2015 IL App (1st) 132291-U

No. 1-13-2291

Fourth Division
May 21, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF	)	Circuit Court of
ILLINOIS	)	Cook County.
Plaintiff-Appellee,	)	
	)	No.
v.	)	
	)	Honorable
OTHA JOHNSON,	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge, presiding.
	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: The State proved beyond a reasonable doubt that defendant illegally possessed a firearm; the trial court improperly convicted defendant of Class 2 unlawful use or possession of a weapon by a felon; defendant's aggravated unlawful use of a weapon convictions were proper.

¶ 2 Following a bench trial, defendant Otha Johnson was found guilty of unlawful use or possession of a weapon by a felon (UUWF) pursuant to section 24-1.1(a) of the Criminal Code of 2012 (the Code) (720 ILCS 5/24-1.1(a) (West 2012)) and four counts of aggravated unlawful use of a weapon (AUUW) pursuant to section 24-1.6(a) of the Code (720 ILCS 5/24-1.6(a)

(West 2012)). The trial court merged the AUUW counts into the UUWF count, and sentenced defendant to five years in prison on the UUWF conviction. On appeal, defendant asserts: (1) the State failed to prove beyond a reasonable doubt that he was guilty of illegal possession of a firearm; (2) the trial court improperly sentenced him to a Class 2 felony based on his prior felony conviction for aggravated battery against a peace officer; (3) his AUUW convictions must be vacated pursuant to *People v. Aguilar*, 2013 IL 112116; (4) the trial court abused its discretion in sentencing defendant to five years in prison; and (5) his mittimus should be amended to reflect a credit of 70 days spent in presentence custody.

¶ 3 Defendant was charged by information with count 1, UUWF for possessing a firearm after having been previously convicted of the felony offense of aggravated battery of a peace officer (720 ILCS 5/24-1.1(a) (West 2012)); count 2, AUUW for carrying or possessing on his person an "uncased, loaded, and immediately accessible firearm" (720 ILCS 5/24-1.6(a)(1),(a)(3)(A) (West 2012)); count 3, AUUW for carrying or possessing on his person a firearm without a valid firearm owner's identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012)); count 4, AUUW for carrying or possessing on his person, upon any public way, a firearm that is "uncased, loaded and immediately accessible" (720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (West 2012)); and count 5, carrying or possessing on his person, upon any public way, a firearm without a valid FOID card (720 ILCS 5/24-1.6(a)(2), (a)(3)(C) (West 2012)). All four AUUW counts were charged as Class 2 offenses, based on defendant's prior felony conviction for aggravated battery of a peace officer. See 720 ILCS 5/24-1.6(d)(3) (West 2012). The following facts were adduced at trial.

¶ 4 BACKGROUND

¶ 5 Chicago police officer Eric Lawriw testified that on June 27, 2012, at about 12:45 a.m., he and his partner Officer Chris Andersen conducted a routine patrol while dressed in

plainclothes. The officers were traveling eastbound on Potomac Avenue in an unmarked car. As they approached the intersection of Potomac Avenue and Mason Avenue, Officer Lawriw, who was sitting in the passenger seat, observed a group of six to eight black males standing on the southeast corner of Mason Street. When the officers' car got within 20 feet of the group, the men dispersed and ran southbound on the east side of Mason Street. Defendant did not run, and instead remained standing on the corner. After 20 to 30 seconds, Officer Andersen stopped the car at the southeast corner of Potomac and Mason, approximately 10 to 12 feet away from where defendant was standing on the sidewalk. Officer Lawriw spoke to defendant from the open window of his car, and asked him to approach the car for a field interview. Defendant looked in Officer Lawriw's direction, and then started to run southbound on Mason Avenue.

¶ 6 Officer Lawriw exited the car and ran after defendant. Defendant was running on the "parkway grass," between the sidewalk and the street. The officer ran approximately five to seven feet behind defendant. After about 15 to 20 feet "[defendant] began to lose his balance" and eventually fell to the ground in front of a home located at 1255 North Mason Avenue. As defendant stumbled and fell, Officer Lawriw had both a rear and left side view of defendant. When defendant hit the ground, Officer Lawriw "observed a weapon come out of his waistband." Officer Lawriw detained defendant and placed him into custody. He then observed a gun laying a foot and a half to the left of defendant, in the parkway grass. Officer Andersen recovered the gun from the parkway grass and showed it to Officer Lawriw. Officer Lawriw observed a ".9 millimeter, two-tone Ruger, fully-loaded automatic weapon." He transported defendant and the gun to the police station, where he inventoried the gun and its bullets.

