

No. 1-10-3165

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 11
)	
DARNELL DEMARY,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment entered on defendant's convictions of unlawful possession of a weapon by a felon affirmed in part and reversed in part where evidence was sufficient to establish his possession of a firearm, but not ammunition; surplus conviction vacated under one-act, one-crime rule.
- ¶ 2 Following a bench trial, defendant Darnell Demary was found guilty of four counts of unlawful possession of a weapon by a felon (UPW), then sentenced as a Class X offender to concurrent terms of six years' imprisonment. On appeal, defendant contends that the State failed

to prove him guilty of UPW beyond a reasonable doubt, and that all but one of his convictions should be vacated under the one-act, one-crime rule.

¶ 3 The record shows, in relevant part, that about 8:30 p.m. on November 15, 2009, Cordaro Griggs, Charles Craft, and Tony Green (collectively, the group) were outside of Griggs' house at 1009 North Ridgeway Avenue, in Chicago, when defendant got out of a vehicle and brandished a gun at them. He was subsequently apprehended by police after a chase and brought to a showup where the group identified him. He and his co-defendant Derrick Andrews were then charged with multiple counts of armed robbery and UPW.

¶ 4 At trial, Griggs testified that on the night in question, he and his friends, "Money" and "Bud," were hanging out on the sidewalk in front of his house when a "pinkish" Crown Victoria pulled up, and one of the occupants exited the vehicle and asked if they had "weed." When Griggs responded that they did not, the individual pulled out a shiny revolver, which was "probably" silver, and took money from Bud's pockets. He then put the gun to Griggs' hip, went into his pockets, and took his cell phone. Meanwhile, the other occupant of the vehicle was "[j]ust sitting in there," and when the gunman returned to the car, they drove off.

¶ 5 Later, the group was riding in a car driven by a friend of Bud's when they saw "a car that looked like the car that robbed us" near Lake Street and Pulaski Road. They followed the car, and the driver flagged down police in the intersection, telling them that they had just been robbed. The police pursued the car while the group "stayed back." About 15 minutes later, the police had two individuals in separate cars and showed them to Griggs, but he did not tell police anything about them or identify them as the robbers. At trial, Griggs testified that he did not know if those were the individuals who robbed him because he "couldn't see them," and he could not make an in-court identification of the robber. Griggs testified that police showed him a bag containing guns, and that one of the guns looked like the gun used during the robbery.

¶ 6 Charles Craft testified that on the night in question, he, Green, and Griggs were "[j]ust chilling" near Griggs' house when a red four-door vehicle pulled up, and one of the two occupants got out and asked them for "weed." When Craft responded that he did not have any, the individual pulled out a silver revolver, and took \$180 from his pocket, a phone from Griggs, and more money from Green, then returned to the car and drove off. Craft was able to see the person who robbed him, but did not see the other occupant of the vehicle.

¶ 7 The group subsequently got into a black car belonging to a friend named "Sam," who was not present at the prior encounter, and, as Green was driving down Pulaski Road and approaching Lake Street, they observed the red car seen earlier and started to chase it. Griggs flagged down police and told them that the people in the red car had robbed them, and police pursued the red car while the group followed. After the suspects had been caught, Craft saw them in the back of a police car and identified them as the individuals who robbed him, but he could not identify those same individuals in court. He also testified that police never showed him a gun. On cross-examination, Craft stated that he could not see the robber's face because he was wearing a hood, and that he is not sure that the person who was in the back of the police car was the same person who robbed him.

¶ 8 Tony Green testified that he is currently incarcerated on a drug case, and acknowledged his 2009 conviction for unlawful use of a weapon by a felon, and 2008 conviction in a narcotics case. On the night in question, he, Craft, and Griggs were outside of Griggs' house when a red car pulled up, and the passenger got out and asked Craft for marijuana. Craft responded that he did not have any marijuana, and, at that point, Green dropped his phone and walked towards Thomas Street to speak with another friend. When he came back after the car had pulled away, Griggs and Craft told him that they had been robbed. Green testified that no money was taken from him.

¶ 9 The group was subsequently riding in a black Bonneville driven by Sam Howard when Craft pointed out a red car that "looked like the car that robbed us." Green testified that it was not the same vehicle as before, but that while they were at a stoplight doing nothing, "I guess the police, you know, felt probable cause to keep on them and got behind their car. And there was a high-speed chase." Green testified that no one in their vehicle said anything to police. At that point, Sam followed the police to see if the red car was the same one seen before, and eventually pulled up to where police had apprehended the occupants of the car. Griggs and Craft then exited the vehicle and identified those individuals, who were in the back of a squad car, as the robbers. Green testified that he did not identify anyone, and he only identified defendant in court as one of the suspects from the back of the squad car.

