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SIXTH DIVISION
July 24, 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. 12 CR 2714
)	
WAYNE HAMPTON,)	The Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶1 *HELD:* The evidence was sufficient to prove defendant guilty of armed robbery with a firearm. At sentencing, however, the fact of defendant's parole status at the time of the underlying crime was not proven beyond a reasonable doubt in violation of *Apprendi*. Defendant demonstrated plain error, thus his sentence in the enhanced degree of the offense of unlawful use of a weapon by a felon must be vacated. Defendant's remaining conviction of record for aggravated unlawful use of a weapon is constitutional. We remand for resentencing on that conviction.

¶2 Following a bench trial, defendant, Wayne Hampton, was convicted of armed robbery while armed with a firearm and unlawful use of a weapon by a felon, and sentenced to a total of 21 years' imprisonment. On appeal, defendant contends: (1) the State failed to prove beyond a reasonable doubt that he was armed with a firearm during the robbery; (2) the trial court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by sentencing him as a class 2 offender for his unlawful use of a weapon by a felon conviction where the evidence did not demonstrate beyond a reasonable doubt that he was on parole at the time of the offense; and (3) assuming this court reduces his unlawful use of a weapon by a felon conviction, his remaining conviction of record is unconstitutional. Based on the following, we affirm defendant's convictions, vacate defendant's unlawful use of a weapon by a felon conviction, and remand this cause for resentencing on defendant's aggravated unlawful use of a weapon conviction.

¶3 **FACTS**

¶4 According to the testimony of Yohance Skipper and LaPorcha Hayes, they were with defendant between 9:30 p.m. and 10 p.m. on January 7, 2012, in Skipper's white Crown Victoria. The group drove to the Circle K gas station located at 1160 West Van Buren in Chicago, Illinois. Skipper and defendant entered the gas station store together while Hayes remained in the back seat of the vehicle. Skipper testified that he went to the restroom and then exited the gas station store. Defendant remained inside. According to Skipper, defendant returned to the vehicle approximately two or three minutes later and entered the passenger seat. Skipper then drove the group to a nearby park before driving to another gas station.

¶5 As Skipper's vehicle entered the second gas station parking lot, a police car appeared and curbed the vehicle. Defendant exited the vehicle and fled on foot. According to their testimony, neither Skipper nor Hayes observed defendant with a handgun on the date in question. Skipper

testified that he did observe defendant with a pack of cigarettes when he exited the Circle K gas station store.

¶6 Deribe Lera testified that, on the date in question, he was working alone at the Circle K gas station located at 1160 West Van Buren. At approximately 9:30 p.m., two men entered the store. One of the men quickly exited the store. The other man, whom he identified in court as defendant, asked to purchase cigarettes. Defendant then went into the bathroom and, after exiting the bathroom, pointed a handgun at Lera while Lera stood behind the register counter. According to Lera, defendant held the gun in his right hand, specifically the front "T part." Defendant told Lera to open the register, but Lera forgot the password and was unable to comply. Instead, Lera gave defendant money from change bags that were kept under the register counter and two cartons of Newport cigarettes. Defendant then exited toward a "white car in front." Lera proceeded to lock the door and call 911. Lera identified a surveillance picture of defendant in court and circled defendant's right hand as the location where he observed defendant's handgun.

¶7 On cross-examination, Lera testified that he could tell defendant was holding a real gun, not a fake gun or an object. Lera stated that he observed the tip and the front side as defendant handled the gun. Lera stated that he "saw the gun properly *** for five minutes or something." Lera denied describing the gun as made of blue steel to the police.

¶8 A surveillance video was introduced into evidence. In the video, defendant can be observed entering the gas station with another black male. Defendant was using his cell phone at the time and both of his hands were visible. He was not wearing any gloves. The men initially approached the register counter together then the other male left the store. The video then showed defendant exit to a room off camera and reenter the main gas station store a short time

later. He paced back and forth in front of the register counter and looked out the glass windows in and near the door. Defendant's right hand can be seen in the video and he was not holding anything at the time, but he was wearing black gloves. Defendant then approached the register while simultaneously placing his right hand in the front pocket of his hooded sweatshirt.