¶ 7 Around 1:15 a.m., defendant was Mirandized and Officer Lawriw spoke with him in one of the holding cells. Defendant told the officer "he was aware of the two recent homicides in the

neighborhood there, that he was a Dirty Unknown Vicelord, which is a street gang in the area, and he had the gun for protection."

¶ 8 The parties stipulated that on June 27, 2012, defendant did not have a valid FOID card. The State also entered into evidence a certified copy of conviction for defendant's prior felony conviction for aggravated battery of a peace officer on April 2, 2009, under case number 09 CR 0155201. Following the close of the State's case, defendant moved for a directed finding, which the trial court denied.

¶ 9 Defendant called Officer Andersen as a witness, who testified consistently with Officer Lawriw. Officer Andersen stated that after Officer Lawriw called defendant to the car, he himself observed defendant from the driver's seat of the car. He observed defendant run southbound and noted that defendant "began stumbling as soon as he began running." As defendant stumbled and fell, "he turned around on an angle where [Officer Andersen] could see the front [of his body]." Officer Andersen observed a gun fall out of defendant's waistband "as he was falling to the ground." Officer Andersen exited the car, walked to the front of the building at 1255 North Mason, and recovered the gun on the grass "between the sidewalk and the street," or the parkway. Andersen acknowledged that during his testimony at the preliminary hearing in this case, he stated that he had recovered the gun from the "front grass," between the sidewalk and the building.

¶ 10 Defendant took the stand in his own defense. He testified that on January 27, 2012, he left work at midnight and drove toward his home. Defendant stopped near Potomac and Mason because he saw a group of men that he knew. He had grown up with two of the men, but only knew their nicknames, "Mike and John." He exited his car and talked to the men for about 15 minutes. As he was talking to the men, a police car pulled up, and "everybody [from the group] took off running." Defendant remained standing on the corner. He observed three police officers

exit the car in black clothes. One of the officers said to defendant, "why [are] those guys running," and defendant started to walk away. He then told defendant, "come here, where you going." The officers continued looking around, and did not use flashlights. Defendant did not have a gun in his waistband, but one of the officers approached him and stated "ah, we just got something," showed him a gun, and asked him whose it was. Defendant stated that he watched the officers as they searched the grass, but he never saw them recover a gun. Defendant also testified that although he knew about the two recent killings, he never told officers that he knew about them.

¶ 11 In closing, defense counsel argued that the testimony regarding where the gun was found was not credible, due to the inconsistency in Officer Andersen's pretrial testimony. Counsel argued that the gun was found in an area where the first group of men had just run through and it was likely that one of them had dropped the gun. Counsel further argued that the officers' testimony about defendant's statement was not credible because "that is like the lamest -- probably 99 percent of cases the police will say the person said he had the gun for protection."

¶ 12 The trial court found that defendant's testimony was "confusing at times" while both Officers Lawriw and Andersen provided "clear" testimonies regarding the facts surrounding defendant's arrest. The court stated that "defendant in his own statement said that he [knew] about the murders in the area, which was consistent with what the officers said," and although the officer's testimony that defendant needed the gun for protection was generic, "that's what he told them about the gun." The court also stated that defendant "said he never saw the officers recover the gun, whether being in the parkway or the front yard. And he also could not give a description of the third officer that he indicated was there." The court noted that "there were some minor inconsistencies" in Officer Andersen's testimony at the preliminary hearing and at trial as to where he found the gun." However, the court found that Officer Andersen's testimony

at trial "clarified" where he found the gun, which was consistent with where Officer Lawriw said it was. The court concluded that "even though there were some minor inconsistencies, *** the State has met [its] burden." The court found defendant guilty on all five counts.