¶ 10 Chicago police officer Robert Lobianco testified that on the night in question, he and his partner Officer Bracho were on routine patrol in a marked vehicle and waiting at a stoplight at Lake Street and Pulaski Road when they observed a red four-door Mercury, and a black vehicle with three occupants who were screaming out "they just robbed us, they just robbed us, they got guns." The officers pursued the red Mercury for about five minutes with their lights and sirens activated. When the vehicle was brought to a stop in the east alley near 400 North Hamlin Avenue, defendant and Andrews exited the car from opposite sides of the car and fled on foot. Officer Lobianco chased Andrews, and Officers Thigis, Keel, and O'Shansky and Sergeant Burke chased defendant. After they were apprehended, the officers brought them to 409 North Hamlin Avenue for a showup where Griggs, Craft, and Green separately viewed them outside the squad car and identified defendant as the gunman.

¶ 11 Chicago police officer Rocco Pruger testified that on the night in question, he and his two partners received a call of an armed robbery and proceeded to the 400 block of North Hamlin Avenue, where a vehicle that had been pursued was stopped. After speaking with Officer

Lobianco, he and a partner searched the route of the vehicle on foot and found a brown canvas bag "[j]ust off the curb in the middle of the street" at 3802 West End Avenue. Officer Pruger opened the bag and discovered a silver revolver and a blue steel firearm inside of it.

¶ 12 The defense rested without presenting any evidence, and the State subsequently reopened its case and presented a stipulation that defendant has prior convictions for unlawful use of a weapon by a felon (UW) (No. 97 CR 11345) and armed robbery (No. 91 CR 8020). The trial court then announced its findings, noting:

"Something obviously has gone on between November 15th and the time of trial. I am not sure what the rhythm is on the street and why people say one thing one day and why they say something entirely different under oath at trial. I have my own strong suspicions and hunches about how those things occur and why they occur."

The court concluded that it could not "say that I know beyond a reasonable doubt that an armed robbery ever took place," and found defendant not guilty of armed robbery. However, it noted that defendant "did run away from the car," and that "[t]hose guns that were recovered came out of that car," and ultimately found defendant guilty on all counts of UPW. Thereafter, the court sentenced defendant as a Class X offender to six years' imprisonment.

¶ 13 In this appeal from that judgment, defendant first contends that the State failed to prove him guilty of UPW beyond a reasonable doubt. He claims that his convictions were "based on little more than the fact that a canvas bag containing two handguns was found on a street that Andrews and [he] had driven past some unspecified time before their arrest, and an unsworn hearsay statement uttered by somebody."

¶ 14 The State responds that it proved defendant guilty of UPW beyond a reasonable doubt where three eyewitnesses identified defendant as possessing a handgun, one identified the gun after it was recovered, and the trial court found the witnesses' recantations at trial inconsistent and incredible.

¶ 15 Initially, we note that defendant claims that two of his UPW convictions for possession of ammunition should be reversed because the State did not introduce any evidence at trial regarding firearm ammunition. The State concedes that these convictions are not supported by the record, and we agree. We therefore reverse defendant's convictions on counts 5 and 7 for unlawful possession of firearm ammunition by a felon.

¶ 16 That said, we turn to defendant's remaining UPW convictions concerning his possession of a firearm. Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after 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. Campbell*, 146 Ill. 2d 363, 374 (1992). It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *Campbell*, 146 Ill. 2d at 375.

¶ 17 To sustain defendant's conviction of UPW, the State was required to prove that defendant knowingly possessed a firearm after having previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008). Viewed in the light most favorable to the prosecution, the record shows that defendant is a twice convicted felon, and that on the evening of November 15, 2009, he got

out of a car in front of Cordaro Griggs' house at 1009 North Ridgeway Avenue and brandished a silver revolver at the group. The car that he was riding in was later observed by the group and pointed out to police, after which a chase ensued for nearly five minutes down various streets in the area. When the car was eventually stopped, defendant got out and fled on foot, but was soon apprehended and brought back for a showup where each member of the group positively identified him as the individual who had pulled a gun on them. In addition, police conducted a foot search along the route of the chase and recovered a brown canvas bag in the middle of one of those streets containing two guns, including a silver revolver which Griggs testified looked like the one used during the alleged robbery.

