

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).

2013 IL App (4th) 110868-U

NO. 4-11-0868

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
January 15, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
DANTE JAMES,	)	No. 10CF1102
Defendant-Appellant.	)	
	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

---

JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

### ORDER

- ¶ 1 *Held:* No error occurred when the trial court denied defendant's motion for a mistrial based on a juror's work on the apartment where the crime occurred where the record does not suggest the juror gained extra knowledge from being in the apartment and if the juror did, the information was not related to a contested issue at defendant's trial.
- ¶ 2 Since aggravated battery with a firearm only requires the victim receive an injury, the trial court's consideration of the fact the victim received a gunshot wound to her face as an aggravating factor was not erroneous.
- ¶ 3 Where the trial court did not sentence defendant to an extended term for unlawful use of a weapon by a felon, defendant cannot establish plain error from the court's alleged mistaken belief defendant was eligible for an extended-term sentence on that offense.
- ¶ 4 In April 2011, a jury found defendant, Dante James, guilty of two counts of aggravated battery and one count of unlawful use of a weapon by a felon. Defendant filed a motion for a new trial. At a joint hearing in July 2011, the McLean County circuit court denied

defendant's motion for a new trial and sentenced him to concurrent prison terms of 15 years for aggravated battery (the second aggravated battery count merged with the first) and 8 years for unlawful use of a weapon by a felon. Defendant filed a motion to reconsider his sentence, which the court denied in August 2011.

¶ 5 Defendant appeals, asserting the trial court erred by (1) denying his motion for a mistrial based on a juror's extraneous knowledge about the apartment where the crime occurred, (2) considering defendant's conduct caused serious harm as an aggravating factor in sentencing defendant for aggravated battery with a firearm when that fact was inherent in the offense, and (3) believing defendant was eligible for an extended-term sentence for unlawful use of a weapon by a felon in sentencing defendant on that crime. We affirm.

¶ 6 I. BACKGROUND

¶ 7 In November 2010, a grand jury indicted defendant by information with two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), one count of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), and one count of obstructing justice (720 ILCS 5/31-4(a) (West 2010)). Before defendant's trial, the trial court dismissed the obstructing-justice charge on the State's motion.

¶ 8 On April 11, 2011, the trial court commenced defendant's jury trial, and 12 jurors and an alternate were chosen. Before the attorneys gave their opening statements, an issue arose, and one of the jurors had to be excused for a prior commitment, resulting in no alternate jurors. The trial resumed on April 12, 2011, and the State first presented the testimony of Normal police officer Jacob Hoeniges, who was the first officer at the scene. He testified that on November 14, 2010, at around 2:10 a.m., he was dispatched to apartment eight at 1216 Major Street. When he

arrived at apartment eight, the front door was slightly ajar. Through the open door, Officer Hoeniges could hear two male voices talking and a female voice screaming and yelling. Officer Hoeniges opened the door and asked where the female was located. Officer Hoeniges described for the jury the layout and contents of the "very small" studio apartment. Inside apartment eight were two males, and Officer Hoeniges walked between them to get to the victim. Officer Hoeniges observed large amounts of blood in the bedroom and proceeded to the bathroom. There, he found the victim covered in blood in the bathtub. The bathroom also had large amounts of blood, and Officer Hoeniges described the bathroom. Officer Hoeniges observed the woman's face was "extremely swollen" and she had a small- to medium-sized gunshot wound on her chin.

¶ 9 Normal police officer Bradley Underwood testified he was the second officer on the scene and observed two males standing together about 40 to 50 feet from apartment eight. As Officer Underwood approached the men, one of them ran away. Officer Underwood identified defendant as the man that stayed. Defendant stated he was the victim's boyfriend and identified her as Maurkettia Starkey. Defendant told Officer Underwood he was not present when Starkey was shot. He explained he had left with another woman and received a call from his brother, Dorian James, telling him to come to the apartment because Starkey had been shot. Defendant agreed to go to the police station to speak with detectives, and Officer Underwood transported him to the station. At the station, Officer Underwood observed blood on defendant's hand, and defendant confirmed he had blood on his hand from holding Starkey.

