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FIFTH DIVISION
November 6, 2015

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. 11 CR 743801
)	
KEEF FUNCHES,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant's due process rights were violated where he was convicted of the uncharged offense of armed robbery with a dangerous weapon other than a firearm, which was not a lesser-included offense of armed robbery with a firearm as charged by the State, and must be reduced to simple robbery and remanded for sentencing. Defendant's convictions for unlawful use of a weapon by a felon based on the simultaneous possession of a firearm and possession of ammunition did not violate the one-act, one-crime rule because they were two separate and distinct items of contraband constituting independent offenses. Defendant's

convictions for aggravated unlawful use of a weapon, however, do violate the one-act, one-crime rule because they were based on the same physical acts as the unlawful use of a weapon by a felon convictions and, therefore, must be vacated as the less serious offenses.

¶ 2 Following a bench trial, defendant, Keef Funches, was found guilty of armed robbery while armed with a dangerous weapon other than a firearm, two counts of unlawful use of a weapon by a felon (UUWF), and two counts of aggravated unlawful use of a weapon (AUUW). The trial court sentenced him to twelve years' imprisonment for armed robbery and six years' imprisonment for each of the two counts of UUWF and the two counts of AUUW, with all of the sentences to run concurrently.

¶ 3 On appeal, defendant contends: (1) the trial court violated his right to due process of law by convicting him of an uncharged offense that is not a lesser-included offense of the charged offense; (2) one of his convictions for UUWF must be vacated because his possession of a single loaded firearm cannot serve as the basis for multiple convictions; and (3) his two convictions for AUUW should be reversed because one of the offenses was declared unconstitutional in *People v. Aguilar*, 2013 IL 112116, and the other offense was not proven by the State. In the alternative, defendant contends his AUUW and UUWF convictions violate the one-act, one-crime rule because they were based on the same acts. Defendant argues that his AUUW convictions must be vacated as the less serious offenses. For the reasons that follow, we reduce defendant's conviction of armed robbery to robbery, vacate defendant's armed robbery sentence, and remand for sentencing on the robbery conviction; affirm defendant's two UUWF convictions; and vacate defendant's AUUW convictions and sentences.

¶ 4

I. BACKGROUND

¶ 5 This case arose from defendant's arrest on the afternoon of April 15, 2011, after Mecahal Holder, a registered confidential informant with the Bureau of Alcohol, Tobacco, and Firearms (ATF), was prepared to make a controlled gun purchase and was robbed at gunpoint by defendant. Defendant was charged with the offenses of armed robbery while armed with a firearm, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon.

¶ 6 At the November 2013 bench trial, Holder testified that he agreed to work as a paid informant for a joint task force of the Chicago police and the ATF. A handgun purchase from Javaris Givens was arranged for April 15, 2011. Prior to going to the predetermined address for the handgun purchase, video and audio surveillance devices were attached to Holder's shirt. Holder also was provided with \$300 of prerecorded United States currency.

¶ 7 Officers Steven Hefel and Michael Laurie were assigned to provide surveillance for the prearranged handgun purchase. Officer Hefel set up a surveillance position near the given address so that he could observe the front of the building and listen to the audio feed that was attached to Holder. Officer Laurie was in plain clothes and positioned in a covert vehicle near the scene. Officer Laurie also had access to Holder's live audio feed.

¶ 8 Holder testified that, at about 1:30 p.m., he went to the designated address to make the gun purchase. Instead of meeting Givens, however, Holder was approached by defendant and codefendant, Terrance Whetstone, in the second floor hallway. Before that day, Holder had never met defendant or codefendant. After talking for approximately 20 minutes, the parties went to the back of the building where Holder was robbed. Holder testified that defendant showed him a gun and asked if he liked it. Defendant then placed the gun to defendant's neck and said, "[w]here the money at, give me the money." Holder handed defendant the \$300 of prerecorded

currency and his cellular phone, while codefendant took Holder's personal money and cigarettes from his back pocket. Before leaving the building through the back door, defendant gave the handgun to codefendant. After defendant and codefendant exited, Holder walked to the front of the building and exited through the front door. Holder proceeded to meet with an ATF agent. The trial court played a DVD containing audio and video footage from the camera attached to Holder's shirt. Holder agreed that the recording did not show a gun being placed to his neck or pointed in his direction.