Defendant leaned over the counter and Lera can be seen repeatedly attempting to open the register. At one point, the video revealed defendant holding a dark object in his right hand. The video then showed defendant leaning even further over the counter and looking at something below the counter. Lera retrieved money from the shelf below the register and handed it to defendant. Defendant grabbed the money with his left hand. The video also showed defendant reach with his left hand toward the drop down shelf above the counter and accept two packs of cigarettes from Lera. Defendant then exited the gas station store. Finally, the video showed Lera moving from behind the counter toward the door. Lera allowed one customer entry prior to following that customer to the door, locking it, and dialing the phone.

¶19 Officer Justin Mielcarz testified that, on the date in question, he and his partner, Officer Jason Edwards, received a call at approximately 9:45 p.m. regarding an armed robbery involving two African American males and a white Crown Victoria. Officer Mielcarz observed a vehicle matching the description and followed it as it turned into a gas station. Officer Mielcarz activated his emergency equipment and the car stopped. Then, the passenger in the front seat, whom the officer identified in court as defendant, exited the vehicle and ran. Officer Mielcarz observed defendant "with a black object I believed to be a pistol" in defendant's right hand based on the object's size and shape and defendant's movements. Although Officer Mielcarz was not "100 percent sure" defendant was armed at that point, the officer pursued defendant on foot. Officer Mielcarz testified that, during the chase, he observed defendant throw the pistol down a

concrete stairwell near 3810 Flournoy. Officer Mielcarz ultimately apprehended defendant in the backyard of 3827 Harrison. Officer Mielcarz testified that he later retrieved a full-size Beretta loaded with 8 live cartridges from the stairwell on Flournoy.

¶10 Officer Jason Edwards testified that he responded to the robbery in question with Officer Mielcarz. Officer Edwards confirmed that, when they performed the traffic stop, the front passenger exited and Officer Mielcarz gave chase. According to Officer Edwards, the front passenger, whom he identified in court as defendant, was fumbling with a handgun when he exited the car. Officer Edwards was approximately five feet behind defendant at that time. While his partner chased defendant, Officer Edwards detained the driver of the car and the rear seat passenger. Officer Edwards testified that Officer Mielcarz eventually detained defendant and retrieved the handgun that defendant discarded during the chase. Officer Edwards identified the Beretta handgun in court. He described it as "blue steel or black." Officer Edwards explained that "blue steel" is "police terminology that [they] use for any black gun, color like that. Officer Edwards additionally testified that he recovered the following items from defendant's person: (1) a baseball hat; (2) two packs of Newport cigarettes; (3) a pair of black gloves; and (4) \$181.

¶11 Officer Matthew Koch testified that he investigated the armed robbery at the gas station. Officer Koch was interviewing Lera when he heard over the police radio that a possible suspect was in custody. In response, Officer Koch and his partner transported Lera to the gas station where defendant was being held. Officer Koch testified that they remained inside his vehicle while defendant stood outside. Lera positively identified defendant as the perpetrator of the armed robbery. The show-up identification took place approximately 30 to 40 minutes after Officer Koch arrived at the Circle K to perform his investigation.

¶12 The parties stipulated that defendant had a felony conviction on August 28, 2008, for the manufacture of a controlled substance in DuPage County.

¶13 After the close of the evidence, the trial court found defendant guilty of armed robbery, two counts of unlawful use of a weapon by a felon, and four counts of aggravated unlawful use of a weapon. In announcing its findings, the trial court stated:

"I have heard the evidence and the arguments of counsel. The video and the testimony of the gas station attendant clearly demonstrates that a robbery occurred and pretty much what you can tell from the video. In addition, the testimony was that the [d]efendant entered the bathroom/restroom before coming out and the first thing one notices after viewing the video a few times, which I did, is that when he exits the restroom, he has gloves on, which he didn't have prior to going into the restroom.

Most of the time prior to going to the restroom, he's speaking on a cell phone. I don't know what happened to the cell phone. There wasn't any testimony any cell phone was recovered from him when he was arrested. When he comes out and reaches over the counter in this conduct of the robbery, it's clear from the video also that the victim wasn't staring at the Defendant the entire time. He was doing—trying to open the register, trying to get the cigarettes, all this happens very quickly.

The other thing you notice is that Mr. Hampton is using his left hand to move around. You can see that several times in the course of the video, several times. What he keeps out of view of the camera behind him and the camera in front of him is his right hand, which you can almost never see except at the instant

when he draws away from the counter demonstrating, [in] the State's still photograph, that there is some kind of object in his hand, right hand.

