2015 IL App (2d) 131076-U
No. 2-13-1076
Order filed February 10, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CF-1048
	)	
SUSAN R. MOORE,	)	Honorable
	)	Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in sentencing defendant to 18 years' imprisonment (the midpoint of the applicable range) for drug-induced homicide, as the sentence was justified by various aggravating factors; the court considered the mitigating factors, defendant's "mere" recklessness was not mitigating, and the court was permitted to rely on general deterrence in aggravation without violating the rule against double enhancements; (2) as defendant's convictions of unlawful delivery of a controlled substance were based on the same act as her conviction of drug-induced homicide, we vacated them.

¶ 2 Defendant, Susan R. Moore, appeals her 18-year sentence for drug-induced homicide (720 ILCS 5/9-3.3(a) (West 2010)) and her convictions of unlawful delivery of a controlled substance to a minor (720 ILCS 570/407(a)(1)(A) (West 2010)) and unlawful delivery of a

controlled substance (720 ILCS 570/401(d)(i) (West 2010)). She contends that the sentence for drug-induced homicide is excessive and that both unlawful-delivery convictions violate the one-act, one-crime rule. We affirm the sentence for drug-induced homicide and vacate the unlawful-delivery convictions.

¶ 3 We set out the procedural history of the case and shall detail the pertinent facts in our discussion of the issues. The State charged defendant with first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)); drug-induced homicide; unlawful delivery of a controlled substance to a minor; and unlawful delivery of a controlled substance. All of the charges were based on the allegation that, on or between April 2, 2010, and April 3, 2010, she knowingly delivered Kadian, a prescription drug containing morphine, to Tanner G. and that he took it and died as a result. A jury convicted defendant of all charges. On July 1, 2011, after a hearing, the trial court, in a written judgment, sentenced defendant to concurrent prison terms of 25 years for first-degree murder; 30 years for drug-induced homicide; and 14 years for each unlawful-delivery conviction.

¶ 4 On appeal, this court held that the evidence was insufficient to convict defendant of first-degree murder, as the State failed to prove that, when she gave Tanner the drug, she knew that her act created a strong probability of death or great bodily harm. Because the evidence proved only recklessness, not knowledge, we reduced the conviction to involuntary manslaughter (720 ILCS 5/9-3(d)(1) (West 2010)). *People v. Moore*, 2012 IL App (2d) 110711-U, ¶ 49. However, because that conviction (a Class 3 felony) was based on the same act as the conviction of drug-induced homicide (a Class X felony), we vacated the former conviction. In accordance with the transcript of the sentencing hearing, at which the trial judge had actually sentenced defendant only for first-degree murder, we vacated the other sentences. We remanded for resentencing on the three convictions. *Id.* ¶¶ 51, 52, 56.

¶ 5 On remand, the trial court conducted a new sentencing hearing. On August 6, 2013, the court sentenced defendant to concurrent prison terms of 18 years for drug-induced homicide and 14 years for each unlawful-delivery conviction. After the court denied her motion to reconsider the sentences, defendant timely appealed.

¶ 6 We consider first defendant's argument that the trial court abused its discretion in sentencing her to 18 years' imprisonment for drug-induced homicide. We begin by summarizing the pertinent evidence from both defendant's trial and her sentencing hearings. (A more comprehensive account of the evidence is available in our 2012 order.)

¶ 7 On the evening of April 2, 2010, defendant, her 13-year-old daughter Alyssa Monson, Alyssa's 13-year-old friend Shaylee, and Shaylee's 14-year-old boyfriend, Tanner, were at defendant's duplex. Defendant spent most of the time alone in her bedroom. At Alyssa's request, however, she bought the minors a 12-pack of beer and a half-pint of Schnapps. The girls drank some beer; Tanner drank all the Schnapps. The three also smoked marijuana that evening.