¶ 13 During defendant's sentencing hearing, the State, in aggravation, argued that defendant was eligible for extended-term sentencing "not only based on the defendant's background of violence, being that aggravated battery to police officer but the nature of the charge and the offense of which the defendant was found guilty." Defense counsel, in mitigation, responded that defendant was not eligible for extended-term sentencing, and also referenced defendant's history of steady employment, his struggle with Tourette's syndrome, and the fact that he "came from a somewhat troubled family" as factors the court should consider in fashioning defendant's sentence. Defense counsel also informed the court that defendant had a construction flagger certificate for which "he had a potential job available in the undetermined future from Meade Construction Company." At the close of the hearing, the trial court remarked:

"The Court has had the opportunity to consider all the properly-presented statutory factors in aggravation and mitigation. I've considered what was presented in the pre-sentence investigation and the arguments of the attorneys that were presented today also. This defendant has been found guilty. All of these counts merge for purposes of sentence, all of them are Class 2 felonies, and the sentencing range for a Class 2 felony is 3 to 7 years in the Illinois Department of Corrections, 7 to 14 years extended term. *** I did review my notes before we proceeded to the post-motions and to the sentencing portion of this hearing, and one of the factors the Court considered the most is defendant's rehabilitative potential, and I believe the defendant does have that. I am not going to sentence this defendant to an extended term, but based on everything that has been properly presented to the court I believe a proper sentence in this case will be 5 years. And the defendant will get credit for 69 days in the Cook County Department of Corrections."

¶ 14 ANALYSIS

¶ 15 Defendant first contends that the State failed to prove beyond a reasonable doubt that he illegally possessed a firearm because the police testimony at trial was not credible. The State responds that the evidence was sufficient to support a conviction for UUWF where two officers individually observed a gun fall out of defendant's waistband as he ran from them.

¶ 16 Whether the State has presented sufficient evidence to sustain a conviction is reviewed by determining whether the evidence presented at trial, when viewed in the light most favorable to the State, would allow any rational trier of fact to find that the State had proved every element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In a bench trial, the judge, sitting as the trier of fact, is responsible for assessing the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). If the trier of fact convicted defendant based on evidence it reasonably believed, then the reviewing court should not disturb the verdict. *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008). When a defendant contests the sufficiency of the evidence, it is not the role of the reviewing court to retry the defendant. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). "A reviewing court may not substitute its judgment for that of the fact finder" with regards to issues of credibility or weight of testimony. *People v. Dunskus*, 282 Ill. App. 3d 912, 918 (1996).

¶ 17 To sustain defendant's conviction of UUWF, the State was required to prove that defendant knowingly possessed a firearm after having been previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2012); *People v. Gonzalez*, 151 Ill. 2d 79, 87 (1992). Defendant does not dispute that he had a prior felony conviction.

¶ 18 Here, Officer Lawriw testified that he and his partner Officer Chris Andersen were conducting routine patrol in an unmarked car when he observed a group of six to eight black

males standing on the corner. As the officers' car approached the corner, all of the men except defendant fled. The officers stopped the car near defendant, and asked him to approach the car for a field interview. Defendant looked in Officer Lawriw's direction and then fled. Officer Lawriw exited the car and chased defendant as defendant ran on the "parkway grass." Lawriw had a rear and left side view of defendant as he ran. Defendant eventually fell to the ground, and Officer Lawriw "observed a weapon come out of his waistband" as defendant was hitting the ground. Officer Andersen recovered the gun, showed it to Officer Lawriw, and the officers arrested defendant. While at the police station, defendant told the officers that "[h]e was aware of the two recent homicides in the neighborhood there, that he was a Dirty Unknown Vicelord, which is a street gang in the area, and he had the gun for protection."

¶ 19 Officer Andersen testified consistently with Officer Lawriw. He observed defendant from the driver's seat of the car and watched as defendant stumbled and fell to the ground. As defendant fell, Officer Andersen observed a gun fall out of defendant's waistband. Although Officer Andersen acknowledged that during his testimony at the preliminary hearing in this case he stated that he recovered the gun from the front grass, between the sidewalk and the building, he testified that the gun was actually located on the parkway grass, between the street and the sidewalk.