¶ 10 Normal police officer Brian Williams testified he is a crime scene investigator and the evidence room manager. On the morning of November 14, 2010, he investigated the crime

scene at apartment eight. Officer Williams also described in more detail the layout and contents of the apartment and identified 13 photographs of the apartment, which the trial court admitted into evidence. The photographs were published to the jury in between direct and cross-examination of Officer Williams.

¶ 11 One of the State's witnesses was not available on April 12, 2011, and thus the trial was not completed that day. At the beginning of the trial on April 13, 2011, one of the jurors sent the trial court a note, stating he had replaced all of the flooring in apartment eight in February. In response, the court brought the juror into the courtroom for questioning. The court permitted the attorneys to also question the juror. The juror explained he and an assistant had removed the carpet from the apartment and installed a new carpet and pad as well as vinyl in the bathroom and kitchen. It took them around three hours to complete their work. The apartment had been recently painted, and the juror had not observed any traces of the crime on the walls or flooring. The juror indicated he had gotten paid a fair price, and it was not a bad job. The juror admitted he had gone home after the prior day's testimony and looked at the invoice to see if it was the same unit. The juror had worked on eight units on Major Street. The juror felt he could still be fair and impartial and could set aside the fact he had been in apartment eight.

¶ 12 When the juror was questioned by defense counsel, the following exchange took place:

"[DEFENSE COUNSEL]: The judge has told all potential jurors and all jurors who are sworn not to talk about this case and not to deliberate until it's time. And I believe among his instructions was also not to do any investigation on your own or any

research, and do you feel like if deliberations start, if you continue as a juror and you start deliberating and someone has a question about the layout of the property, that you would then offer your special knowledge of the [sic], of the property? Do you think you could talk to them about the layout and how the place is arranged?

[JUROR]: I mean, when we were sitting there and talking yesterday, it pretty much was explained to a T. They all know about the apartment and what it looks like.

[DEFENSE COUNSEL]: Do you understand that witnesses sit there and the jurors sit where your sitting?

[JUROR]: Correct.

[DEFENSE COUNSEL]: And jurors can't be witnesses, and witnesses can't be jurors?

[JUROR]: I understand that."

¶ 13 After the juror left the courtroom, defense counsel made a motion for a mistrial, asserting the juror had special knowledge of the premises where the crime occurred and would likely become a witness during deliberation. Defense counsel also refused to stipulate to a jury of less than 12. The trial court denied the motion for a mistrial, finding the juror's experience of being in the apartment did not really add anything to his knowledge of the case or affect his ability to be fair and impartial. The juror remained on the jury, and the testimony resumed.

¶ 14 Dorian testified that, on November 14, 2010, apartment eight belonged to his cousin, Bobby James, and Dorian was living with Bobby while Dorian was on parole. Defendant

and Starkey were visiting from Chicago and also staying at the apartment. On the evening of November 13, 2010, a gathering took place at apartment eight that included defendant and Starkey. That night, Dorian consumed a large amount of liquor and eventually passed out on the couch in the living-room area. Some time later, Dorian was awakened by a loud bang that sounded like a gunshot. Dorian got up and went to the bedroom area. There, he saw Starkey sitting on the end of the bed, defendant standing a few feet away, and a gun laying on the floor near the base of the bed. Dorian panicked because he was on parole, grabbed the gun, and ran outside. Dorian called 9-1-1 and hid the gun on the ground near a Dumpster that was behind the apartment complex. Dorian later pleaded guilty to obstruction of justice for hiding the gun and was currently in prison for that crime. When Dorian returned to the apartment, he found Starkey in the bathtub, and defendant was putting pressure and a towel on Starkey's face. Dorian then went back outside and was still there when the police arrived.