When he is stopped by the police and flees, the police testimony is that he eventually tossed a firearm which was recovered.

When I review *** all [of] the testimony, the video, the totality of all this convinced me that Mr. Hampton was in fact armed with a weapon at the time he was in the store robbing the victim who testified."

¶14 The trial court subsequently denied defendant's motion for a new trial.

¶15 During defendant's sentencing hearing, the State argued, in aggravation, that defendant had four prior misdemeanor convictions and a felony conviction in 2008 for which he was sentenced to six years' imprisonment. The trial court asked if defendant "was on parole at the time of the [underlying] offense," and the State responded, "yes, your Honor. He was on parole at the time of the offense as well." In mitigation, defense counsel stated that defendant lived with his girlfriend with whom he shared three children. Defense counsel rested on the pretrial investigation report. The pretrial investigation report¹ provided that defendant had prior criminal involvement under the following categories: misdemeanor, felony, probation, incarceration, and parole. The report did not provide details regarding any parole terms. Ultimately, the trial court sentenced defendant to a six-year prison term for armed robbery plus an additional 15 year enhancement because he was armed with a firearm during the commission of the offense. The trial court merged defendant's convictions for aggravated unlawful use of a weapon with his unlawful use of a weapon by a felon conviction and sentenced him for unlawful use of a weapon by a felon to a six-year prison term to be served concurrently with the armed robbery sentence.

¹The parties refer to the report as a presentence investigation report, but the report was issued prior to trial, on March 6, 2013. No presentence investigation report appears in the record before us.

Defendant additionally received three years' mandatory supervised release. This timely appeal followed.

¶16

ANALYSIS

¶17

I. Sufficiency of the Evidence Claim

¶18 Defendant first contends the State failed to prove him guilty of armed robbery beyond a reasonable doubt where the evidence did not establish he was armed with a handgun during the commission of the gas station robbery.

¶19 A challenge to the sufficiency of the evidence requires a reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Williams*, 388 Ill. App. 3d 422, 429 (2009). In order to overturn a judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶20 A defendant is guilty of armed robbery when he knowingly takes property from the person or presence of another by use of force or by threatening the imminent use of force and he carries or is otherwise armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2012).

¶21 Again, the challenge here is whether the evidence demonstrated beyond a reasonable doubt that defendant was armed with a firearm while robbing the Circle K gas station.

Defendant argues that none of the surveillance cameras "depict[ed]" him holding a firearm nor did Skipper or Hayes testify to seeing him with a handgun prior to or after the offense.

Therefore, according to defendant, the trial court's entire finding that he was armed with a handgun rested on the "inconsistent and equivocal" testimony of Lera.

¶22 Based on the record before us, we find that the trial evidence did support defendant's armed robbery conviction. Lera testified that defendant exited the gas station bathroom, approached the register counter, and pointed a handgun at him, demanding cash and cigarettes. Lera described the gun as black and recalled seeing the front "T part" of the gun in defendant's right hand. On cross-examination, Lera added that he saw the tip of the gun and the handle. Lera also stated that he was sure defendant was holding a real gun, not a fake gun or some other object. Although defendant's companions testified that they never saw defendant with a firearm on the date in question, the surveillance video from the Circle K gas station confirmed that defendant reached into his right sweatshirt pocket while simultaneously leaning over the register counter toward Lera. While the majority of the footage showed defendant using his left hand to commit the robbery, additional surveillance video footage revealed defendant pulling a dark object from his front pocket and returning it back to his sweatshirt pocket approximately one minute later. In addition, the photograph admitted into evidence depicted defendant holding a dark object in his right hand near his front sweatshirt pocket.

¶23 Moreover, the surveillance video confirmed Lera's testimony regarding the robbery itself, in that Lera was unable to open the cash register and instead gave defendant money from the change bags located under the counter along with two packs of Newport cigarettes. We recognize Lera testified that he gave defendant two cartons of Newport cigarettes as opposed to two packs; however, the trial court was in the best position to resolve inconsistencies in the

testimony. See *Williams*, 388 Ill. App. 3d at 429. This minor inconsistency did not discredit Lera's testimony, especially where the brand of cigarette was consistent across the testimony. In addition, Skipper testified to observing defendant with cigarettes when he exited the gas station store and Officer Edwards confirmed that two packs of Newport cigarettes were recovered from defendant's person.