¶ 20 Viewing the evidence in light most favorable to the State, we find that Officers Lawriw and Andersen provided credible testimony that they both observed a gun fall out of defendant's waistband as he fled the scene. Additionally, the trial court found that Officer Lawriw's testimony that defendant told the officers that he "had the gun for protection" was credible and thus established that defendant knowingly possessed the gun. Based on this evidence, any rational trier of fact could find beyond a reasonable doubt that defendant was guilty of UUWF.

Thus, defendant's argument that the State failed to prove beyond a reasonable doubt that he illegally possessed a firearm because of non-credible police testimony at trial fails.

¶ 21 Defendant contends that the State's evidence was insufficient to convict him of UUWF. Specifically, defendant argues that (1) the officers' testimony regarding his conduct after they arrived on the scene and defendant's post-arrest statement runs contrary to human experience; (2) the officers' testimony regarding both how the gun fell out of defendant's waistband and where the gun was found was not credible; and (3) the trial court relied upon improper factors in making its credibility determination. The State responds that the evidence was sufficient to support a conviction for UUWF where two officers individually observed a gun fall out of defendant's waistband as he ran from them.

¶ 22 First, we reject defendant's argument that the officers' testimony regarding his conduct after they arrived on the scene and defendant's post-arrest statement runs contrary to human experience. Defendant asserts that if he had actually possessed a gun at the time he first observed the officers, common sense would dictate that defendant would run away with the rest of the group. He further argues that his alleged post-arrest statement that he was aware of the two recent homicides in the neighborhood, that he was a Dirty Unknown Vicelord, and that he had the gun for protection was "unworthy of belief." However, we note that it is not for this court to speculate as to why defendant acted as he did in this situation and when the evidence is sufficient to establish a defendant's guilt beyond a reasonable doubt, the failure of the State to prove motive does not necessitate reversal. *People v. Reed*, 23 Ill. App. 3d 686, 693 (1974). Although defendant offers alternative explanations for his actions, maintains that he did not run with the other men because he had nothing to hide, and further contends that it is incredulous that he would spontaneously admit to officers that he possessed the gun, defendant advanced these

contentions at trial and the court apparently rejected them. This court will not substitute its judgment for that of the trial court on this issue. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 23 We reject also defendant's contention that the officers' testimony regarding how the gun fell out of defendant's waistband and where the gun was found was not credible. Officers Lawriw and Andersen both had a clear view of defendant as he fell and testified consistently regarding how the gun fell out of defendant's waistband. Further, although Officer Andersen testified that the gun was found in the "front grass," during the preliminary hearing, and in the "parkway," during trial, the court found that Officer Andersen's testimony "clarified" where he found the gun. The court noted the "minor inconsistencies" in Officer Andersen's testimony, but ultimately ruled that his testimony regarding the location of the gun was consistent with where Officer Lawriw said it was. Because it is the responsibility of the trial court to assess the credibility of the witnesses, weigh the evidence, resolve conflicts in the evidence, and draw reasonable inferences, we defer to its determination that Officers Lawriw and Andersen provided consistent and credible testimony in this case. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 24 Further, we reject defendant's contention that the trial court relied upon improper factors in making its credibility determination. Defendant contends that the trial court improperly relied upon defendant's testimony that he was aware of the two recent shootings as being corroborative of the officer's testimony that defendant told them he knew about the murders. However, viewing the statement in its context, we find that the trial court was merely noting that defendant's testimony that he knew about the murders was consistent with the officers' testimony regarding defendant's post-arrest statement.

¶ 25 Finally, we reject defendant's argument that the trial court improperly relied on the fact that his testimony was "confusing" while the officers' testimony was "clear" in making its credibility determination. Specifically, defendant argues that the trial court "appeared to be

conflating articulateness with credibility" and used defendant's "inarticulateness against him" in making its determination. However, our review of the record indicates that the trial court's credibility determination was not based on defendant's inarticulateness, but rather, significant inconsistencies in his testimony. The trial court explicitly noted the inconsistencies in defendant's version of events, including his testimony regarding whether he saw the officers recover a gun from the grass and his inability to give a description of the third officer that he indicated was there. Conversely, the court noted "minor inconsistencies" in the State's case regarding Officer Andersen's testimony during the preliminary hearing and his testimony at trial; however, it nonetheless found the officer's testimony to be credible. We find that the trial court was in the superior position to assess the credibility of the witnesses and observe their demeanor while they testified, and we find no reason to disturb its findings. *People v. Austin*, 349 Ill. App. 3d 766, 769 (2004).

