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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff- Appellee,	)	
	)	
v.	)	No. 09 CR 7765
	)	
TONY MARSHALL,	)	
	)	The Honorable
Defendant-Appellant.	)	Joseph M. Claps,
	)	Judge, presiding.
	)	

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PRESIDING JUSTICE HYMAN delivered the judgment of the court.  
Justices Neville Mason concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant acquiesced in convictions for armed robbery with a dangerous weapon other than a firearm when he was charged with armed robbery with a firearm, and convictions do not constitute plain error to overcome forfeiture. Mittimus is corrected to properly reflect offense
- ¶ 2 Following a bench trial, defendant Tony Marshall was found guilty of three counts of armed robbery and of aggravated battery and sentenced to concurrent prison terms of eight and one-half years for each armed robbery and three years for aggravated battery. On appeal,

Marshall contends that the court erred by convicting him of armed robbery with a dangerous weapon other than a firearm because he was charged with armed robbery with a firearm and the former is not a lesser-included offense of the latter. But Marshall acquiesced in his convictions for armed robbery with a dangerous weapon other than a firearm, and any error was not unfair to Marshall and did not affect the integrity of the judicial process. Also, the parties agree that defendant's mittimus must be corrected to properly reflect one of his convictions.

¶ 3

### BACKGROUND

¶ 4

Marshall and codefendant were charged by information with armed robbery, various firearm offenses, aggravated battery, and aggravated unlawful restraint, all allegedly committed on April 11, 2009. The three armed robbery counts alleged that they took money, cigarettes, and a lighter from Christian Centeno, money from Jose Navas, and money, a cellular telephone, and a wallet and its contents from Angel Diaz-Ramos, all by force or threat of force while "armed with a dangerous weapon, to wit: a firearm." 720 ILCS 5/18-2(a)(2) (West 2010). The complaint for preliminary examination had alleged that Marshall took money from the victims "while armed with a firearm" and "while his accomplice was armed with a dangerous weapon, a Baretta [sic] 9mm handgun used as a bludgeon."

¶ 5

At trial, the victims, Centeno, Diaz, and Navas testified that they were employees or, in Navas' case, a friend of the owner of the liquor store where the robberies occurred. As the liquor store closed, around 3 a.m., Marshall and codefendant approached them. Codefendant showed the victims a gun, and Marshall was also holding a gun as both defendants took items from the victims' pockets. When codefendant ordered the victims into a nearby alley, Nava told the other victims to run and then struggled with codefendant for his gun. Marshall struck Nava on the back of the head with his gun, and then both defendants struck him repeatedly until a passerby in

a car started shouting and honking her horn, causing them to flee. The police were called to the area and found defendants; codefendant discarded a loaded pistol during his unsuccessful flight, and Marshall was found hiding in a garbage can while in possession of a wallet, lighter, and money. But the testimony conflicted as to where the pistol was found: one officer testified that the weapon was found over a block from where defendant was arrested while another prepared a report stating that the gun was found next to defendant's garbage can. In a lineup, the victims identified Marshall and codefendant as the robbers and identified their recovered property. At trial, Navas and Centeno identified the recovered pistol as that held by codefendant during the robbery.

¶ 6 The court found Marshall guilty of aggravated battery and all three counts of armed robbery, and not guilty of all other charges. The court linked Marshall to the robbery by the items found on him during his arrest, but the evidence of the location of the gun caused the court to "question whether or not that was the firearm or if any firearm was used" while "something of a dangerous nature, a dangerous weapon" had been used to injure Navas "so I'm entering a finding of guilty [of armed robbery while] armed with a dangerous weapon other than a firearm, removing the add-on."

¶ 7 Marshall's general post-trial motion was denied without reference in the motion, argument, or ruling to the distinction between the information alleging armed robbery with a firearm and the court's findings of armed robbery with a dangerous weapon other than a firearm.

¶ 8 Following arguments in aggravation and mitigation, the court reiterated that it was sentencing Marshall for armed robbery with a dangerous weapon other than a firearm before sentencing him on the three armed robbery counts to prison terms of eight years and six months and on aggravated battery to three years' imprisonment, with all sentences to be served

concurrently. The mittimus incorrectly states that Marshall's three-year sentence is for aggravated unlawful restraint. This appeal timely followed.

¶ 9

#### ANALYSIS

¶ 10

Marshall contends that the court erred by convicting him of armed robbery with a dangerous weapon other than a firearm because he was charged with armed robbery with a firearm and the former is not a lesser-included offense of the latter.

¶ 11

The State contends that Marshall forfeited this claim by not raising it in the circuit court, and particularly not in his post-trial motion. The doctrine that an issue not raised in the trial court is generally forfeited on appeal encourages a defendant to raise issues in the trial court and thereby allow the court to correct its errors and preclude defendants from obtaining reversal through inaction. *In re Raheem M.*, 2013 IL App (4th) 130585, ¶ 43, citing *In re M.W.*, 232 Ill. 2d 408, 430 (2009). Marshall replies that his claim should be considered as a matter of plain error, specifically under the second prong of the plain error doctrine. A plain error is an obvious error where either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the defendant's proceedings and challenged the integrity of the judicial process. *In re M.W.*, 232 Ill. 2d at 431. But we agree with the State that "defendant's conduct went beyond mere forfeiture and was likely a strategic decision" in that trial counsel acquiesced to the court's findings and sentence because it avoided the 15-year firearm enhancement (720 ILCS 5/18-2(b) (West 2010)). Stated another way, we conclude that any error by the trial court was neither unfair to Marshall nor challenges the integrity of the judicial process.

¶ 12

In particular, the evidence underlying the armed robbery convictions supports a finding that Marshall acquiesced to the court's decision. While the trial court found defendant not guilty

of firearm offenses and found insufficient evidence of a firearm for the armed robbery charges, a loaded firearm was recovered and linked by victim testimony to codefendant. Thus, even if the evidence was inadequate to show that Marshall had a firearm, as the trial court found, the court nonetheless could have found defendant guilty of armed robbery with a firearm on an accountability basis (720 ILCS 5/5-1, 5-2 (West 2010)). It is apparent to us that the court refrained from doing so out of a sense of mercy or leniency; that is, the court's object was "removing the add-on," as it stated.

¶ 13 Had Marshall raised the argument in the trial court, that court could have yet decided that an armed robbery sentence with the firearm enhancement was too long but a robbery sentence of no more than seven years in prison (720 ILCS 5/18-1(c); 730 ILCS 5/5-4.5-35(a) (West 2010)) was too short and ruled accordingly, to defendant's detriment. Indeed, the prison sentence that the court considered appropriate, eight and one-half years, could not have been imposed for robbery. Conversely, a finding of armed robbery with a firearm – which as stated above would be amply supported by this record – would have resulted in a minimum prison sentence of 21 years. 720 ILCS 5/18-2(b); 730 ILCS 5/5-4.5-25(a) (West 2010). Hence, to not raise the claim in the trial court palpably benefited Marshall and we see no injustice in holding him to that decision.

¶ 14 Marshall also contends, and the State correctly agrees, that the mittimus must be corrected. Marshall was convicted under count 14 and sentenced to three years' imprisonment, but that conviction is for aggravated battery rather than aggravated unlawful restraint, as the mittimus states.

¶ 15           Accordingly, under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the mittimus to reflect that Marshall's conviction under count 14 is for aggravated battery. The judgment of the circuit court is otherwise affirmed.

¶ 16           Affirmed; mittimus corrected.