¶ 8 At about 7 p.m., defendant gave Tanner one pill containing 60 milligrams of Kadian (morphine), which he took at about 8:30 or 9 p.m. The three minors drank for the rest of the night and went to sleep. The next morning, the two girls woke up and entered the bedroom where Tanner was sleeping. Defendant joined them. They left soon but checked on him periodically. At about 12:30 p.m., Tanner was still asleep, but his heart was racing and he was sweaty. Defendant said that he would be fine. Ten minutes later, the three checked again on Tanner; he was still apparently asleep. Defendant told the girls, "just leave him alone, he's just sleeping, he's really—he's messed up, don't ruin his buzz." Shaylee and Alyssa checked on Tanner several more times. At about 2 or 3 p.m., Shaylee noticed a greenish substance coming

out of his mouth. At Shaylee's urging, defendant entered the room. She saw Tanner, became agitated, and said to take Tanner to the shower in order to wake him up.

¶ 9 Defendant, Alyssa, and Shaylee carried Tanner into the bathroom, where defendant put him under a cold shower, hit him in the face several times, and told him to wake up. She then removed him from the shower and told Alyssa to call defendant's niece Angela Vince, a nurse's aide. When Angela arrived, she had Alyssa call 9-1-1 and tried to help Tanner. According to Vince's testimony, defendant said, "No, don't call the police." According to Shaylee's testimony, while waiting for the paramedics, defendant took the two girls aside and told them, "You don't know what happened. He didn't get the pills from me; you don't know anything."

¶ 10 The paramedics and police arrived. Defendant admitted to the police that, although she spent 10 to 15 minutes trying to wake up Tanner by showering him with cold water, then called Vince for help, she did not call 9-1-1. She said that she did not know why. Tanner was taken to the hospital, where he died two days later without regaining consciousness. Medical testimony at trial established that his death resulted from ingesting morphine.

¶ 11 At defendant's original sentencing hearing, the court received the following evidence. Defendant was born in 1970 and had a ninth-grade education. Between 1995 and 1998, she was convicted of battery (1995); prostitution (1998); possession of drug paraphernalia and resisting a peace officer (1998); and two traffic offenses. In 2000, she was convicted of driving under the influence of alcohol (DUI). None of these convictions resulted in incarceration.

¶ 12 In 2000, defendant was convicted of unlawfully possessing cocaine, a Class 4 felony, for which she received 24 months' probation to be monitored by the drug court. In 2003, she admitted to violating the terms of her probation, and she was resentenced to 30 months' "standard probation." In 2004, she admitted to violating the terms of her probation and was

resentenced to two years' imprisonment. In 2006, defendant pleaded guilty to prostitution, a Class 4 felony, and was sentenced to 30 months' imprisonment. In 2009, she pleaded guilty to DUI and was sentenced to a year of conditional discharge.

¶ 13 The presentence investigation report noted that, while on probation between October 2000 and November 2004, defendant initially responded to drug treatment well. In October 2001, though, she relapsed into using cocaine and did so regularly until sometime in 2003. She failed in treatment twice, being discharged from Rosecrance in March 2002 and January 2003, but she successfully completed inpatient treatment at New Leaf in Peoria, being discharged in December 2002 and April 2003. However, even after the second successful discharge, defendant continued to test positive for opiates. After she was resentenced to standard probation, defendant failed to comply with "any part" of it. She had been separated from her husband since 2003 and had had three children. As of June 2011, defendant was unemployed and had been receiving $675 monthly in disability payments for three years.

¶ 14 At the sentencing hearing, held on July 1, 2011, defendant called her elder sister (and Angela's mother), Toni Vince, who testified as follows. She and defendant had had a happy childhood and had gotten along well. Later, defendant injured her back and started taking prescription medicine. She kept taking more and asked her doctors for stronger medicine. Defendant started exceeding the prescribed dosages, and she became more forgetful and "more into just staying away from people."

¶ 15 Vince testified that she had lived near defendant and had visited her almost every day for the past few years. Defendant had been a "good mother" to her three children, keeping them well-fed and properly clothed, even though she had been unemployed. Vince never saw defendant strike anyone or treat anyone meanly. Asked her opinion of "what type of person"

defendant was, Vince said that she was "a good person without the influence of drugs and alcohol. You couldn't ask for a better sister."