¶ 26 Because we find that the testimonies of Officers Lawriw and Andersen provided sufficient evidence of defendant's guilt and our review of the record reveals nothing to suggest that the officers' testimony was not credible, we find that the State proved that defendant, a felon, knowingly possessed a firearm beyond a reasonable doubt.

¶ 27 Defendant’s second contention is that the court should reduce his conviction for UUWF from a Class 2 felony to a Class 3 felony and remand for re-sentencing because his prior conviction for aggravated battery of a peace officer was not a "forcible felony," as required to enhance the offense. The State initially responds that defendant has waived this issue by failing to object at trial and failing to include it in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant concedes that he failed to preserve this issue for appellate review, but he argues that his claim of error is nevertheless reviewable because (1) the error implicated his substantial rights and is thus subject to plain-error review (2) his sentence is void and may be

challenged at any time; and (3) his counsel rendered ineffective assistance in failing to properly preserve the issue and he suffered prejudice as a result. Because we find that defendant presents a valid plain error claim, we will limit our review to plain error.

¶ 28 A sentencing issue is forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Freeman,* 404 Ill. App. 3d 978, 994 (2010) (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). Nevertheless, forfeited claims related to sentencing issues may be reviewed for plain error. *Hillier*, 237 Ill. 2d at 545. The plain error doctrine allows a reviewing court to consider trial errors not properly preserved in a criminal case when (1) the evidence is closely balanced or (2) the error is so fundamental and of such magnitude that the accused was denied his right to a fair trial. *People v. Harvey*, 211 Ill. 2d 368, 387 (2004). Defendant contends that because the court imposed a sentence outside of its statutory authority, this issue should be reviewable under the second prong of the doctrine. Before we consider application of the plain error doctrine, however, we must determine whether the trial court committed error. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 7.

¶ 29 Here, we consider whether a particular crime fits the statutory definition of "forcible felony" for purposes of section 24-1.1(e) of the Code. When interpreting a statute, the reviewing courts must ascertain and give effect to the legislature's intent. *People v. Jones*, 214 Ill. 2d 187, 193 (2005). The legislature's intent is best ascertained by examining the language of the statute itself. *People v. Belk*, 203 Ill. 2d 187, 192 (2003). Because this case requires that we interpret statutory language, this presents a question of law reviewed *de novo. Id.*

¶ 30 As previously noted, defendant was convicted of UUWF under 24-1.1(a) of the Code. The sentencing portion of that section is found in 24-1.1(e) and reads:

> "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 sentenced to not less than 3 years and not more than 14 years." 720 ILCS 5/24-1.6(e) (West 2012).

¶ 31 Section 2-8 of the Code defines forcible felony, in relevant part, as "aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2012).

¶ 32 In this case, defendant was previously convicted of aggravated battery of a peace officer pursuant to section 12-4(b)(18) of the Criminal Code of 1961, which provides that aggravated battery to a peace officer occurs when a defendant "commits a battery" and "[k]nows the individual harmed to be an officer or employee of the State of Illinois, a unit of local government, or school district engaged in the performance of his or her authorized duties as such officer or employee." 720-5/12-4(b)(18). The 1961 Code states that "a person commits battery if he intentionally or knowingly without legal justification and by any means, causes bodily harm to an individual or makes physical contact of an insulting or provoking nature with an individual." Our review of the plain language of the 1961 Code suggests that defendant's previous conviction lacks the gravity of harm enunciated in section 2.8. Furthermore, our review of the record in the instant case reveals nothing indicating that defendant's previous aggravated battery conviction resulted in great bodily harm or permanent disability or disfigurement as required by section 2.8. Section 24-1.1(e) explicitly states that defendant can only be sentenced as a Class 2 offender if his prior conviction was a forcible felony. Because such a showing is

absent in this case, we find that defendant's previous conviction for aggravated battery of a peace officer is not a qualifying offense under section 24-1.1(e) and the trial court erred in convicting defendant for Class 2 UUWF.

