

No. 1-12-1498

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

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 11 CR 11462
)	
KENNETH BERTUCCI,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concur in the judgment.

ORDER

¶ 1 *Held:* Where defendant's conviction for unlawful use of a firearm by a felon was predicated on a forcible felony, his sentence as a class 2 felon was not an impermissible double enhancement.

1-12-1498

¶ 2 Following a bench trial, defendant Kenneth Bertucci was convicted of unlawful use of a weapon by a felon (UUWF) and sentenced to three years' imprisonment and two years of mandatory supervised release (MSR). On appeal, defendant contends that he was improperly sentenced as a class 2 felon because his prior felony burglary conviction was used as both an element of the offense and again as a factor to enhance his sentence to a class 2 felony, violating the prohibition against double enhancement. Because defendant has completed his prison sentence, he requests that we issue a corrected mittimus reducing his UUWF conviction to a class 3 felony and reduce his MSR term to one year. We affirm.

¶ 3 BACKGROUND

¶ 4 Following a bench trial, defendant was convicted of unlawful use of a weapon by a felon (UUWF) in violation of section 24-1.1(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.1(a) (West 2010)). The following relevant evidence was adduced at trial. Defendant was arrested and charged with UUWF after police officers observed him in possession of a handgun during a traffic stop. The indictment stated that defendant "knowingly possessed on or about his person a firearm, after having been previously convicted of the felony offense of burglary." The State offered testimony from the arresting officers that they observed defendant driving without wearing his seatbelt, and after stopping his vehicle, they observed defendant in possession of a handgun. The State also presented as evidence a certified copy of defendant's prior conviction for burglary.

¶ 5 The trial judge found defendant guilty of UUWF predicated on his prior burglary conviction. The court indicated that because defendant's burglary conviction was a forcible

1-12-1498

felony, he would be sentenced as a class 2 felon, and he was sentenced to three years' imprisonment. Defendant filed a posttrial motion, which was denied. This appeal followed.

¶ 6

ANALYSIS

¶ 7 On appeal, defendant contends that his prior felony burglary conviction was used as an element of the UUWF offense of which he was convicted, and was then used a second time to upgrade his sentence for that offense from a class 3 to a class 2 felony, in violation of the rule against double enhancement. While defendant concedes that he failed to preserve this argument by challenging the alleged double enhancement in the court below, defendant urges us to review the issue under the plain error doctrine.

¶ 8 The plain error doctrine allows review of an unpreserved error affecting substantial rights in two circumstances. "In the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was 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). The defendant bears the burden of persuasion under both prongs of the test. *Hillier*, 237 Ill.2d at 545. However, before determining whether the plain error exception applies, we must first determine whether any error in fact occurred. *In re Samantha V.*, 234 Ill.2d 359, 368 (2009).

¶ 9 As a rule of statutory construction, there is a general prohibition against double enhancement, which occurs when a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than would otherwise have been imposed. *People v. Guevara*, 216 Ill.2d 533, 545 (2005); *People v. Powell*, 2012 IL App (1st) 102363, ¶ 8. However, the determination of criminal conduct and the penalties attached for such conduct is a function of the legislature. *People v. Taylor*, 102 Ill. 2d 201, 206 (1984). The legislature has the authority to

1-12-1498

enact statutory provisions that enhance a crime or the range of punishment applied when the offense is committed. *People v. Thomas*, 171 Ill. 2d 207, 233 (1996). Thus, where the legislature clearly expresses its intention to enhance the penalty based on some aspect of the offense, an exception to the prohibition against double enhancement exists. *Id.* To determine whether the legislature intended such an enhancement, we must look to the statute itself. *People v. Rissley*, 165 Ill. 2d 364, 390 (1995). Because this issue involves statutory construction, the standard of review is *de novo*. *Powell*, 2012 IL App (1st) 102363, ¶ 8.

¶ 10 Defendant was charged with UUWF under section 24-1.1(a) of the Code, which states: “It is unlawful for a person to knowingly possess on or about his person any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction.” 720 ILCS 5/24-1.1(a) (West 2010).

He was sentenced as a class 2 felon pursuant to Section 24-1.1(e), which states:

“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 ***. 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 sentence to not less than 3 years and not more than 14 years.” 720 ILCS 5/24-1.1(e) (West 2010).

