

No. 1-11-1561

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. 09 CR 18426
)	
MIGUEL BARRIERA,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Trial court did not impose an impermissible double enhancement when sentencing defendant as a Class 2 felon for unlawful use of a weapon by a felon where he had a prior conviction for burglary, a forcible felony.

¶ 2 Following a bench trial, defendant Miguel Barriera was convicted of aggravated battery with a firearm and unlawful use of a weapon by a felon (UUWF), then sentenced to respective, concurrent terms of 20 and 10 years in prison. On appeal, defendant does not contest the sufficiency of the evidence to sustain his convictions, but rather, contends that he was subjected

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to an improper double enhancement when the same prior felony conviction was utilized as an element of the offense and to elevate the classification of the UUWF offense from a Class 3 to a Class 2 felony. He thus requests that we reduce his conviction for UUWF to a Class 3 felony and remand his cause with instructions on resentencing.

¶ 3 The record shows that defendant was convicted on evidence showing that about 10 p.m. on September 25, 2009, he fired a gun at a group of people at a gas station on Pulaski Road and Grand Avenue in Chicago, resulting in injuries to Nicholas Mendoza.¹ Officer Yi, who was patrolling the nearby area at the time of the shooting, pursued the minivan in which defendant was traveling at a high rate of speed, and, in the process, saw defendant jump out of the van, remove a gun from his waistband, and throw it on the sidewalk. While another officer guarded the gun, Officer Yi pursued and captured defendant on foot.

¶ 4 The parties stipulated that a proper chain of custody was maintained on the gun and that testing revealed that a bullet recovered from Mendoza's shoe had been fired from that gun. Jeffrey Bell, who witnessed the shooting, identified defendant as the shooter at a lineup conducted about an hour after the shooting. Additional officers testified regarding the recovery of the gun, the investigation at the scene, and witness interviews. Defendant rested without presenting any testimonial evidence.

¶ 5 The trial court found defendant guilty of aggravated battery with a firearm, aggravated unlawful use of a weapon, UUWF, and aggravated battery on the public way. The trial court denied defendant's motion for a new trial, then sentenced him to concurrent, respective terms of

¹ The record reflects that the State *nolle prossed* all of the charges against defendant involving Miguel Jimenez, the second victim.

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20 and 10 years in prison for aggravated battery with a firearm, a Class X felony, and UUWF predicated on defendant's prior burglary conviction, a Class 2 felony. Defendant then filed a motion to reconsider sentence, which the trial court denied.

¶ 6 On appeal, defendant contends that his prior burglary conviction was used as an element of the UUWF offense of which he was convicted, then used again to elevate his punishment for that offense from a Class 3 felony to a Class 2 felony, in violation of the rule against double enhancements. Defendant concedes that he failed to include this issue in his motion to reconsider sentence, but maintains that review is warranted under the plain error rule set forth in Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). He maintains that sentencing issues are excepted from the doctrine of waiver because they affect a defendant's substantial rights.

¶ 7 The plain error doctrine 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). Accordingly, 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).

¶ 8 In general, a single factor cannot be utilized both as an element of an offense and as a basis upon which to impose a harsher sentence than otherwise would have been imposed for that offense. *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). Use of a single factor in this manner is known as a double enhancement. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). Double

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enhancement is allowed, however, where the legislature's intent to enhance the penalty for a crime is clear. *People v. Sharpe*, 216 Ill. 2d 481, 530 (2005). We review this question of statutory construction *de novo*. *Phelps*, 211 Ill. 2d at 12.

¶ 9 The applicable statute provides as follows:

"(e) Sentence. Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person, if sentenced to a term of imprisonment, shall be sentenced to no less than 2 years and no more than 10 years and any second or subsequent violation shall be a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 14 years. Violation of this Section by a person not confined in a penal institution *who has been convicted of a forcible felony *** is a Class 2 felony* for which the person shall be sentenced to not less than 3 years and not more than 14 years." 720 ILCS 5/24-1.1(e) (West 2008) (emphasis added).

¶ 10 Defendant acknowledges that in *People v. Powell*, 2012 IL App (1st) 102363, this court "construe[d] subsection 5/24-1.1(e) in a manner that would defeat his present argument," but maintains that *Powell* was wrongly decided. We disagree.

¶ 11 In *Powell*, this court addressed and rejected the same arguments that defendant raises here. In *Powell*, defendant was convicted of UUWF, which was predicated on a prior conviction for burglary, and then sentenced to 4 ½ years in prison. *Powell*, 2012 IL App (1st) 102363, ¶ 1. On appeal, this court affirmed the trial court's ruling, rejecting defendant's contention that his sentence was the result of an impermissible double enhancement because the trial court used his

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prior burglary conviction as an element of the offense and a sentence enhancement. *Powell*, 2012 IL App (1st) 102363, ¶¶ 1, 19. In doing so, this court found that the language of subsection 5/24-1.1(e) clearly expressed the legislature's intent to elevate the UUWF offense to a class 2 felony, with a corresponding penalty, where the offender has a previous conviction for a forcible felony, and noted that "once defendant was convicted of the Class 2 felony, no further enhancement occurred." *Powell*, 2012 IL App (1st) 102363, ¶¶ 11, 13.

¶ 12 We continue to find the reasoning in *Powell* viable, and likewise reject defendant's present argument that the legislature's intent to impose a more severe penalty under these circumstances is not clearly expressed. *Powell*, 2012 IL App (1st) 102363, ¶¶ 11-13. As in *Powell*, defendant at bar was convicted of UUWF predicated on his prior burglary conviction, a forcible felony (720 ILCS 5/2-8 (West 2008)), which, pursuant to the language of subsection 24-1.1(e), constitutes a Class 2 felony with a sentencing range of 3 to 14 years in prison (720 ILCS 5/24-1.1(e) (West 2008)). Consistent with the statute, the court sentenced defendant to 10 years' imprisonment.

¶ 13 We also reject defendant's interpretation of *People v. Owens*, 377 Ill. App. 3d 302 (2007) and *People v. Chaney*, 379 Ill. App. 3d 524 (2008), which this court distinguished in *Powell* as factually inapposite in that both cases involved a second enhancement where Class X penalties were imposed. *Powell*, 2012 IL App (1st) 102363, ¶ 14. That factual distinction applies here, where, unlike *Owens* and *Chaney*, defendant's prior conviction was not used to first enhance the charged offense to a higher class felony and then used to make defendant Class X eligible. *Powell*, 2012 IL App (1st) 102363, ¶ 17. In this instance, defendant's prior conviction, which the legislature specified constituted a Class 2 felony, was utilized once to serve as the basis of his

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offense. After which he was sentenced to a term falling within the range for Class 2 felonies; no further enhancement occurred. *Powell*, 2012 IL App (1st) 102363, ¶ 11.

¶ 14 We decline to deviate from our reasoning in *Powell*, which, as applied to this case, reflects that defendant was not subjected to an impermissible double enhancement. Because defendant failed to establish an error warranting plain error review, we find that defendant has forfeited this issue. *Hillier*, 237 Ill. 2d at 547. Having so found, we need not address defendant's argument in support of his request for remand with instructions on resentencing.

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 16 Affirmed.