¶24 Further, Lera's testimony was supported by the officers' testimony. Officer Mielcraz testified that he observed defendant exit Skipper's white Crown Victoria with a suspected black pistol. Officer Mielcarz further testified that defendant discarded a firearm down a stairwell during their foot chase. The loaded, black Beretta was recovered from the same stairwell. Officer Edwards testified that he was five feet behind defendant when defendant exited Skipper's white Crown Victoria and observed defendant holding a "blue steel" handgun. Officer Edwards explained that "blue steel" was police terminology for any black handgun. Therefore, contrary to defendant's argument that the police report conflicted with Lera's description of the handgun, Officer Edwards' testimony clarified the description used in the report and confirmed that the handgun at issue was black. Moreover, Officer Edwards testified that, in addition to the two packs of Newport cigarettes, \$181 was found on defendant's person, along with a pair of black gloves, which the surveillance video revealed defendant put on while in the gas station bathroom immediately prior to committing the offense. Finally, Officer Koch testified that Lera positively identified defendant during a police show-up approximately 40 minutes after beginning his investigation.

¶25 In sum, it was the trial court's duty to determine issues of credibility, assign weight to the testimony, and resolve inconsistencies. *Id.* The trial court determined that Lera's testimony of the events along with the surveillance video established defendant's guilt. Viewing the evidence

in a light most favorable to the State, we conclude that a rational trier of fact would find the State's evidence proved beyond a reasonable doubt that defendant was armed with a firearm during the commission of the robbery of the Circle K gas station. The evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt. See *Slim*, 127 Ill. 2d at 307.

¶26

II. *Apprendi* Claim

¶27 Defendant next contends he should not have been sentenced as a class 2 offender for unlawful use of a weapon by a felon. Defendant maintains his conviction should have been for a class 3 felony because the State failed to prove his parole status beyond a reasonable doubt in violation of *Apprendi*.

¶28 Defendant concedes that he failed to preserve this issue for purposes of appeal. *People v. Herron*, 215 Ill. 2d 167, 175 (2003) (a defendant forfeits review of an issue if he does not simultaneously object and include the alleged error in a posttrial motion). The failure to object at trial or to file a posttrial motion alleging error constitutes forfeiture of that issue on review. *People v. Piatkowski*, 255 Ill. 2d 551, 564 (2007). Defendant, however, requests that we review his contention under the doctrine of plain error.

¶29 The plain error doctrine is 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. *Herron*, 215 Ill. 2d at 178-79. In both instances, the burden of persuasion is on the defendant.

Id. at 186-87. Application of the plain error doctrine first requires a determination as to whether an error occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶30 In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Illinois legislature codified the *Apprendi* rule in section 111-3(c-5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c-5) (West 2012)). The statute provides:

"Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument ***, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt. Failure to prove the fact beyond a reasonable doubt is not a bar to a conviction for commission of the offense, but is a bar to increasing, based on that fact, the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for that offense." 725 ILCS 5/111-3(c-5) (West 2012).

Whether an *Apprendi* violation occurred is a question of law we review *de novo*. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 66.

¶31 Section 24-1.1 of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.1 (West 2012)), provides the statutory elements of unlawful use of a weapon by a felon. Section 24-1.1(e) of the Criminal Code provides the sentencing structure for the offense, such that a

"[v]iolation 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. ***. Violation of this Section by a person who is on parole or mandatory supervised release is a Class 2 felony for which the person shall be sentenced to no less than 3 years and no more than 14 years." 720 ILCS 5/24-1.1(e) (West 2012). Therefore, for purposes of this case, in terms of *Apprendi* and section 111-3(c-5) of the Code of Criminal Procedure, any fact other than defendant's prior felony conviction which was not an element of unlawful use of a weapon by a felon, such as a person who was on parole or mandatory supervised release, had to be proven beyond a reasonable doubt in order for the range of penalties to be increased from the statutory maximum for a class 3 offender to those for a class 2 offender.