¶ 16 In argument, the State urged the court to impose a "substantial sentence" for first-degree murder and the other offenses. The State stressed defendant's substantial criminal record, including her two separate violations of probation for her 2000 drug conviction, her 2006 conviction of felony prostitution, and her 2009 DUI conviction. Also, the State urged, a substantial sentence was necessary to deter others from committing similar crimes.

¶ 17 Defendant's attorney responded that, although the jury had found defendant guilty of first-degree murder, there had been no evidence that she had intended to hurt Tanner. Nor had she delivered drugs for profit. Instead, she was a "good mom" who "did something stupid." Defendant's attorney requested that the court impose the minimum 20-year prison term for murder. In allocution, defendant apologized to Tanner's family and expressed remorse for her act; she had never meant for Tanner to get hurt, but she should never have been using drugs while there were children in the house, and she should have been "a more responsible adult." She had been receiving social security disability payments for several years, based on "mental retardation, depression, and back problems."

¶ 18 The trial judge stated as follows. Of the statutory factors in mitigation, only one clearly applied: defendant's conduct resulted from circumstances that were unlikely to recur (see 730 ILCS 5/5-5-3.1(b)(8) (West 2010)). "[I]nconclusive" was whether her character and attitudes indicated that she was unlikely to commit another crime (see 730 ILCS 5/5-5-3.1(b)(9) (West 2010)). Of the statutory factors in aggravation, two applied. The first was defendant's substantial prior criminal activity (see 730 ILCS 5/5-5-3.2(a)(3) (West 2010)), particularly her

failure to complete probation successfully. The second was the need to deter others from committing the same crime (see 730 ILCS 5/5-5-3.2(a)(7) (West 2010)).

¶ 19 On the latter factor, the judge explained that defendant had provided beer and Schnapps to minors; that she and the minors had been using drugs; and that, while the three teenagers were in her home, defendant had been "indifferent and purposefully unaware of what was going on under [her] roof *** just a few feet away." "[M]ost troubling" was that, when defendant learned of Tanner's distress, she ignored the danger, telling the girls, "Don't ruin his buzz." She had abdicated her responsibility as an adult, taking a "hands-off" approach. Even when defendant became concerned over Tanner's condition, she failed to call 9-1-1 and instead dragged him to the shower and made "some very crude attempts at sobering him up." Her conduct showed "a hardness of heart, an indifference to any human being in distress."

¶ 20 The judge then stated as follows:

> "I'm going to sentence you to 25 years *** on the murder charge. If I were sentencing you on the drug-induced homicide, I would sentence you to 30. If I was sentencing you separately on the Class 2 [drug charge], I would sentence you to 14. If I was sentencing you to the Class, Count 4, the other Class 2, I would sentence you to 14. Obviously, all these merge into one sentence.
>
> I do not find that this is a 20-year case under these facts. ***
>
> A sentence such as this is necessary to deter others not [*sic*] to give prescription medication, though lawfully obtained, to a young person, or any other person, strong morphine drug [*sic*] such as this. The message has to be sent to the public, they have to be—people have to be aware that this is first degree murder to give someone drugs like this."

¶ 21 On appeal, as noted, this court vacated defendant's conviction of first-degree murder, vacated the remaining sentences, and remanded for resentencing. On August 6, 2013, the trial court held a sentencing hearing. Defendant called several witnesses.

¶ 22 Toni Vince testified as follows. Defendant was the youngest of five siblings. Her life began to "go downhill" at age 13 or 14, when she started associating with the wrong people. Later, while working as a prostitute, defendant injured her back when she was thrown from a car, and she was also beaten up several times. Because of her chronic back pain and limited mobility, defendant started to take prescription medicines, including morphine. She asked for more and would tell the doctors that someone had stolen her medicine; that way, she could use more than had been prescribed. Defendant was also drinking heavily and smoking marijuana and crack cocaine; these habits worsened over time. When defendant was not under the influence of drugs or alcohol, she was a "very good person." Defendant had had three children, but one, a daughter, died of an accidental overdose while defendant was in prison.