¶ 9 Officer Hefel testified that he was able to listen to the audio feed on Holder's shirt, but was unable to see the video feed. According to Hefel, after approximately 20 minutes, he concluded that the gun sale became a robbery of the informant. Hefel then observed defendant and codefendant run from the back of the building. Hefel began to follow defendant and codefendant in his vehicle. Once they recognized they were being followed, defendant and codefendant slowed their pace to a fast walk. Officer Laurie also approached in another surveillance car and announced his office. Defendant and codefendant responded by running in different directions. Officer Hefel stated that he pursued defendant on foot, while Officer Laurie pursued codefendant. Hefel caught defendant after a one-block chase. After conducting a search of defendant, an officer recovered Holder's cellular phone and \$280 of prerecorded funds previously intended for the gun purchase.

¶ 10 Officer Laurie testified that he was 100 yards away from defendant and codefendant when he observed them leave the building. When Officer Laurie approached defendant and codefendant and announced his office, Laurie observed codefendant placed his hands in the front of his waistband. Both defendant and codefendant fled. As Officer Laurie pursued codefendant, he observed codefendant drop a .357 Magnum revolver down an embankment near railroad

tracks. Another ATF agent stayed with the weapon while Laurie continued to pursue codefendant. Codefendant was captured about 75 yards from the apartment building. The handgun was recovered and found to be loaded with five live .357 rounds and one live .38 special round.

¶ 11 The parties stipulated that, if called, ATF agent Mark Scott would testify that he viewed the audio and video tape surveillance during the drug purchase and nothing demonstrated a weapon being pointed at Holder. Moreover, Holder never mentioned "anything about a gun being pointed to his throat at any time."

¶ 12 The State entered into evidence a certified copy of defendant's prior robbery conviction.

¶ 13 At the close of evidence, defense counsel made an oral motion "for acquittal," arguing that the evidence was insufficient to support a conviction of robbery "at gunpoint." Instead, defense counsel argued that "what the State has shown is not an armed robbery but robbery."

¶ 14 The trial court found defendant guilty of armed robbery while armed with a dangerous weapon other than a firearm, two counts of UUWF, and two counts of AUUW. The court reasoned that the encounter began as a purchase but became something else. The evidence demonstrated that there was a gun present and shown, but never fired. The gun was later recovered by the police. After considering all of the facts, the trial court found that the government met their burden of proof for armed robbery and held that armed robbery with a dangerous weapon other than a firearm is the lesser included offense of armed robbery with a firearm. Therefore, the trial court found defendant guilty of armed robbery without a firearm. The court sentenced him to twelve years' imprisonment for armed robbery and six years' imprisonment for each of the two counts of UUWF and two counts of AUUW, with all of the sentences to run concurrently. Defendant has appealed.

¶ 15

II. ANALYSIS

¶ 16

A. Due Process of Law

¶ 17 Defendant first contends that his due process rights were violated because the trial court convicted him of the uncharged offense of armed robbery with a dangerous weapon other than a firearm (720 ILCS 5/18-2 (a)(1) (West 2010)), which was not a lesser-included offense of the charged offense of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). Defendant acknowledges that he failed to preserve his contention for our review on appeal. Defendant, however, requests that we review his conviction of the uncharged offense under the doctrine of plain error.

¶ 18 The failure to both object at trial and to file a posttrial motion alleging error constitutes forfeiture of that issue on review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Piatkowski*, 255 Ill. 2d 551, 564 (2007). The plain error doctrine, however, offers a narrow and limited exception to the forfeiture rule. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under the doctrine, a reviewing court may consider a forfeited error affecting substantial rights where: (1) the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from that error and not the evidence; or (2) the error was so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). In both instances, the burden of persuasion is on the defendant. *Id.* at 186-87. In this case, defendant argues that his contention should be reviewed under the second-prong of plain error. Application of the plain error doctrine first requires a determination as to whether any error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 19 We first must determine whether the trial court erred in convicting defendant of armed robbery with a dangerous weapon other than a firearm. In doing so, we must address whether

defendant's conviction of armed robbery with a dangerous weapon other than a firearm is a lesser-included offense of armed robbery with a firearm.