¶ 33 The State makes two arguments in support of its contention that defendant's aggravated battery of a peace officer conviction qualifies as a forcible felony as defined by section 2-8. First, the State argues that the offense falls under the "residual" category of the statute, which includes "any other felony which involves the use or threat of physical force or violence against any individual."

¶ 34 The State cites *People v. Jones*, 226 Ill. App. 3d 1054 (1992), and *People v. Hall*, 291 Ill. App. 3d 411 (1997), in support of its contention that the legislature did not intend that an aggravated battery can only be considered a forcible felony if it actually resulted in great bodily harm or permanent disability or disfigurement. In *Jones*, the court, acknowledging that its decision was not free from doubt, found that aggravated battery with a showing that the defendant used physical force was a forcible felony under the residual category of section 2-8. *Jones*, 226 Ill. App. 3d at 1056. The court noted that the legislature intended to include as a forcible felony "any aggravated battery that involved the use of physical force or violence against an individual" as the legislature was concerned with the "harm that resulted from the battery." *Id.* Similarly, in *Hall* the court invoked the residual category of section 2-8 and found that the defendant's aggravated battery while using a deadly weapon was a forcible felony. *Hall*, 291 Ill. App. 3d at 418.

¶ 35 However, in a more recent treatment of this issue in *People v. Schmidt*, 392 Ill. App. 3d 689 (2009), the court arrived at the opposite conclusion. In *Schmidt*, this court held, in relevant part, that the aggravated battery of a police officer without resulting great bodily harm or disability was not a forcible felony that could support a felony murder conviction. The *Schmidt*

court noted that the forcible felony statute enumerates specific felonies, followed by a residual clause for "any other felony which involves the use or threat of physical force or violence against any individual," 720 ILCS 5/2-8 (West 2008); *Schmidt*, 392 Ill. App. 3d at 695, and found that, "by using the word 'other' after listing 14 specific felonies, the legislature clearly intended the residual category to refer to felonies not previously specified. Where the statute specifically enumerated aggravated battery resulting in great bodily harm or permanent disability or disfigurement, 'other felony' must refer to felonies other than aggravated battery." *Schmidt*, 392 Ill. App. 3d at 695. The *Schmidt* court further noted that the 1990 amendment to the forcible felony statute clearly demonstrates an intention by the legislature to exclude aggravated batteries that do not result in "great bodily harm or permanent disability or disfigurement" from the definition of forcible felony. *Id.* at 696. Specifically, the *Schmidt* court noted that, before 1990, the statutory definition of "forcible felony" included all aggravated batteries. However, in 1990, the legislature amended the statute by adding the phrase "resulting in great bodily harm or permanent disability or disfigurement." *Id.* The court found that "by enacting the 1990 amendment, the legislature expressed its intent to limit the number and types of aggravated batteries that would qualify as forcible felonies." *Id.* Although *Schmidt* concerned the definition of a forcible felony in the context of felony murder, we find it instructive in the instant case.

¶ 36 We recognize the split in the appellate court on this issue; however, we find the First District's well-reasoned analysis in *Schmidt* persuasive and agree that the legislature intended the residual category of section 2-8 to refer to felonies not previously specified in the preceding list of felonies contained within that section. See also *In re Rodney S.*, 402 Ill. App. 3d 272 (2010); *In re Angelique*, 389 Ill. App. 3d 430 (2009). Thus, we find that the legislature intended to limit forcible felonies to aggravated batteries that result in great bodily harm or permanent disability or disfigurement. Furthermore, even if we were to rely on the reasoning in *Hall* and *Jones*, in

both cases the court invoked the residual category of the forcible felony statute only after it found the defendant's aggravated battery conviction involved the use of physical force or violence against the victim. There is no such showing of this element in the instant case; therefore, the State's argument fails.

¶ 37 Second, the State argues that because there is no information in the record regarding the facts surrounding defendant's prior felony conviction for aggravated battery of a peace officer, the record must be construed in its favor. Specifically, the State contends that there must be an "affirmative showing of error" on the record to reverse defendant's sentence.