¶ 23 Vince testified that she had visited defendant in prison three or four times and noticed a change in her. Defendant was "at peace" and knew that she needed direction in her life. Defendant had "asked God to forgive her" and give her direction. Defendant had been drug-free for three years, as far as Vince knew, but that was because drugs were not allowed in prison.

¶ 24 Alyssa Monson testified that she had also visited defendant in prison. Defendant knew that she had done something wrong. Asked what kind of a mother defendant had been, Monson testified, "She wasn't really like there mentally, but she tried to be when she wasn't on drugs. But when she was high or anything like that, or drunk, it wasn't like she was a mom."

¶ 25 Defendant testified as follows. Since going to prison, she had reflected on how she had behaved, and she now realized that she had been a very bad parent. In prison, she successfully

completed a parenting class, although nobody had told her to take it. She did so because she needed guidance. The most important thing she had learned was that a parent sometimes must say "no" to her children, which she had never done. Also, while in prison, defendant obtained her GED, in order to build her self-esteem and provide encouragement to Alyssa, who was struggling in school. Defendant had come to realize that she needed guidance in her life, so she successfully completed a Bible study class. She achieved a peace that she had not had before, while realizing that she would still face choices everyday between doing right and doing wrong.

¶ 26 Defendant also testified that, on her own initiative, she had successfully completed a restaurant management class to get the training that she would need to get a job when she was released. Defendant said that she took full responsibility for her offense but that she was now a more responsible adult and could be a better parent.

¶ 27 In argument, the prosecutor emphasized the need to deter others from committing the same offense. She noted that defendant had not merely delivered a fatal dose of morphine to a 14-year-old but had also provided alcohol to minors and had spent the evening in her room using crack cocaine. The prosecutor next noted defendant's substantial criminal record, dating back to 1995. The prosecutor urged the maximum 30-year prison term for drug-induced homicide.

¶ 28 Defendant's attorney stressed that she had not intended to harm anyone but had acted without considering the consequences or taking any responsibility as a parent. Defendant, however, had since recognized that she had been a poor parent, and she had worked to improve herself: she had received her GED, gotten job training, and taken a parenting class. Defendant's attorney requested that she receive the minimum sentence of six years' imprisonment.

¶ 29 The trial judge stated as follows. First, unlike first-degree murder, drug-induced homicide "requires no mens rea, meaning no mental state, as a result [*sic*] of one's actions. It

simply requires [that] the defendant knowingly gave a controlled substance to another. And if that person dies as a result of taking that substance, the defendant is responsible for the person's death." The judge added, "I was influenced by the jury's verdict on the first[-]degree murder finding when I originally opined that I would sentence her to 30 years on the drug-induced homicide as well as 25 years on the first[-]degree murder." Thus, it was necessary to consider anew the proper sentence on the lesser charge.

¶ 30 In doing so, the judge noted both the tragedy of Tanner's death and defendant's "abortive attempts to resuscitate the decedent by putting him in the shower ***." The judge continued:

> "And I think Ms. Moore, at least based on what she said today, appreciates now just how horribly wrong that was. She has taken responsibility for it, at least by her words today. I think that's important; I do. So that's a perspective that she has demonstrated today that—I am mindful of that or aware of that."

¶ 31 Nonetheless, the judge continued:

> "In any event, the real issue here is I have to fashion a sentence to deter others because adults like yourself or—whether it be adults or not, but in your case an adult—a knowledgeable person who knowingly gave a controlled substance to a child.
>
> And this is why the legislature has seen fit to make it a serious offense. Because things like this can happen to a relatively, relatively innocent person, a 15-year-old.
>
> In any event, in order to deter others and not to deprecate the seriousness of the offense, I'm resentencing you to 18 years in the Department of Corrections instead of the 30 that I had spoken about previously. *** I think anything less would deprecate the seriousness of the offense."