¶ 15 Normal police detective Ryan Ritter also described the layout and contents of apartment eight in his testimony. Detective Ritter took a statement from both Dorian and defendant. Dorian told the detective he was unaware of any disagreement between defendant and Starkey. Detective Ritter's testimony laid the foundation for the DVD of defendant's police interrogation, which the State played for the jury. A transcript of the interrogation was also admitted into evidence. During the first round of questioning, defendant again said his name was Dante Williams and stated he was not in the apartment at the time Starkey was shot. After about a 25-minute break, the questioning resumed, and defendant admitted he had used his father's name in case he had any warrants. Defendant eventually admitted he had found a gun in a coat in the closet at apartment eight while he was putting away some clothes. After Dorian had passed

out, he and Starkey had sex and ate. Defendant then stated he wanted to play Russian Roulette with the gun. To scare Starkey, defendant removed all of the bullets except one. Starkey did not want to play the game. Defendant believed the gun barrel turned clockwise, moving an empty chamber into the firing position. He lifted the gun up and pulled the trigger. The barrel went counterclockwise, and the lone bullet struck Starkey. Defendant denied pointing the gun at Starkey and denied intending to shoot her. After the shot fired, he dropped the gun and ran over to Starkey.

¶ 16 The parties stipulated Starkey suffered a fracture of the right lower jaw and a small bullet fragment was in that area. Moreover, several teeth in the area of the jaw fracture were also fractured.

¶ 17 During closing argument, defense counsel attempted to create reasonable doubt by noting the State did not produce the victim, the bullet, ballistics testing, and fingerprints from the gun. He also argued no reliable testimony was presented on who fired the gun and suggested defendant's statements to the police were coerced.

¶ 18 At the conclusion of the trial, the jury found defendant guilty on all three counts. Defendant filed a motion for a new trial, arguing (1) the State failed to prove him guilty beyond a reasonable doubt, (2) the trial court erred by denying his motion for a directed verdict, (3) the court erred in denying defense counsel's timely objections, (4) the jury's verdict was based on the State's witnesses' unreliable, biased, and self-serving testimony, (5) the State failed to produce a complaining witness, and (6) the verdict was based on facts that do not exclude every reasonable hypothesis consistent with defendant's innocence.

¶ 19 At a joint hearing in July 2011, the trial court denied defendant's motion for a new

trial and sentenced defendant to concurrent prison terms of 15 years for aggravated battery with a firearm and 8 years for unlawful use of a weapon by a felon. The court noted the sentence imposed on the second aggravated-battery-with-a-firearm count merged with the sentence on the first count. Defendant filed a motion to reconsider his sentence, arguing (1) his sentence did not comply with the Illinois Constitution (Ill. Const. 1970, art. I, § 11), (2) the court failed to give proper weight to the mitigating evidence presented at his sentencing hearing, and (3) the court erred by affording too great of weight to the aggravating evidence. After an August 31, 2011, hearing, the court denied defendant's motion to reconsider his sentence. On September 27, 2011, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606(d) (eff. Mar. 20, 2009). Accordingly, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 20

## II. ANALYSIS

¶ 21

### A. Motion for a Mistrial

¶ 22

Defendant first asserts the trial court erred by denying his motion for a mistrial based on the juror's personal knowledge of the crime scene and his investigation to confirm he had worked on the apartment where the crime occurred. Specifically, defendant asserts the court should have questioned all of the jurors to see if they were influenced by the juror's personal knowledge. The State asserts defendant forfeited this issue by failing to raise it in his motion for a new trial. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Defendant recognizes the forfeiture and asserts we should review the matter under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 23

The plain-error doctrine permits a reviewing court to consider unpreserved error

under the following two scenarios:

