree murder, one count of attempted first degree murder, two counts of aggravated battery (one count based on battery with a deadly weapon, and one count based on great bodily harm), and one count of armed violence. The armed violence charge was predicated upon the great bodily harm aggravated battery charge. Defendant was also indicted on one count of theft, which the State later agreed to nol-pros. The jury returned verdicts finding defendant (i) guilty of first degree murder, (ii) guilty of armed violence, (iii) guilty of aggravated battery

based on great bodily harm, (iv) guilty of aggravated battery based on a deadly weapon, and (v) not guilty of attempted murder.

As noted previously, defendant maintained in the appellate court that his aggravated battery conviction must be vacated because it was based on the same physical act as his armed violence conviction, or, alternatively, that the mittimus, which reflected two aggravated battery convictions, should be corrected to reflect the fact that the trial court merged defendant's two aggravated battery convictions into one battery conviction. The appellate court rejected defendant's "same physical act" argument, but amended the mittimus to reflect one, as opposed to two, aggravated battery convictions.

## Discussion

Defendant maintains that the remaining aggravated battery conviction must be vacated because the aggravated battery charge stemmed from the same physical act which formed the basis of the armed violence charge. According to defendant, the three stab wounds to Arlene did not constitute "different offenses" such that multiple convictions can be sustained.

The State responds that the appellate court, in rejecting defendant's contention, properly applied the precedent of this court. The State maintains that defendant stabbed Arlene three times and that each act of stabbing properly constitutes a separate offense. As framed by the State, the issue before this court is whether these three different stabbings were three "separate and distinct acts" each capable of independently sustaining a complete criminal conviction.

The seminal case in this area is *People v. King*, 66 Ill. 2d 551 (1977). There, this court explained:

"Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *King*, 66 Ill. 2d at 566.

Based on this reasoning, the court in *King* upheld the defendant's convictions for rape and burglary because the offenses were based on separate acts, each requiring proof of a different element.

Both defendant and the State ask this court to revisit *King*, albeit for different reasons. Defendant urges us to reconsider the definition of an "act" in *King* and specifically asks us to consider a six-part test that has developed in the appellate court. The State, on the other hand, argues that the "multiple acts/lesser included offense" portion of the *King* rule has caused confusion over the years and asks us to clarify it.

The State correctly notes that, in *King*, this court defined an "act" as any overt or outward manifestation that will support a separate offense. *King*, 66 Ill. 2d at 566. This court has consistently used the *King* definition of an "act." For example, in *People v. Myers*, 85 Ill. 2d 281 (1981), we considered a situation in which the defendant stabbed one victim in the throat, removed the knife briefly to cut a second victim, then again stabbed the first victim in the throat. In determining that the defendant committed two physical acts with respect to the first victim, this court accorded significance to the fact that there was a distinct, intervening act separating the successively inflicted stab wounds. See *Myers*, 85 Ill. 2d at 288-89. One year later, in *People v. Dixon*, 91 Ill. 2d 346 (1982), this court again looked to *King*, interpreting the

definition of an "act" narrowly. There, we rejected the argument that striking the victim several times with a club constituted a continuous beating and therefore a single physical act. Rather, we held that the separate blows, although closely related, constituted separate acts which could properly support multiple convictions with concurrent sentences.

As noted, defendant invites this court to apply a six-factor test that has developed in our appellate court in cases that postdate *Dixon*. See, e.g., *People v. Crum*, 183 Ill. App. 3d 473, 490-91 (1989); *People v. Williams*, 143 Ill. App. 3d 658, 665-66 (1986), *People v. Horne*, 129 Ill. App. 3d 1066, 1074-75 (1984). The test is a culmination of points gleaned from various Illinois cases. See *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996) (discussing test). This court in *Rodriguez* acknowledged the existence of the appellate court test, but declined to address its merits. We cautioned, however, that "a court must not lose sight of the forest for the trees. The definition of an 'act' under the *King* doctrine remains simply what this court stated in *King*: 'any overt or outward manifestation which will support a different offense.' " *Rodriguez*, 169 Ill. 2d at 188.

After examining the record in the instant case, we believe that the adoption of the six-factor test is unnecessary to the disposition of this appeal. Under *Dixon*, each of Arlene's stab wounds could support a separate offense; however, this is not the theory under which the State charged defendant, nor does it conform to the way the State presented and argued the case to the jury.

A careful review of the indictment in this case reveals that the counts charging defendant with armed violence and aggravated battery do not differentiate between the separate stab wounds. Rather these counts charge defendant with the same conduct under different theories of criminal culpability. The armed violence count of the indictment charged defendant with committing aggravated battery against Arlene while he was armed with a knife that had a blade of over three inches. The aggravated battery counts charged defendant as follows:

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Nowhere in these charges does the State attempt to apportion these offenses among the various stab wounds.