¶ 38 "It is well settled that a reviewing court will not consider anything which is not contained in the record." *People v. Hermann*, 150 Ill. App. 3d 224, 227 (1986). We believe that the record before the court is sufficient to make a determination on this issue. Limiting our review solely to the record on appeal, we reiterate that we do not find any indication that defendant's prior conviction for aggravated battery of a peace officer resulted in great bodily harm or permanent disability or disfigurement. Thus, we believe that the mere absence of such a showing on the record is sufficient to find that defendant's prior conviction for aggravated battery to a peace officer did not meet the statutory definition of a forcible felony.

¶ 39 Accordingly, we agree with defendant that the trial court erred when it convicted him as a Class 2 felon under section 24-1.1(e). We further agree that this error amounted to second-prong plain error "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). Prejudice is presumed under the second prong of the plain-error doctrine due to the importance of the right involved. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 40 Finding defendant's conviction for Class 2 UUWF invalid, we exercise our authority to reduce the degree of defendant's conviction to Class 3 UUWF pursuant to Supreme Court Rule

615(b)(3) (eff. Feb. 6, 2013). Because defendant has four remaining valid felony convictions for Class 2 AUUW[1], the conviction of record will become Class 2 AUUW, with a sentencing range of 3 to 7 years. See *People v. Johnson*, 237 Ill. 2d 81, 97 (2010) (finding that under the one-act, one-crime doctrine where multiple convictions are carved from the same physical act, only the conviction for the most serious offense may stand)). Defendant concedes that his five year sentence for Class 2 UUWF conviction falls within the permissible sentencing range for Class 2 AUUW. He contends, however, that plain error lies in the fact that the judge considered an improper range when imposing sentence. Thus, he argues, the case must be remanded for resentencing. We agree. See *People v. Owens*, 377 Ill. App. 3d 302, 305-306 (2007) (even if wrongly imposed sentence falls within correct sentencing range, the sentence must be vacated); see also *People v. Hall*, 2014 IL App (1st) 122868, ¶¶ 12-15.

¶ 41 In *People v. Marquis*, 54 Ill. App. 3d 209 (1977), the defendant was sentenced to 90 days' imprisonment based upon the trial court's erroneous belief that the offense on which he was convicted was a Class A misdemeanor. The maximum sentence for a Class A misdemeanor was a determinate term of not more than 1 year. However, the offense for which the defendant had been convicted was actually a Class B misdemeanor, for which the maximum term was not more than 6 months' imprisonment. Although the 90 days' sentence fell within the correct sentencing range, the defendant urged the court's remand for resentencing. He argued that had the trial judge known that the legislature had not considered the offense for which he was convicted to be serious enough to be classified as a Class A misdemeanor, the court would not have imposed as severe a sentence. In remanding, the court noted that it was doing so in order that the defendant might have the benefit of being sentenced under circumstances where there was no misunderstanding as to the limits of the sentence to be imposed. *Id.* at 215.

[1] We discuss the validity of defendant's AUUW conviction in detail below.

¶ 42 Class 2 UUWF is a felony punishable by "not less than 3 years and not more than 14 years." 720 ILCS 5/24-1.1(e) (West 2012). Class 2 AUUW is a lesser felony punishable by "not less than 3 years and not more than 7 years." 720 ILCS 5/24-1.6(d)(3) (West 2012). At sentencing, the court commented that all of defendant's convictions were Class 2 felonies and noted that the sentencing range was 3 to 7 years. Defendant was sentenced to five years on his conviction for Class 2 UUWF. To be convicted of Class 2 UUWF, the defendant must have been convicted of a prior forcible felony. Additionally, although no extended term was imposed, the court believed that an extended term of 7 to 14 years was applicable for the offense.

¶ 43 We have determined that defendant's prior conviction for aggravated battery did not constitute a forcible felony and, therefore, cannot support a conviction and sentencing for Class 2 UUWF under section 24-1.1(e). Further, even if defendant's conviction and sentence for Class 2 UUWF had been correct, the sentencing provision for that offense does not contemplate the applicability of an extended term and we find nothing in the record to support it. Thus, we find plain error in sentencing and adopt the reasoning in *Marquis*. We remand this case for resentencing in order that defendant might receive a sentence free of any misunderstanding either with respect to the sentencing range or the seriousness of the offense.

