

1-12-1330

Criminal Code of 1961 (Criminal Code) (720 ILCS 5/24-1.1(a) (West 2010)). Defendant was sentenced to 10 years' imprisonment pursuant to the mandatory Class X sentencing provision in section 5-4.5-95(b) of the Unified Code of Corrections. 730 ILCS 5/5-4.5-95(b) (West 2010). The parties agree that this sentence should be vacated and the matter must be remanded for resentencing because the trial court improperly sentenced defendant as a Class X offender. *Id.* The parties, however, dispute whether defendant should be resentenced as a Class 3 or Class 2 offender. On appeal, Williams contends he was not provided with notice pursuant to section 111-3(c) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 111-3(c) (West 2010) as his prior felony conviction of robbery was used both to enhance his sentence and as an element of the offense and, therefore, on remand he must be sentenced as a Class 3 offender. For the reasons which follow, we vacate defendant's Class X sentence, find defendant was properly convicted of a Class 2 felony, and remand the matter for defendant to be resentenced as a Class 2 offender.

¶ 3

BACKGROUND

¶ 4 The State charged defendant with 16 counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2010) and three counts of U UW by a felon (720 ILCS 5/24-1.1(a) (West 2010) by information. Fourteen of the counts were nol-prossed by the State. The State proceeded on counts three and 15. Count three charged:

"[T]hat on or about September 3, 2010, at and within the County of Cook Antwon D[.] Williams committed the offense of aggravated unlawful use of a weapon in that he, knowingly carried on or about his person, a firearm, at a time when he was not on his

own land or in his own abode or fixed place of business, and the firearm possessed was uncased, loaded and immediately accessible at the time of the offense, in violation of 720 ILCS 5/24-1.6(a)(1)/(3)(A) of the Illinois Compiled Statutes 1992, as amended, and the State shall seek to sentence Antwon Williams as a Class 2 offender in that he has previously been convicted of a felony to wit: robbery under case number 93CF-2312."

Count 15 charged:

"[T]hat on or about September 3, 2010 at and within the County of Cook Antwon D[.] Williams committed the offense of unlawful use or possession of a weapon by a felon in that he, knowingly possessed on or about his person any firearm, to wit: a .38 caliber revolver, after having been previously convicted of the felony offense of robbery under case number 93CF-2312, under the laws of the State of Illinois, in violation of Chapter 720 Act 5 Section 24-1.1(a) of the Illinois Compiled Statutes 1992 as amended."

¶ 5 Detective Major Coleman (Coleman) of the Dolton police department and the only witness to testify at trial testified that at 7:40 p.m. on September 3, 2010, he was a passenger in an unmarked police vehicle driven by his partner, Detective D. Griffin (Griffin).¹ While traveling along 144th Street just west of Woodlawn in Dolton, Coleman observed an African-American male walking on the sidewalk. Coleman identified the individual as defendant in court. Coleman testified he observed defendant adjust the waistband of his pants, revealing the

¹ The record does not contain Griffin's first name.

butt of a handgun.² Griffin drove the police vehicle toward the defendant and Coleman then exited the automobile and announced himself as a police officer. Defendant began to run and as he fled defendant grabbed what Coleman could "clearly" identify as a handgun. Coleman commenced pursuit of defendant on foot while Griffin pursued defendant in the police vehicle.

¶ 6 While in pursuit, Coleman observed defendant reach into his waistband, remove the handgun, and throw it into a yard. Colman further testified he observed the handgun fall into the grass. Thereafter, defendant ran across an alley, jumped over a fence, and was caught hiding in some bushes in the front yard of a residence. Coleman then detained defendant and placed him in the police vehicle. Thereafter, Coleman retraced his footsteps to locate the weapon, which he recovered in the grass where he observed defendant throw it. Upon obtaining the handgun, Coleman broke the cylinder open and observed six live rounds in the weapon.

¶ 7 On cross-examination, Coleman testified he was in his tactical uniform during the incident. The uniform consisted of a bullet-proof vest with the word "police" on the back with his badge placed on the front of his vest. Coleman testified it was still daylight when he observed defendant, however, some street lights may have been illuminated. Coleman further testified he observed half of the handle of the handgun from more than two, but less than 20 feet away when he was inside the police vehicle. In addition, Coleman testified that although he submitted the ammunition and handgun to be tested for latent fingerprints, no report was ever returned from the crime lab.

² On cross-examination Coleman testified that the "butt" of the handgun is part of the handle of the handgun.

¶ 8 At the conclusion of Coleman's testimony and outside the presence of the jury, the parties stipulated that defendant had previously been convicted of a felony offense. The trial court admitted into evidence a certified copy of defendant's prior robbery conviction without objection.³ Thereafter, the State rested. Defense counsel moved for a motion for directed finding, which was denied by the trial court. The defense rested without presenting any evidence.