¶ 20 The United States Constitution guarantees a due process right to notice, in that a defendant has a right not to be convicted of an uncharged offense. U.S. Const. Amend. XIV; Ill. Const. Art. I, sec. 2; *People v. Kolton*, 219 Ill. 2d 353, 360-61 (2006). A defendant, however, may be convicted of an uncharged offense if it qualifies as a lesser-included offense. *Kolton*, 219 Ill. 2d at 360. Illinois courts employ the charging instrument approach when determining whether the evidence offered on the uncharged offense establishes the lesser offense. In *Kolton*, the supreme court concluded that under the charging instrument approach, "[a] lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Id.* at 367. This approach looks at the allegations in the charging instrument to determine whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser-included offense. *Id.* at 361. If a particular offense is a lesser-included offense of the charged crime, a court "must then examine the evidence adduced at trial to decide whether the evidence rationally supports a conviction on the lesser offense." *Id.* Our standard of review for this question of law is *de novo*. *Id.*

¶ 21 The armed robbery statute requires the State prove that the defendant committed robbery and (1) carried on or about his or her person or was otherwise armed with a dangerous weapon other than a firearm; or (2) carried on or about his or her person or was otherwise armed with a firearm. 720 5/18-2(a)(1), (2) (West 2010). In this case, the State charged defendant with one count of armed robbery with a firearm pursuant to section 18-2(a)(2) of the Criminal Code. The

grand jury indictment alleged defendant: "knowingly took property, to wit: United States currency, cigarettes, and a cellular telephone, from the person or presence of Mecahel Holder, by the use of force or by threatening the imminent use of force and [he] carried on or about [his] person or was otherwise armed with a firearm." The State did not charge defendant with armed robbery with a dangerous weapon other than a firearm pursuant to section 18-2(a)(1).

¶ 22 Defendant contends armed robbery with a dangerous weapon other than a firearm is not a lesser-included offense of the initial charge because the allegation that defendant was armed with a dangerous weapon other than a firearm could not be inferred from the indictment. Defendant cites *People v. Clark*, 2014 IL App (1st) 123494, to support his argument.

¶ 23 In *Clark*, this court assessed the same question presented to us in this appeal, namely, whether armed robbery with a dangerous weapon other than a firearm is a lesser-included offense of armed robbery with a firearm. The State, in *Clark*, alleged that defendant was "armed with a firearm" during the commission of a robbery. The defendant was not charged with armed robbery with a dangerous weapon other than a firearm and the State did not allege the defendant used the firearm as a bludgeon or other dangerous weapon. *Id.* ¶ 32. After apply the charging instrument approach, this court ultimately concluded that armed robbery with a dangerous weapon other than a firearm was not a lesser-included offense of armed robbery with a firearm. *Id.* Relying on *People v. Barnett*, 2011 IL App (3d) 090721, and *People v. McBride*, 2012 IL App (1st) 100375, this court reasoned that "the allegation that defendant was armed with a firearm necessarily excluded an allegation that defendant was armed with a dangerous weapon other than a firearm. None of the language in the information provides a basis to reasonably infer an allegation that defendant was armed with a dangerous weapon other than a firearm." *Clark*, 2014 IL App (1st) 123494, ¶ 32; see *Barnett*, 2011 IL App (3d) 090721, ¶ 38 ("the

language of the [armed robbery] statute clearly demonstrates that a violation under section 18-2(a)(1) and one under section 18-2(a)(2) are mutually exclusive of each other"). This court also distinguished *People v. Washington*, 2012 IL 107993, which involved an earlier version of the armed robbery statute that did not distinguish between firearms and dangerous weapons other than firearms. Instead, the earlier version of the armed robbery statute simply required the State to prove the defendant was armed with a "dangerous weapon." *Id.* ¶¶ 5-7.

¶ 24 We find that *Clark* is dispositive of the question before this court. Here, the State similarly provided no evidence that defendant was armed with a dangerous weapon other than a firearm. Critically, an allegation that defendant was armed with a dangerous weapon other than a firearm cannot reasonably be inferred from the allegation that defendant was armed with a firearm. See *Kolton*, 219 Ill. 2d at 361. In this case, defendant's indictment did not provide a "broad foundation or main outline" of armed robbery pursuant to section 18-2(a)(1) of the Criminal Code. Instead, the indictment expressly provided that defendant "knowingly took property, to wit: United States currency, cigarettes, and a cellular telephone, from the person or presence of Mecahele Holder, by the use of force or by threatening the imminent use of force and [he] carried on or about [his] person or was otherwise armed with a firearm." We, therefore, conclude defendant's conviction for armed robbery with a dangerous weapon other than a firearm was not a lesser-included offense of the offense charged.