¶ 44 Because we remand for resentencing on the Class 2 AUUW conviction, we need not address defendant's alternative contention that the trial court abused its discretion in sentencing him to a prison term of five years.

¶ 45 We now turn to defendant’s next contention that his AUUW convictions must be vacated. When a defendant contests the constitutionality of the statute under which he was convicted, our review is *de novo*. *People v. Neely*, 2013 IL App (1st) 120043, ¶ 8-9.

¶ 46 Initially, we note that defendant, citing our supreme court's recent decision in *People v. Mosley*, 2015 IL 115872, ¶ 26-50, which upheld the "no-FOID" version of AUUW under 720

ILCS 5/24-1.6(a)(3)(C), concedes in his reply brief that counts 3 and 5 were proper and his conviction for Class 2 AUUW may stand. However, he nonetheless contends that his AUUW convictions under count 2 for carrying or possessing on his person an "uncased, loaded, and immediately accessible firearm"(720 ILCS 5/24-1.6(a)(1),(a)(3)(A) (West 2012)) and count 4 for carrying or possessing on his person, upon any public way, a firearm that is "uncased, loaded and immediately accessible" (720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (West 2012)) were improper and contrary to our supreme court's decision in *People v. Aguilar*, 2013 IL 112116. The State responds that defendant ignores the marked difference between *Aguilar* and this case as he was convicted of the Class 2 form of AUUW, whereas *Aguilar* addressed the Class 4 form of AUUW.

¶ 47 In *Aguilar*, which was modified upon denial of rehearing on December 19, 2013, our supreme court held that the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution, and therefore is unconstitutional. *Aguilar*, 2013 IL 112116, ¶ 22. The court emphasized that its ruling was "specifically limited to the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute" (*Id.* at n.3) because "the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) categorically prohibits the possession and use of an operable firearm for self-defense outside the home." *Id.* The court, relying on the Supreme Court's reasoning in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), recognized that "in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation" *Aguilar*, 2013 IL 112116, ¶ 21. Thus, although the court in *Aguilar* held that the Class 4 form of the AUUW statute is unconstitutional, it nonetheless recognized and acknowledged the longstanding prohibitions on the possession of firearms by felons. Furthermore, we note that this court has

considered this issue a number of times, and has held that the Class 2 form of AUUW remains constitutional and enforceable. See *People v. Moore*, 2014 IL App (1st) 110793-B ¶ 16; *People v. Burns*, 2013 IL App (1st) 120929, *appeal allowed*, No. 117387, ¶ 27; *People v. Soto*, 2014 IL App (1st) 121937, ¶ 14.

¶ 48 In this case, because defendant's AUUW convictions were enhanced to a Class 2 conviction because of his prior felony conviction of aggravated battery to a peace officer, and because our supreme court has held that the Class 4 form of the AUUW statute is unconstitutional and did not make any such ruling with respect to the Class 2 form of the AUUW statute, we affirm defendant's AUUW convictions here.

¶ 49 Defendant acknowledges that this court upheld the constitutionality of the Class 2 version of the AUUW in *Burns*, 2013 IL App (1st) 120929, but he maintains that *Burns* was wrongly decided, and notes that the supreme court has granted defendant's petition for leave to appeal in that case. However, we continue to find the well-reasoned decision in *Burns* persuasive, and decline to depart from it unless directed otherwise. Accordingly, we find that defendant's convictions for the Class 2 form of the AUUW offense is constitutional and must stand. *Id.* at ¶ 27.

¶ 50 Finally, defendant contends that his mittimus should be amended to reflect 70 days spent in custody prior to being sentenced. However, he concedes this issue in his reply brief, acknowledging that the argument was based on a miscalculation.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, we exercise our authority under Illinois Supreme Court Rule 615(b)(3) and reduce defendant's conviction to Class 3 UUWF, acknowledging that the conviction of the record will become Class 2 AUUW pursuant to the one-act, one-crime doctrine, we remand the matter to the trial court solely for the purposes of sentencing defendant within the

appropriate statutory range on that offense. The judgment of the circuit court of Cook County is otherwise affirmed.

¶ 53 Affirmed in part; vacated and remanded in part.1`