¶ 11 The prior felony used to convict defendant under this section was a prior conviction for burglary, which is a forcible felony. Burglary is also a forcible felony under section 2-8 of the

1-12-1498

Code and satisfied the statute's requirement for sentencing defendant as a class 2 felon. 720 ILCS 5/2-8 (West 2010).

¶ 12 Nevertheless, defendant contends that this was an impermissible double enhancement. We addressed the very issue raised by defendant in *People v. Powell*, 2012 IL App (1st) 102363. In *Powell*, we held that the language of the UUWF statute shows that the legislature intended to upgrade the class of the offense and the applicable penalty on the basis of some aspect of the offense; namely, the type of felony committed. *Powell*, 2012 IL App (1st) 102363, ¶ 11. Furthermore, we found that “[o]nce defendant was convicted of the class 2 felony, no further enhancement occurred.” *Id.*

¶ 13 Defendant argues that his previous conviction for burglary was impermissibly used twice: first as an underlying element to charge him with UUWF, and again to upgrade his sentence to a class 2 felony. However, as we explained in *Powell*, the defendant's argument is flawed. Section 24-1.1(e) does not present a two-step process for charging and sentencing. “Defendant's prior burglary conviction elevated his commission of unlawful use of weapons from a class A misdemeanor to a class 2 felony, not to a class 3 felony, and left the trial court with no option but to sentence defendant as a class 2 felon.” *Id.* at ¶ 12. The trial court did not impermissibly enhance defendant's sentence; rather, it imposed the penalty established by the legislature. *Id.*

¶ 14 Defendant argues that we erred in *Powell* by mistakenly construing subsection 5/24-1.1(e) as creating two mutually exclusive categories of UUWF offenders. He argues that *Powell* conflicts with the Illinois Supreme Court's decision in *People v. Robinson*, 232 Ill.2d 98 (2008), which held that if the legislature had intended to create two distinct offenses, it would have clearly done so. However, defendant's reliance on *Robinson* is misplaced. *Robinson* analyzed

1-12-1498

whether a defendant's conviction could stand if the offense for which he was convicted was not charged in the indictment. It focused on whether "involuntary manslaughter of a household or family member" was one offense with a sentencing enhancement to reflect the relationship of the victim, or whether involuntary manslaughter and involuntary manslaughter of a family member were two distinct offenses. If the latter, as the defendant argued, then the defendant would have been impermissibly convicted of an uncharged offense. The supreme court held that there was one offense of involuntary manslaughter and the fact that the victim was a family member resulted in an enhanced sentence. It held that the legislature gave no indication that it intended to create two separate offenses.

¶ 15 Similarly, in this case, we reject the defendant's contention that *Powell* interpreted section 24-1.1(e) as creating two distinct offenses: one for those found guilty of UUWF whose prior convictions were forcible felonies, and another for those whose prior convictions were not. Rather, as in *Robinson*, UUWF involving a forcible felony results in a sentence enhancement. Thus, *Robinson* actually supports the holding in *Powell*.

¶ 16 Finally, defendant contends that in *Powell* we did not properly distinguish *People v. Owens*, 377 Ill. App. 3d 302, 302-06 (2007) or *People v. Chaney*, 379 Ill. App. 3d 524, 529 (2008). *Powell* does in fact discuss and distinguish these cases, both of which included convictions under the UUW statute where a prior felony was used to enhance the class of the offense from lower class felony to a class 2 felony and was then used again to enhance the defendant's sentence to a mandatory class X sentence. *Id.* at 543. Unlike *Owens* and *Chaney*, there was no additional enhancement here after imposing defendant's class 2 felony sentence. *Id.* Rather, as we noted in *Powell*, the UUWF statute "reflects the General Assembly's intent to

1-12-1498

enhance the class of felony, with its concomitant harsher sentencing range, for felons in possession of a weapon who have committed a *forcible* felony in the past.” (Emphasis in original.) *Id.* at ¶17.

¶ 17

CONCLUSION

¶ 18 For the reasons stated above, the sentence imposed by the trial court was proper.

Because we find that the trial court did not commit error in sentencing defendant, there can be no plain error. See *In re Samantha V.*, 234 Ill.2d at 368. Accordingly, we decline to issue a corrected mittimus reducing defendant’s UUWF conviction to a class 3 felony and his MSR term to one year.

¶ 19 Affirmed.