¶ 18 Although the three eyewitnesses (Griggs, Craft, and Green) recanted their identifications of defendant at trial, it is undisputed that those identifications were nonetheless admissible as substantive evidence since each witness testified at trial and was subject to cross-examination. 725 ILCS 5/115-12 (West 2008). In addition, defendant's flight from the vehicle in which he was riding after a five-minute police chase suggested his consciousness of guilt. *People v. Hart*, 214 Ill. 2d 490, 519 (2005). Finally, the record shows that police found a brown canvas bag containing two guns on the route of the police chase, and one eyewitness identified a silver revolver in the bag as looking like the gun used by defendant. In light of this evidence, we find that the evidence was sufficient to allow the trial court, as the trier of fact, to conclude that defendant was proved guilty of UPW beyond a reasonable doubt. 720 ILCS 5/24-1.1(a) (West 2008).

¶ 19 Defendant, however, disputes this conclusion. He maintains that the court relied on conjecture in finding that the canvas bag belonged to him because no one saw him dispose of it. We disagree. In making this claim, defendant has confused the concept of reasonable inference with conjecture. Here, the State presented evidence showing that defendant brandished a silver

revolver at three people, then later fled from police in a vehicle chase down various streets. The police foot patrol search of those streets shortly thereafter revealed a brown canvas bag on one of them which contained two firearms, including a silver revolver which looked like the gun he was seen with earlier in the evening. It was thus reasonable for the trial court to infer from these facts that the bag did not just happen to be there, but rather, that defendant disposed of it during his flight from police (*Sutherland*, 223 Ill. 2d at 242), and we find no basis for disturbing that finding here (*Campbell*, 146 Ill. 2d at 375).

¶ 20 Defendant also claims that the trial court erred in finding Officer Lobianco's testimony of the eyewitnesses' prior identifications of defendant to be credible, as opposed to the witnesses' testimony at trial, citing *People v. Arcos*, 282 Ill. App. 3d 870 (1996) and *People v. Reyes*, 265 Ill. App. 3d 985 (1993). In *Arcos*, 282 Ill. App. 3d at 871-72, this court reversed defendant's murder conviction where it was based on the largely uncorroborated written statement and grand jury testimony of a witness who disavowed his prior statements at trial. In *Reyes*, 265 Ill. App. 3d at 990-91, this court reversed defendant's attempted murder conviction where the only evidence of his guilt was the disavowed prior testimony of two witnesses.

¶ 21 Recently, this court has noted that our decision in *Arcos* turned on the specific facts of that case, and did not establish, as a matter of law, that a recanted prior inconsistent statement cannot support a conviction. *People v. Logan*, 352 Ill. App. 3d 73, 80 (2004), citing *People v. Zizzo*, 301 Ill. App. 3d 481 (1998). To the contrary, this court upheld a jury's finding that a witness' pretrial statement and grand jury testimony were more credible than her trial testimony, and found those prior statements sufficient to sustain defendant's murder conviction. *Logan*, 352 Ill. App. 3d at 80.

¶ 22 Here, the trial court clearly found the prior identifications of defendant made by Griggs, Craft, and Green more credible than their trial testimony. The initial identifications took place

just after the chase which they initiated, and were corroborated by the fact that a silver revolver, like the one defendant brandished at them earlier in the night, was recovered on the route he and his co-defendant drove while fleeing from police, which distinguishes this case from *Reyes*.

People v. Tolliver, 347 Ill. App. 3d 203, 219 (2004). Under these circumstances, we have no basis for interfering with the trial court's determination that the prior identifications of defendant by Griggs, Craft, and Green were more credible than their trial testimony, and find those identifications sufficient to sustain defendant's UPW convictions. *Logan*, 352 Ill. App. 3d at 80.

¶ 23 Defendant next contends that one of his two remaining UPW convictions must be vacated under the one-act, one-crime rule because both convictions are based on the same act of possessing a firearm. The State responds that the one-act, one-crime rule was not violated where defendant was charged with and convicted of separate counts of UPW for each weapon in his possession. In reply, defendant claims that where the indictment only alleged his possession of a firearm under different attendant circumstances, his convictions are deemed to have arisen from the same act for purposes of the rule.

¶ 24 Although largely overlooked by the parties, we note that defendant has not properly preserved this issue for review. To preserve a claim of trial error, both an objection at trial and a written post-trial motion raising the issue are required. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant did not raise a one-act, one-crime claim in his motion for a new trial or motion to reconsider sentence, and has thus forfeited the issue for review. *Enoch*, 122 Ill. 2d at 186.