¶32 The record does reveal that the indictment for defendant's unlawful use of a weapon by a felon charge, upon which he was sentenced, provided "the State shall seek to sentence Wayne Hampton as a class 2 offender pursuant to section 24-1.1(e) in that he was on parole or mandatory supervised release at the time of the offense." Accordingly, defendant was put on notice before trial that the State intended to seek the increased range of penalties. However, the fact of defendant's parole at the time of the underlying offense was not proven beyond a reasonable doubt. There was no certified copy of defendant's DuPage County conviction admitted into the record showing his terms of parole. Moreover, there was no stipulation offered by the parties regarding defendant's parole status. See, e.g., *People v. Howard*, 2014 IL App (1st) 122958, ¶ 6. Rather, the only "evidence" in the record regarding defendant's parole status was the pretrial investigation report indicating that defendant's prior criminal involvement included misdemeanor, felony, probation, incarceration, and parole, and the State's affirmative

response at the sentencing hearing to the trial court's inquiry of whether defendant was on parole when he committed the underlying offenses. That "evidence" was no evidence at all where there was nothing demonstrating the terms of defendant's parole, if any. As a result, we conclude defendant's parole status was not proven beyond a reasonable doubt in violation of *Apprendi*.

¶33 We find *People v. Ford*, 198 Ill. 2d 68 (2001), a case cited by the State to support its argument that proof of defendant's parole status was unnecessary because his sentence was within the range of possible penalties for a class 3 offender, to be distinguishable. In *Ford*, the Illinois Supreme Court held that the defendant's 100-year sentence did not violate *Apprendi* where the trial court already determined he was eligible for death due to findings, beyond a reasonable doubt, that the murder was committed in the course of another felony and involved the infliction of torture. *Id.* at 74. Therefore, the trial court's failure to find beyond a reasonable doubt that the murder was accompanied by exceptionally brutal or heinous behavior was not the reason the defendant's penalty was increased beyond the typical maximum of 60 years. *Id.*

¶34 In this case, defendant was sentenced to six years' imprisonment for his unlawful use of a weapon by a felon conviction. We acknowledge that defendant's sentence was within the range of penalties prescribed for a class 3 offender; however, unlike in *Ford*, the trial court's finding that defendant was on parole at the time of the offense was the reason his maximum penalty was increased beyond the statutory maximum for a class 3 offender. The supreme court has stated that, although *Apprendi* does not require that "every fact related to sentencing be proved beyond a reasonable doubt," the *Apprendi* case does require that "those facts that increase the penalty for a crime *beyond the prescribed statutory maximum* be proved beyond a reasonable doubt."

(Emphasis in original.) *Id.* Because the fact of defendant's parole status increased the range of

possible penalties beyond the maximum prescribed for a class 3 offender, the failure to establish that fact beyond a reasonable doubt was an *Apprendi* violation.

¶35 Since we have found error, we must determine whether that error rose to the level of plain error. Defendant contends the error satisfied the second prong of plain error because it was "grave," in that his due process rights were violated.

¶36 Our supreme court has equated second prong plain error to structural error. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). More specifically, a structural error is "a systematic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *Id.* at 613-14 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), quoting *Herron*, 215 Ill. 2d at 186). Our research has not revealed any cases examining plain error under the circumstances before us. The cases we have reviewed which considered plain error in the context of *Apprendi* violations have concluded that no plain error occurred. For example, the supreme court has concluded that a sentence based on a judge-made finding that a murder was brutal or heinous indicative of wanton cruelty "is not a presumptively prejudicial error that must be remedied regardless of its effect on the trial's outcome." *People v. Nitz*, 219 Ill. 2d 400, 415; *People v. Kaczmarek*, 207 Ill. 2d 288, 302 (2003); *People v. Crespo*, 203 Ill. 2d 337, 348 (2001). In those cases, there were clear *Apprendi* violations where the judge-made findings increased the defendants' sentencing maximums above that prescribed by statute; however, prejudice for purposes of plain error was not presumed. Instead, in those cases, based on the overwhelming trial evidence establishing that the defendants committed brutal or heinous murders indicative of wanton cruelty, the supreme court concluded that the defendants were not prejudiced despite the State's failure to prove the aggravating fact beyond a reasonable doubt. *Nitz*, 219 Ill. 2d at 420-21; *Kaczmarek*, 207 Ill. 2d at 302-04; *Crespo*, 203 Ill. 2d at 348-89.