¶ 25 We find that *Washington* is inapplicable to this case as the relevant statute there was the preamended version that did not distinguish between firearms and dangerous weapons other than firearms. Contrary to the State's assertion, defendant's indictment did not provide him notice that he could be charged with armed robbery with a dangerous weapon other than a firearm.

¶ 26 Because we have found the trial court erred in convicting defendant of an offense that was not a lesser-included offense of armed robbery with a firearm as charged by the State, we must determine whether this error constituted plain error. Defendant contends the error constitutes second-prong plain error. As previously described, second-prong plain error occurs where 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. *Herron*, 215 Ill. 2d at 186-87. In response, the State contends, in relevant part, that this error should not be reviewed under the second prong of plain error because it is not structural error. More specifically, the State argues that second-prong plain error has been equated with structural error, meaning that automatic reversal is only required where an error is deemed to be a systemic error that serves to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *People v. Glasper*, 234 Ill. 2d 174, 197-98 (2009) (quoting *Herron*, 215 Ill. 2d at 186). The State also cites *People v. Thompson*, 238 Ill. 2d 598 (2010), asserting that "an error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Id.* at 609.

¶ 27 We again turn to *Clark* for its well-reasoned discussion of plain error. In *Clark*, this court highlighted that the supreme court in *Glasper* did not limit second-prong plain error to the six categories often listed, namely, a complete denial of counsel; trial before a biased judge; racial discrimination in grand jury selection; denial of self-representation at trial; denial of a public trial; and defective reasonable doubt instruction. *Clark*, 2014 IL App (1st) 123494, ¶ 38. The *Clark* court additionally noted that *Thompson* did not preclude errors falling outside of one of the six identified types of structural error. *Id.* ¶ 39. In fact, the Illinois Supreme Court has

recognized second-prong plain error applies to errors other than the six listed. *Id.* ¶ 40; see *e.g.*, *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (failure to apply the one-act, one-crime rule constituted second-prong plain error); *People v. Walker*, 232 Ill. 2d 113, 131 (failure to exercise discretion in denying a continuance constituted second-prong plain error).

¶ 28 The remaining question is whether the error in this case was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 186-87. The supreme court in *Kolton* held that a conviction of an uncharged offense that is not a lesser included offense of a charged offense violates a defendant's "fundamental due process right to notice of the charges brought against him." *Kolton*, 219 Ill. 2d at 359-60. We similarly find that conviction of a crime for which a defendant is neither charged nor is the lesser-included offense of the offense charged affects the integrity of the judicial process. *Clark*, 2014 IL App (1st) 123494, ¶ 41; *People v. McDonald*, 321 Ill. App. 3d 470, 472 (2001). We, therefore, conclude defendant's conviction for armed robbery with a dangerous weapon other than a firearm was plain error.

¶ 29 Pursuant to our authority under Illinois Supreme Court Rule 615(b)(3) (eff. Jan 1, 1967), we reduce defendant's armed robbery with a dangerous weapon other than a firearm conviction to robbery pursuant to section 18-1 of the Criminal Code (720 ILCS 5/18-1 (West 2010)). See *People v. Kennebrew*, 2013 IL 113998, ¶ 21 (Rule 615(b)(3) provides the appellate court with broad authority to reduce the degree of a defendant's conviction and order the entry of judgment on a lesser-included offense even when the lesser offense was not charged). We vacate defendant's sentence for armed robbery and remand the matter for sentencing on the robbery conviction.

¶ 30 Because of our plain error finding, we need not address defendant's claim that his trial counsel was ineffective for failing to object to and preserve the error caused when the trial court convicted him of an uncharged offense.

¶ 31 B. Unlawful Use of A Weapon By A Felon

¶ 32 Defendant next contends that one of his convictions for UUWF must be vacated because his possession of a single loaded firearm cannot serve as the basis for multiple convictions.