¶ 25 Without acknowledging his forfeiture in this case, defendant claims that a surplus conviction is a plain error properly addressed for the first time on appeal, regardless of forfeiture. The plain error rule is a narrow exception to the waiver rule which allows a reviewing court to consider unpreserved claims of error where defendant shows that the evidence is closely

balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under both prongs, defendant bears the burden of persuasion, and he must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Thus, before addressing whether the plain error exception applies, we must first determine whether any error occurred. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009)

¶ 26 Under the one-act, one-crime rule, defendant may be convicted of only one crime resulting from a single act. *People v. Jimerson*, 404 Ill. App. 3d 621, 635 (2010). Thus, where the State intends to treat the conduct of defendant as multiple acts in order to sustain multiple convictions, it must so indicate that intent in the indictment. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

¶ 27 Here, the State presented evidence at trial establishing that defendant possessed two handguns on the night in question, which constitutes separate violations under the UPW statute. 720 ILCS 5/24-1.1(e) (West 2008). However, the State did not indicate in the indictment that it was seeking to prosecute defendant for possessing multiple firearms. Rather, count 4 of the indictment charged defendant with UPW for possessing *a firearm* after having previously been convicted of armed robbery in case No. 91 CR 8020, and of the same in count 6 of the indictment for possessing *a firearm* after having previously been convicted of unlawful use of a weapon by a felon in case No. 97 CR 11345. As neither of these charges refers to different firearms, we find that the indictment was insufficient to sustain multiple UPW convictions against defendant (*Crespo*, 203 Ill. 2d at 345), and that the court erred in entering convictions for two offenses. Having so found, we must determine whether the plain-error exception to the forfeiture rule applies. *In re Samantha V.*, 234 Ill. 2d at 378. Since a one-act, one-crime violation affects the integrity of the judicial process, we conclude that defendant has sustained his burden of showing

plain error under the second prong of the plain error test (*In re Samantha V.*, 234 Ill. 2d at 378-79), and we next consider the proper remedy.

¶ 28 In light of the one-act, one-crime violation noted above, defendant should be sentenced only on the most serious offense, and the less serious offense should be vacated. *In re Samantha V.*, 234 Ill. 2d at 379. When determining which offense is the most serious, we first consider the plain language of the statutes because common sense dictates that the legislature would prescribe greater punishment for the offense it deems most serious. *In re Samantha V.*, 234 Ill. 2d at 379. In the event the punishments are identical, we consider which offense has the more culpable mental state. *In re Samantha V.*, 234 Ill. 2d at 379.

¶ 29 Under the plain language of the operative statute, defendant's UPW convictions are both Class 2 felonies and have the same sentencing range. 720 ILCS 5/24-1.1(e) (West 2008). However, because of his criminal history, defendant is Class X mandatory (730 ILCS 5/5-4.5-95(b) (West 2008)), and the court sentenced him to the minimum term of six years' imprisonment on each conviction (730 ILCS 5/5-4.5-25(a) (West 2008)). The mental state for each conviction is also identical. 720 ILCS 5/24-1.1(a) (West 2008).

¶ 30 The supreme court has held that where it cannot be determined which of the convictions based on a single physical act is the more serious offense, the cause will be remanded for the trial court to make that determination. *People v. Artis*, 232 Ill. 2d 156, 177 (2009). Given the circumstances of this case, however, we find that remand is not required.

¶ 31 Under section 5-5-4 of the Unified Code of Corrections (730 ILCS 5/5-5-4 (West 2008)), defendant cannot receive a harsher sentence on remand than the one he has already received from the trial court unless the more severe sentence is based on defendant's conduct after the original sentencing. *People v. Durdin*, 312 Ill. App. 3d 4, 10 (2000). Given his mandatory Class X

status, defendant could not be sentenced to a lesser term than the six-year minimum imposed by the trial court.

¶ 32 As noted by defendant, the only distinction between counts 4 and 6 in this case is the underlying predicate felony conviction. In count 6, the predicate felony was a conviction for UUW (No. 97 CR 11345) for which defendant was sentenced to four years' imprisonment. In count 4, the predicate felony was an armed robbery conviction (No. 91 CR 8020), a Class X felony punishable by a term of 6 to 30 years' imprisonment (720 ILCS 5/18-2(b), 730 ILCS 5/5-4.5-25(a) (West 2010)). Based on this difference, we deem count 6 as the lesser category of offense, and vacate the judgment entered on defendant's UPW conviction predicated on his prior UUW conviction.

¶ 33 For the reasons stated, we affirm the judgment of the circuit court of Cook County finding defendant guilty of UPW for possession of a firearm (count 4), reverse defendant's UPW convictions based on his possession of ammunition (counts 5 and 7), and vacate his UPW conviction predicated on his prior UUW conviction (count 6).

¶ 34 Affirmed in part; reversed in part; vacated in part.