¶ 9 Following closing arguments and jury instructions, the jury deliberated and found defendant guilty of aggravated unlawful use of a weapon and UUW by a felon. The trial court denied defendant's motion for a new trial.

¶ 10 At sentencing, the State asserted that defendant qualified for mandatory Class X sentencing of between six and 30 years' imprisonment. The State provided certified copies of defendant's 1993 Class 2 robbery conviction and a 2003 Class 1 manufacture and delivery of a controlled substance conviction.⁴ Defendant agreed he "just barely" qualified as a Class X offender, but presented no witnesses in mitigation.

¶ 11 After considering the presentence investigative report, evidence in aggravation and mitigation, the arguments of counsel, and the evidence at trial, the trial court determined that defendant was a mandatory Class X offender and sentenced him to 10 years' imprisonment in the Illinois Department of Corrections with three years of mandatory supervised release. The trial

³ The record on appeal is devoid of defendant's certified conviction.

⁴ None of these certified convictions are contained in the record on appeal.

court merged defendant's aggravated unlawful use of a weapon count with the UUW by a felon count. Thereafter, defendant made an oral motion to reconsider sentence wherein he requested the trial court reduce his sentence based on the fact that he had not previously been convicted of a Class X felony and his potential for rehabilitation was great. The motion was denied by the trial court. This appeal timely followed.

¶ 12

ANALYSIS

¶ 13 The parties agree that the matter must be remanded for resentencing because the trial court improperly sentenced defendant as a Class X offender. We agree that the trial court improperly sentenced defendant as a Class X offender because the elements needed to sentence defendant in the Class X range were not met. 730 ILCS 5/5-4.5-95(b) (West 2010). In order to sentence defendant as a Class X offender, the State must present evidence that defendant was previously convicted of two Class 1 or Class 2 offenses. *Id.* In this case, the State established defendant had a 1993 Class 2 robbery conviction and a 2003 Class 1 manufacture and delivery of a controlled substance conviction. The prior robbery conviction was also used to establish an element of the present UUW by a felon offense. The application of a prior conviction to establish an element of UUW by a felon and then the subsequent application of the same prior felony conviction to sentence defendant as a Class X offender is improper double enhancement. See *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004) (double enhancement occurs when a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed). Accordingly, we agree with the parties that defendant's sentence must be vacated and his cause remanded for resentencing.

¶ 14 The issue remains, however, as to whether defendant should be resentenced as a Class 2 or Class 3 offender. Although the trial court has discretion to impose a sentence, we review this issue *de novo* because it involves a question of law. *People v. Easley*, 2014 IL 115581, ¶ 13.

¶ 15 Defendant contends he was improperly convicted of a Class 2 UUC by a felon because the State failed to give him notice pursuant to section 111-3(c) of the Code (725 ILCS 5/111-3(c) (West 2010)) that it intended to seek an enhanced Class 2 sentence. The State responds that it did not violate section 111-3(c) of the Code because under section 24.1-1(e) of the Criminal Code (720 ILCS 5/24-1.1(e) (West 2010)), a Class 2 sentence is the only possible sentence defendant can receive and thus is not an "enhanced sentence." The State argues defendant was on notice that he was facing a Class 2 felony.

¶ 16 Initially, we note that defendant acknowledges he failed to preserve this issue for review. He asserts, however, that his claim of error is nevertheless reviewable because the error implicated his substantial rights and is thus subject to plain error review. Forfeited claims of sentencing error may be reviewed under the plain-error doctrine. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18. "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was so closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under both prongs of the plain error rule the burden of persuasion remains on the defendant. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 30. Before we consider application of the plain-error doctrine, however, we must determine whether his conviction as a Class 2 offender was error. *People v. Staple*, 402 Ill. App. 3d 1098, 1105 (2010); *Nowells*, 2013 IL App

1-12-1330

(1st) 113209, ¶ 20 (quoting *People v. Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 17 Defendant contends error was committed because he was improperly convicted as a Class 2 offender where he was not provided notice pursuant to section 111-3(c) of the Code (725 ILCS 5/111-3(c) (West 2010)) that the State intended to seek a Class 2 sentence. Section 111-3(c) provides:

"(c) When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c) (West 2010).

The purpose of section 111-3(c) is "to ensure that a defendant received notice, before trial, of the *offense* with which he is charged." (Emphasis in original.) *People v. Jameson*, 162 Ill. 2d 282, 290 (1994).