¶ 33 Defendant, however, acknowledges that in *People v. Almond*, 2015 IL 113817, the supreme court recently held section 24-1-1(e) of the Criminal Code (720 ILCS 5/24-1.1(e) (West 2010)) authorizes separate convictions for the simultaneous possession of a firearm and ammunition in a loaded firearm. *Almond*, 2015 IL 113817, ¶ 36 (under the one-act, one crime rule, a defendant may not be convicted of multiple offenses based on the same physical act). The supreme court instructed that the separate convictions do not violate the one-act, one-crime rule because, although a defendant's possession of a firearm and ammunition are simultaneous, the items are two separate and distinct items of contraband. *Id.* ¶ 46. Possession of either a firearm or ammunition by a felon is an independent criminal offense (720 ILCS 5/24-1.1(a) (West 2010)). A defendant's possession of both are interrelated, yet separated acts, which support two different convictions. *Almond*, 2015 IL 113817, ¶ 48, 50. In light of *Almond*, we, therefore, conclude that the evidence supported both of defendant's convictions for UUWF.

¶ 34 C. Aggravated Unlawful Use of a Weapon

¶ 35 Defendant finally contends that this Court should reverse his AUUW convictions because one of the convictions was for the same subsection of the AUUW statute declared unconstitutional in *People v. Aguilar*, 2013 IL 112116, and the State failed to present any evidence to support a conviction for the second AUUW offense, which involved possessing a

firearm without having a valid FOID card. In the alternative, defendant contends that his convictions for AUUW violate the one-act, one-crime rule and must merge into his UUWF convictions. The State concedes that defendant cannot properly be convicted and sentenced for both AUUW and UUWF where both offenses were based on defendant's possession of a firearm and ammunition.

¶ 36 At the outset, we note that defendant failed to preserve this issue for appellate review. *Enoch*, 122 Ill. 2d at 186 (a defendant must object at trial and include the alleged error in a posttrial motion to avoid forfeiture). The supreme court, however, has advised that a one-act, one-crime violation qualifies for review as second-prong plain error. *People v. Harvey*, 211 Ill. 2d 358, 377 (2004). As stated, the State concedes that defendant's convictions for both AUUW and UUWF violate the one-act, one-crime rule; therefore, we review defendant's contention under the second prong of plain error.

¶ 37 Our supreme court has held that a defendant's conduct cannot result in multiple convictions if the convictions are based on precisely the same physical act and any of the offenses are included offenses. *People v. King*, 66 Ill. 2d 551, 566 (1977). The court in *King* reasoned that "[p]rejudice results to the defendant only in those instances where more than one offense is carved from the same physical act." *Id.* It is the court's responsibility to determine whether a defendant's conduct consisted of separate acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). A physical act is "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566.

¶ 38 Defendant was charged and convicted of two counts of AUUW for "knowingly carr[ying] on or about is person, a firearm *** and the firearm possessed was uncased, loaded and immediately accessible at the time of the offense" and for "knowingly carr[ying] on or about his

person, a firearm at a time when he was not on his own land or in his abode or fixed place of business, and Keef Funches had not been issued a currently valid Firearm Owner's Identification Card," and two counts of UUWF for "knowingly possess[ing] on or about his person any firearm after previously being convicted of the felony offense of robbery" and for "knowingly possess[ing] on or about his person any firearm ammunition after previously being convicted of the felony offense of robbery." Accordingly, two of the defendant's convictions were based upon his possession of a firearm, and two of the counts were based upon his possession of firearm ammunition. Defendant's convictions violate the one-act, one-crime rule because the same acts cannot result in multiple convictions.

¶ 39 The supreme court consistently has held that under the one-act, one-crime rule, the less serious conviction must be vacated. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). This court has determined that, although both offenses are class 2 felonies, UUWF is the greater offense due to a greater sentencing range. *People v. Anthony*, 2011 IL App (1st) 091528, ¶ 6. The parties agree. We, therefore, must vacate defendant's convictions and sentences for AUUW.

¶ 40

III. CONCLUSION

¶ 41 We reduce defendant's conviction for armed robbery with a dangerous weapon other than a firearm to robbery and remand for sentencing of the robbery conviction. We affirm defendant's unlawful use of a weapon by a felon convictions. We, however, vacate defendant's aggravated unlawful use of a weapon convictions as violations of the one-act, one-crime rule and vacate the accompanying sentences.

¶ 42 Affirmed in part; vacated in part; remanded for sentencing.