¶37 In contrast, we find the *Apprendi* violation in this case did constitute second prong plain error. Here, unlike in the cases discussed above, the fact that increased defendant's sentence, namely, his parole status at the time of the underlying offense, could not be established by the trial evidence. Rather, as stated, there was no actual evidence admitted to establish whether defendant was on parole, for what, or the terms of that parole. Moreover, unlike the cases cited above, defendant suffered prejudice as a result of the *Apprendi* violation in this case. *People v. Cloutier*, 178 Ill. 2d 141, 173 (to demonstrate prejudice from an error, a defendant must show a reasonable probability that the result of the proceeding would have been different without the error). Defendant was sentenced to 6 years' imprisonment, which, as stated, was within the prescribed sentencing range for a class 3 felony conviction; however, the maximum sentence that could have been imposed upon him was higher based on the trial court's finding that he was a class 2 offender. Defendant was also sentenced to three years of mandatory supervised release as opposed to one year if he had been sentenced as a class 3 offender. Compare 730 ILCS 5/5-4.5-35(1) (West 2012) to 730 ILCS 5/5-4.5-40(1) (West 2012). In addition, as a class 2 offender, defendant is subject to greater penalties for future class 2 or greater convictions. See 730 ILCS 5/5-4.5-95(b) (West 2012). Accordingly, although defendant's term of imprisonment may have been the same if he had been sentenced as a class 3 offender, he was exposed to a higher range of potential incarceration, the length of his mandatory supervised release was longer, and the potential consequences of committing future crimes are more harsh. As a result, we cannot say the *Apprendi* error did not affect the integrity of defendant's judicial process and undermine the fairness of his sentence.

¶38 Because defendant's parole status was not proven beyond a reasonable doubt, his conviction for unlawful use of a weapon by a felon must be reduced to a class 3 felony. Pursuant

to Illinois Supreme Court Rule 615(b)(3) (eff. 1963), this court has the authority to "reduce the degree of the offense of which the appellant was convicted." We, therefore, reduce defendant's unlawful use of a weapon by a felon conviction, which was entered on count II in the indictment, from a class 2 offense to a class 3 offense.

¶39 III. Constitutionality of Aggravated Unlawful Use of a Weapon Statute

¶40 As previously stated, defendant was found guilty of four counts of aggravated unlawful use of a weapon. Those counts were merged into his unlawful use of a weapon by a felon conviction pursuant to the one-act, one-crime doctrine. See *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996) (multiple convictions are improper if they are based on precisely the same physical act or if any of the offenses are lesser included offenses); *People v. Johnson*, 237 Ill. 2d. 81, 97 ("if a defendant is convicted of two offenses based upon the same physical act, the conviction for the less serious offense must be vacated"). Defendant contends that, as a result of the reduction of the degree of his unlawful use of a weapon by a felon conviction to a class 3 offense, his remaining conviction of record would be for aggravated unlawful use of a weapon, which was a class 2 offense due to his unchallenged prior felony. See 720 ILCS 5/24-1.6(d)(3) (West 2012) (commission of aggravated unlawful use of a weapon by a person with a prior felony conviction is a class 2 felony instead of a class 4). Defendant argues that the remaining aggravated unlawful use of a weapon conviction is unconstitutional following the supreme court's decision in *People v. Aguilar*, 2013 IL 112116, ¶¶ 19-20.

¶41 As provided in the indictments, defendant was found guilty of four counts of aggravated unlawful use of a weapon based on the following: (1) section 24-1.6(a)(1)/(a)(3)(A) of the Criminal Code for knowingly carrying 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 that firearm was uncased,

loaded, and immediately accessible at the time of the offense (720 ILCS 5/24-1.6(a)(1)/(a)(3)(A) (West 2012)); (2) section 24-1.6(a)(1)/(a)(3)(A) of the Criminal Code for knowingly carrying in a vehicle a firearm at a time when he was not on his own land or in his own abode or fixed place of business and that firearm was uncased, loaded, and immediately accessible at the time of the offense (720 ILCS 5/24-1.6(a)(1)/(a)(3)(A) (West 2012)); (3) section 24-1.6(a)(2)/(a)(3)(A) of the Criminal Code for knowingly carrying on or about his person a firearm on a public street, *i.e.*, West Flournoy Street, at a time when he was not on his own land or in his own abode or fixed place of business, he was not an invitee on the public street, and the firearm was uncased, loaded, and immediately accessible at the time of the offense (720 ILCS 5/24-1.6(a)(2)/(a)(3)(A) (West 2012)); and (4) section 24-1.6(a)(2)/(a)(3)(A) of the Criminal Code for knowingly carrying on or about his person a firearm on a public street, *i.e.*, West Van Buren Street, at a time when he was not on his own land or in his own abode or fixed place of business, he was not an invitee on the public street, and the firearm was uncased, loaded, and immediately accessible at the time of the offense (720 ILCS 5/24-1.6(a)(2)/(a)(3)(A) (West 2012)). Because defendant previously had been convicted of a felony, which was stipulated to by the parties at trial, the counts were class 2 felonies instead of class 4 felonies. See 720 ILCS 5/24-1.6(d)(3) (West 2012).