¶ 18 Our supreme court recently addressed whether the State is required to notify a defendant pursuant to section 111-3(c) of the Code of its intent to seek an enhanced sentence in *People v.*

Easley, 2014 IL 115581. In *Easley*, the defendant was charged with aggravated unlawful use of a weapon and UUW by a felon in violation of section 24-1.1(a) of the Criminal Code (720 ILCS 5/24-1.1(a) (West 2008)). *Id.* ¶ 10. After a bench trial, the trial court found the defendant guilty of aggravated unlawful use of a weapon and UUW by a felon and merged all counts into the UUW by a felon count. *Id.* The defendant was sentenced to nine years in prison as a Class 2 offender based on his prior conviction for UUW by a felon. *Id.* Before the appellate court, the defendant asserted that the trial court improperly sentenced him as a Class 2 offender where the State charged him with a Class 3 offense and did not provide notice that it intended to charge him with an enhanced Class 2 offense, in violation of section 111-3(c) of the Code of Criminal Procedure. *Id.* ¶ 11. The appellate court vacated defendant's Class 2 sentence and remanded the matter to the trial court with directions to sentence defendant as a Class 3 offender, concluding the defendant did not receive notice pursuant to the statute. *Id.*

¶ 19 Our supreme court held that "notice under section 111-3(c) is not necessary when the prior conviction is a required element of the offense." *Id.* ¶ 19. The court reasoned:

"In construing the language of section 111-3(c), it is clear that the notice provision applies only when the prior conviction that would enhance the sentence is not already an element of the offense. The language of section 111-3(c) states that 'the fact of such prior conviction and the State's intention to seek an enhanced sentence *are not elements of the offense* and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.' (Emphasis added.) [Citation.] This language necessarily implies that section 111-3(c) applies only when the prior conviction

is not an element of the offense." *Id.*

¶ 20 Applying this reasoning to the facts of the case, our supreme court explained that,

"[t]he indictment in this case alleged that defendant was guilty of unlawful use of a weapon by a felon in that he was previously convicted of unlawful use of a weapon by a felon. The section 111-3(c) notice provision clearly does not apply in this case because the State did not seek to enhance defendant's sentence with his prior conviction. Rather, as alleged in the indictment, defendant's Class 2 sentence was the only statutorily allowed sentence under section 24-1.1(e) of the Criminal Code (720 ILCS 5/24-1.1(e) (West 2008). Defendant could not have been given a Class 3 sentence under the applicable sentencing statute." *Id.* ¶ 22.

¶ 21 In support of its determination, our supreme court found *Nowells*, 2013 IL App (1st) 113209, persuasive. In *Nowells*, the defendant was convicted of UUW by a felon and sentenced as a Class 2 offender based on his prior felony for delivery of a controlled substance. *Id.* ¶¶ 1, 3. The defendant appealed, arguing he was improperly sentenced as a Class 2 offender where the State failed to give him proper notice pursuant to section 111-3(c) of the Code that it was charging him with an enhanced Class 2 offense. *Id.* ¶ 17. The *Nowells* court concluded the section 111-3(c) notice provision did not apply because "the State did not seek to enhance the defendant's sentence; as alleged in the indictment, defendant's Class 2 sentence was the only statutorily allowed sentence available in this situation." *Id.* ¶ 27.

¶ 22 Here, defendant was convicted of UUW by a felon pursuant to section 24-1.1(a) of the Criminal Code. To prove UUW by a felon, the State must establish that the defendant knowingly

1-12-1330

possessed a weapon or ammunition and that the defendant had previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). Section 24-1.1(e) of the Criminal Code states in relevant part:

"(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 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, a felony violation of Article 24 of this Code or of the Firearm Owners Identification Card Act, stalking or aggravated stalking, or a Class 2 or greater felony under the Illinois Controlled Substances Act, the Cannabis Control Act, or the Methamphetamine Control and Community Protection Act is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years.*" (Emphasis added.) 720 ILCS 5/24-1-1(e) (West 2010).

A forcible felony includes robbery. 720 ILCS 5/2-8 (West 2010).

¶ 23 In the present case, defendant was charged by information, which stated in pertinent part:

"[T]hat on or about September 3, 2010 at and within the County of Cook Antwon D[.] Williams committed the offense of unlawful use or possession of a weapon by a felon in that he, knowingly possessed on or about his person any firearm, to wit: a .38 caliber revolver, after having been previously convicted of the felony offense of robbery under

case number 93CF-2312, under the laws of the State of Illinois, in violation of chapter 720 act 5 section 24-1.1(a) of the Illinois compiled statutes 1992 as amended."

As written, defendant's information alleged that defendant was guilty of UUW by a felon in that he was previously convicted of robbery, a forcible felony. Based on his information, a Class 2 sentence was the only sentence defendant could receive. Accordingly, the State was not required to provide notice pursuant to section 111-3(c) of the Code. *Easley*, 2014 IL 115581, ¶ 19; *Nowells*, 2013 IL App (1st) 113209, ¶ 27; 720 ILCS 5/24-1.1(e) (West 2010). We conclude no error occurred. Defendant's conviction of a Class 2 felony was proper and, on remand, he must be resentenced as a Class 2 offender. *Easley*, 2014 IL 115581, ¶ 26.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, we vacate defendant's Class X sentence and remand the matter for defendant to be resentenced as a Class 2 offender. We affirm the judgment of the trial court in all other respects.

¶ 26 Affirmed in part; vacated in part; and remanded.