We believe that to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair. When the State originally charged defendant with aggravated battery (great bodily harm), the State alleged that the great bodily harm was stabbing the victim with a knife. The State's original aggravated battery (deadly weapon) charge was predicated on allegations that defendant stabbed Arlene with a knife. The State's closing argument, with respect to both charges of aggravated battery, consisted on the following remarks:

"To sustain the charge of aggravated battery, the State must prove the following propositions: first, the defendant knowingly and intentionally caused bodily harm to Arlene Guerrero. We know he stabbed her three times. Second that he used a deadly weapon other than the discharge of [a] firearm. Ladies and gentlemen, this knife is a deadly weapon."

Then, when the prosecutor addressed armed violence, which was predicated on the offense of aggravated battery (great bodily harm), the assistant State's Attorney read the elements of the offense and said, "We

know that he stabbed Arlene Guerrero three times." After addressing all of the elements, the prosecutor stated, "each of these propositions has been proved." Thus, the State's theory at trial, as shown by its argument to the jury, amply supports the conclusion that the intent of the prosecution was to portray defendant's conduct as a single attack.

It has been held that what constitutes "great bodily harm" to support a charge of aggravated battery is a question of fact to be determined by the finder of fact. See *People v. Hadley*, 20 Ill. App. 3d 1072, 1077 (1974). Here, the State specifically argued to the jury that the three stab wounds constituted great bodily harm. The State never argued that only one of the stab wounds would be sufficient to sustain this charge. Again, it must be pointed out that the State *could have*, under our case law, charged the crime that way, and *could have* argued the case to the jury that way. The State chose not to do so, and this court cannot allow the State to change its theory of the case on appeal. It is possible that, although the jury found that all three stab wounds together constituted great bodily harm, the jury would not have considered any one of the stab wounds individually to constitute great bodily harm. This court will not invade the province of the jury and decide this question of fact.

In both *People v. Crum*, 183 Ill. App. 3d 473, and *People v. Ellis*, 143 Ill. App. 3d 892 (1986), the appellate court found that the charging instruments evinced the State's intent to treat the conduct of the defendants as single acts. Similarly, in this case, the charging instruments reveal that the State intended to treat the conduct of the defendant as a single act. In order to convict defendant, the State charged him with stabbing in four different ways, based on four different theories. Apart from the attempted murder charge, the State charged that defendant (i) committed aggravated battery because he caused the victim great bodily harm, (ii) committed aggravated battery because he used a deadly weapon, and (iii) committed armed violence because he committed an aggravated battery while armed with a dangerous weapon. The State made no attempt, however, to apportion these crimes among the stab wounds, and it is improper for this court to do so now on appeal.

Moreover, we believe that today's decision avoids several constitutional problems that might arise were we to agree with the State that multiple convictions are proper under these circumstances. We note that the United States and Illinois Constitutions both require that a defendant in a criminal prosecution be informed of the nature and cause of the accusation. U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8. Under Illinois law, a defendant has a fundamental right to be informed of the nature and cause of the criminal accusations against him so that he may prepare a defense and so that the charged offense may serve as a bar to subsequent prosecution arising out of the same conduct. *People v. Meyers*, 158 Ill. 2d 46, 51 (1994). If we were to agree with the State, defendant would not have known until the cause was on appeal that the State considered each of the separate stabs to be separate offenses, and therefore he would not have been able to defend the case accordingly.

We emphasize that in *Dixon*, this court held that each separate blow of a mop handle could support a separate conviction and that this remains a valid proposition of law. Today's decision merely holds that in cases such as the one at bar, the indictment must indicate that the State intended to treat the conduct of defendant as multiple acts in order for multiple convictions to be sustained.

Due to our disposition of this appeal, we do not reach the State's argument regarding lesser-included offenses.

## Conclusion

As noted, the appellate court ordered the circuit court to amend the mittimus in this matter to reflect one, not two, aggravated battery convictions and also affirmed the defendant's convictions for first degree murder and armed violence. However, for the reasons stated, the defendant's remaining aggravated

battery conviction should have been reversed. Therefore, the judgment of the appellate court is affirmed in part and reversed in part and the judgment of the circuit court is affirmed in part and reversed in part.

*Appellate court judgment affirmed in part and reversed in part;*

*circuit court judgment affirmed in part and reversed in part.*

JUSTICE GARMAN took no part in the consideration or decision of this case.

#### FOOTNOTES

1. The State, in the appellate court, conceded that one of the convictions should merge. In its brief in this court, the State asserts that it improperly conceded this argument at the appellate court level. Although the State now believes that the merger was not proper, it accepts "the fact that it has already been conceded."