"(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 24 A reviewing court will not disturb a trial court's denial of a motion for mistrial absent a clear abuse of discretion. *People v. Nelson*, 235 Ill. 2d 386, 435, 922 N.E.2d 1056, 1083 (2009). A clear abuse of discretion occurs when "the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000). Our supreme court has held a trial court should exercise its discretion to grant a mistrial with great caution, only in urgent circumstances, and for very plain and obvious reasons. *People v. Laws*, 29 Ill. 2d 221, 225, 193 N.E.2d 806, 808 (1963). Moreover, a mistrial should be granted when "an error of such gravity has

occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *Nelson*, 235 Ill. 2d at 435, 922 N.E.2d at 1083. Accordingly, a jury's exposure to improper extraneous information does not warrant the automatic reversal of the jury verdict. *People v. Willmer*, 396 Ill. App. 3d 175, 181, 919 N.E.2d 1035, 1040 (2009). The defendant must establish prejudice by demonstrating (1) the extraneous information relates directly to something at issue in the case and (2) it may have influenced the verdict. *Willmer*, 396 Ill. App. 3d at 181, 919 N.E.2d at 1040. If the defendant does so, the burden then shifts to the State to establish the incident was harmless. *Willmer*, 396 Ill. App. 3d at 181, 919 N.E.2d at 1040-41. The jury's verdict can stand only if it is obvious the extraneous information did not prejudice the defendant. *Willmer*, 396 Ill. App. 3d at 181, 919 N.E.2d at 1041. Courts consider "whether the conduct at issue involved such a probability of resulting prejudice that the verdict must be deemed inherently lacking in due process." *Willmer*, 396 Ill. App. 3d at 181, 919 N.E.2d at 1041.

¶ 25 Defendant asserts the Third District's *Willmer*, 396 Ill. App. 3d 175, 919 N.E.2d 1035, provides guidance on the issue here. In that case, the defendant filed a posttrial motion with an affidavit by one of the jurors that indicated the juror had done independent research on the offense for which the defendant was convicted and shared the research with the other jurors and a different juror read bible verses to the other jurors during deliberations. *Willmer*, 396 Ill. App. 3d at 179, 919 N.E.2d at 1038-39. The trial court denied the posttrial motion without inquiring into exactly what extraneous information was shared with the jury, and thus the issue on review was whether an evidentiary hearing was warranted. Citing the standard in *People v. Kuntu*, 188 Ill. 2d 157, 161, 720 N.E.2d 1047, 1049 (1999), the Third District found the juror's

affidavit was sufficient to warrant an evidentiary hearing. *Willmer*, 396 Ill. App. 3d at 182, 919 N.E.2d at 1041. Specifically, it found the juror's "affidavit provided specific, detailed and nonconjectural evidence in support of defendant's position that the jury's verdict had been tainted by the jury's exposure to extraneous *prejudicial* information." (Emphasis added.) *Willmer*, 396 Ill. App. 3d at 182, 919 N.E.2d at 1041.

¶ 26 In this case, defendant fails to establish the extraneous information was prejudicial. Unlike in *Willmer*, the transcript of the trial court's questioning of the juror at issue reveals exactly what extraneous information the juror knew. The juror only had personal information about the flooring and layout of the apartment where the crime occurred as the juror indicated no evidence of the crime still remained when he worked in the apartment. Defendant fails to explain how that information (1) related directly to a matter at issue in this case and (2) may have influenced the verdict. Our review of the record shows the apartment's layout and flooring were not at issue in defendant's trial and had no impact on the crime. Since the extraneous information was not related to a contested issue at trial, the information could not have influenced the verdict. Moreover, defendant does not explain how the juror looking at his work records to confirm his recollection that he had worked on the apartment could be prejudicial to defendant's case. It is understandable the juror would want to make sure he had worked on the apartment before he brought the matter to the court's attention. The record gives no indication the juror was attempting to conduct his own investigation of the crime or to present additional evidence to the other jurors as in *Willmer*. Further, the record shows the State had presented both photographs and testimony describing the small, studio apartment where the crime occurred. Defendant does not demonstrate what other information beyond the evidence presented at trial the juror gained by

being at the apartment after the crime scene had been cleaned. Accordingly, we agree with the trial court's conclusion the juror's presence "in the apartment does not really add anything to his knowledge of the case or his ability to be fair and impartial."