¶42 Defendant argues that after *Aguilar* the elements of both subsection (a)(1), (a)(3)(A) and (a)(2), (a)(3)(A) are facially unconstitutional and may not be applied to anyone. This court has found otherwise. In *People v. Burns*, 2013 IL App (1st) 120929,² and *People v. Soto*, 2014 IL App (1st) 121937, this court was asked "whether the Class 2 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute [citation] violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution [citation]." *Burns*, 2013

² The supreme court granted leave to appeal On May 28, 2014. 2014 IL 117387.

IL App (1st) 120929, ¶ 22; *Soto*, 2014 IL App (1st) 121937, ¶¶ 12, 14. This court answered the question in the negative in both cases. *Burns*, 2013 IL App (1st) 120929, ¶¶ 25-27; *Soto*, 2014 IL App (1st) 121937, ¶14. Relying on *Aguilar* and the United States Supreme Court decision in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), this court reasoned:

"In *Aguilar*, our supreme court observed that the right to keep and bear arms is subject to meaningful regulation. [Citation.] Such regulations may include, but are not limited to, ' "longstanding prohibitions on the possession of firearms by felons * * *, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualification on the commercial sale of arms." ' (Emphasis added.)

[Citations.] Indeed, the United States Supreme Court described such provisions as 'presumptively lawful.' [Citation.] Based on similar reasoning, this court has rejected second amendment challenges to other statutes restricting the possession or use of firearms by felons. [Citations.]

Aguilar is further instructive on the mode of constitutional analysis to be employed. In that case our supreme court affirmed [the defendant's] other conviction for unlawful possession of a firearm (UPF). [Citation.] [The defendant's] age—17 years old at the time of the offense—was the basis for his conviction under the UPF statute. [Citation.] Our supreme court, based on the almost 150-year history of laws banning the juvenile possession of firearms, concluded 'the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection.' [Citation.]

In this case, the history of prohibitions on the possession of firearms by felons has been expressly recognized by the United States Supreme Court and the Illinois Supreme Court. [Citations.] Thus, we conclude the possession of firearms by felons is conduct that falls outside the scope of the second amendment's protection. In this case, the Class 2 form of AUUW at issue merely regulates the possession of a firearm by a person who has been previously convicted of a felony. Accordingly, defendant's constitutional challenge to the Class 2 form of the offense in the AUUW statute fails." *Burns*, 2013 IL App (1st) 120929, ¶¶ 25-27.

¶43 We agree with *Heller*, *Aguilar*, *Burns*, and *Soto* in finding that the prohibition on the possession of firearms by felons is a historically acceptable limitation on the second amendment right to bear arms. In addition, as was the case in *Soto*, defendant's aggravated unlawful use of a weapon convictions in this case are based on a prior felony conviction for the manufacture of a controlled substance, not for possession of a firearm. In sum, we conclude that defendant's aggravated unlawful use of a weapon convictions are constitutional.

¶44 In light of our finding with respect to defendant's unlawful use of a weapon by a felon conviction upon which he was sentenced, we remand this cause with instructions for the trial court to determine which of his aggravated unlawful use of a weapon convictions is the most serious and enter a sentence thereupon in conjunction with the one-act, one-crime rule.

¶45 **CONCLUSION**

¶46 Based on the foregoing, we affirm defendant's convictions and vacate defendant's sentence for unlawful use of a weapon by a felon with instructions to remand for resentencing on defendant's aggravated use of a weapon conviction.

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¶47 Affirmed in part; vacated in part; remanded with instructions.