¶ 27 Moreover, assuming *arguendo*, the juror had shared his flooring experience at the apartment with the other jurors as suggested by defendant, defendant still has not shown any prejudice because the flooring and layout information was not different from the evidence presented at defendant's trial and did not go to a contested issue at trial. Thus, an evidentiary hearing regarding what the other jurors might have known is unwarranted in this case.

¶ 28 Since defendant has failed to show the juror's extraneous knowledge was prejudicial, we find the trial court did not abuse its discretion by denying defendant's motion for a mistrial. Accordingly, no error occurred, and thus no further analysis of plain error is warranted. Moreover, since we have addressed the merits of defendant's challenge to the court's denial of his motion for a mistrial, defendant has not suffered any prejudice from his trial counsel's failure to include the issue in his posttrial motion, and thus defendant was not denied effective assistance of counsel by counsel's failure to raise the issue. See *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999) (finding ineffective assistance of counsel claims are reviewed under the standard in set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), under which a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant).

¶ 29 B. Aggravating Factor Inherent in the Offense

¶ 30 Defendant next argues the trial court erred by considering the fact defendant's conduct caused serious harm as a factor in aggravation because the factor is inherent in the

offense of aggravated battery with a firearm. The State also asserts defendant has forfeited this issue, and defendant again requests plain-error review. Accordingly, we begin our analysis by first determining whether any error occurred at all. See *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059.

¶ 31 The question of whether the trial court relied on an improper factor in imposing the defendant's sentence presents a question of law, requiring *de novo* review. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459, 463. A trial court errs when it considers an inherent element of the offense as an aggravating factor in sentencing. *People v. Carter*, 272 Ill. App. 3d 809, 813, 651 N.E.2d 248, 251 (1995). In other words, a single factor cannot be used both as an element of the offense and as a basis for imposing a harsher sentence than would have been imposed without it. *People v. Phelps*, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004). However, our supreme court has recognized the following:

"Sound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed. Certain criminal conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. Likewise, the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the

severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphasis in original.)  
*People v. Saldivar*, 113 Ill. 2d 256, 269, 497 N.E.2d 1138, 1143 (1986).

In *Saldivar*, 113 Ill. 2d at 272, 497 N.E.2d at 1144, the trial court did err in its consideration of harm to the victim as an aggravating factor in sentencing because it focused solely "on the end result of the defendant's conduct, *i.e.*, the death of the victim, a factor which is implicit in the offense of voluntary manslaughter."

¶ 32 Here, in discussing factors in aggravation, the trial court stated "[a]nd certainly [*sic*] the defendant's conduct here caused serious harm with the gunshot to the face of the victim." Under section 12-4.2(a) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-4.2(a) (West 2010)), "[a] person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm (1) causes *any* injury to another person[.]" (Emphasis added.) Defendant contends the injury to the victim's face was encompassed within the definition of "any injury," which is an inherent element of the offense. He further argues the trial court's comment did not indicate the court was "considering any special degree of harm beyond that which is an inherent element of aggravated battery with a firearm." We disagree.

¶ 33 In *People v. Ehrich*, 165 Ill. App. 3d 1060, 1073-75, 519 N.E.2d 1137, 1145-46

(1988), this court addressed *Saldivar* and the trial court's comments in sentencing the defendant for home invasion. Like aggravated battery with a firearm, an element of the home invasion statute was " 'any injury' to persons in a dwelling." *Ehrich*, 165 Ill. App. 3d at 1072, 519 N.E.2d at 1144 (quoting Ill. Rev. Stat. 1985, ch. 38, ¶ 12-11). This court noted "the intentional causation of even a slight physical injury is sufficient to support a home invasion conviction." *Ehrich*, 165 Ill. App. 3d at 1075, 519 N.E.2d at 1146. We pointed out not all home invasions involved the harm caused in that case, which was serious psychological trauma to young children. *Ehrich*, 165 Ill. App. 3d at 1075, 519 N.E.2d at 1146. Thus, this court concluded that, "[s]ince the home invasion which [the defendant] committed caused harm which is not the end result of all home invasions, the circuit court did not err in considering the harm caused by [the defendant]'s invasion of the [victim's] home as an aggravating factor in imposing sentence." *Ehrich*, 165 Ill. App. 3d at 1075, 519 N.E.2d at 1146.

¶ 34 As stated, aggravated battery with a firearm requires only the victim suffer "any injury." See 720 ILCS 5/12-4.2(a)(1) (West 2010). Defendant agrees that, even a slight injury, such as a scratch or bruise would meet the injury element of aggravated battery with a firearm. Thus, as with the home invasion in *Ehrich*, not all aggravated batteries with a firearm involve the serious harm of a bullet wound to the face. Likewise, the serious facial injury defendant inflicted upon his victim is not the end result of all aggravated batteries. See *Ehrich*, 165 Ill. App. 3d at 1075, 519 N.E.2d at 1146. Thus, this case is distinguishable from *Saldivar*, which involved voluntary manslaughter, an offense for which *all* voluntary manslaughters result in the victim's death. Accordingly, the court's comments about the serious harm and the victim receiving a gunshot to the face go to the degree and nature of the victim's injury and were properly consid-

ered as a factor in aggravation at sentencing. See *Saldivar*, 113 Ill. 2d at 269, 497 N.E.2d at 1143. Since no error occurred with this matter, we do not address the parties' arguments regarding plain error.

¶ 35

### C. Extended-Term Sentence

¶ 36

Defendant last asserts the trial court erred in sentencing defendant for unlawful use of a weapon by a felon because it mistakenly believed defendant was eligible for an extended-term sentence on that charge. Thus, he contends he is entitled to a new sentencing hearing. Defendant again failed to raise this issue in the trial court and asks us to review the matter under the plain-error doctrine. Citing this court's decision in *People v. Tyus*, 2011 IL App (4th) 100168, ¶¶ 86, 87, 960 N.E.2d 624, 639, the State contends defendant cannot establish plain error because the court did not sentence him to an extended term.

¶ 37

In general, a Class 3 felony is punishable by a prison term of two to five years and, when applicable, an extended term of 5 to 10 years. 730 ILCS 5/5-4.5-40(a) (West 2010). However, section 24-1.1(e) of the Criminal Code (720 ILCS 5/24-1.1(e) (West 2010)) provides a sentencing range of 2 to 10 years' imprisonment for unlawful use of a weapon by a felon, who is not in a penal institution. Thus, defendant's eight-year prison term for unlawful use of a weapon by a felon was within the range for a nonextended-term sentence for that offense. Accordingly, the record is not even clear the trial court was mistaken when it said defendant was eligible for an extended-term sentence as it could have been referring to the special sentencing range for unlawful use of a weapon by a felon. Moreover, even assuming the court sentenced defendant under a mistaken belief about extended-term eligibility, defendant cannot establish either prong of the plain-error doctrine because (1) the extended-term sentencing range for a Class 3 felony

was the same as the sentencing range for an unlawful-use-of-a-weapon-by-a felon violation and (2) the court did not sentence defendant to an extended-term (see *Tyus*, 2011 IL App (4th) 100168, ¶ 86, 960 N.E.2d at 639).

¶ 38 Accordingly, we find defendant is not entitled to a new sentencing hearing for his unlawful-use-of-a-weapon-by-a-felon conviction.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the McLean County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 41 Affirmed.