¶ 32 Defendant was also resentenced to 14 years' imprisonment on each unlawful delivery offense, with all sentences to run concurrently. After the judge pronounced the sentences, the prosecutor asked, "You did take into account today the factors in aggravation and mitigation that are set forth in the statutes, correct, Your Honor?" The judge responded:

> "I did. And, you know, I probably should have mentioned those specifically. I have considered all the statutory factors in aggravation and mitigation.
>
> I'm only mentioning specifically a sentence to deter others. I don't want to deprecate the seriousness of the offense. The reason why I focused on that one or commented on that one exclusively is because the defense was asking for something at the low end of the sentencing range and the State was asking that I again reimpose the maximum. And I was attempting to explain why I'm not imposing the maximum [or] the minimum. So that will be the judgment of the Court."

¶ 33 Defendant moved to reconsider the sentences, arguing that they did not give sufficient weight to the applicable mitigating factors. In denying the motion, the trial judge stated:

> "All right. I did consider the material that [defendant] submitted to me by way of mitigation including the things she's done, the steps she's undertaken while in the Department of Corrections, and I did consider the evidence presented and I did consider—and I don't know what kind of record I made at the time I resentenced her because the appellate court opined that perhaps the first-degree murder conviction affected this Court in its sentence on the drug-induced homicide conviction and gave me the opportunity to resentence her on drug-induced homicide apart from the first-degree murder conviction.

I took that opportunity and I reconsidered the evidence and I—whether I stated it or not, I considered—I was the trial judge. I considered all the evidence presented at trial in support of the drug-induced homicide conviction as well as the evidence in aggravation and mitigation. I gave appropriate weight to the statutory factors that apply and always considering [*sic*] Ms. Moore's potential for rehabilitation. And yet, nonetheless, I thought that an 18-year sentence was appropriate *** because she gave Kadian, a synthetic pain medication, that she knew was a serious controlled substance that she received, and she gave it to this lad and he went into respiratory arrest. And opportunities were presented at different points during the evening to get help for him and those were not taken and she was the only adult available.

And notwithstanding her attempts to rehabilitate herself, I still think that an 18-year sentence is appropriate to deter others from this extremely dangerous and serious crime."

¶ 34 We return to defendant's argument that her 18-year sentence for drug-induced homicide is excessive. Defendant contends specifically that (1) the trial judge focused almost entirely on the nature of defendant's offense and essentially ignored the mitigating evidence, especially that pertaining to defendant's potential for rehabilitation; (2) defendant's sentence was excessive in light of the mental state with which she committed the offense; and (3) the consideration of general deterrence as an aggravating factor amounted to an improper "double enhancement." Defendant's contentions all lack merit, and we cannot say that her sentence is excessive.

¶ 35 The trial court has broad discretion in sentencing. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A reviewing court may not disturb a sentence that is within the statutory limits unless it is greatly at variance with the spirit and purpose of the law or manifestly

disproportionate to the nature of the offense. *Id.* We may not substitute our judgment for that of the trial court merely because we might have weighed the pertinent factors differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 36 We cannot say that defendant's sentence for drug-induced homicide is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of her offense. The 18-year sentence is exactly halfway between the statutory maximum and minimum (see 730 ILCS 5/5-4.5-25(a) (West 2010)). And, as the trial judge noted, there were aggravating circumstances other than those provided by statute. Defendant did far more than deliver a fatal drug to Tanner. She also provided large amounts of alcohol to three minors and then failed to supervise their consumption of it—or, for that matter, their use of marijuana. She failed to exercise any other supervision until it was too late. When alerted to Tanner's condition, defendant essentially laughed it off, telling the girls not to "ruin his buzz." Even when she was on notice that Tanner was in serious danger, defendant failed to call 911 but instead clumsily attempted to wake him up in the shower. And, after the paramedics and the police had been called, she told the girls to cover up her role in endangering Tanner. The judge correctly considered that defendant passed up repeated opportunities to avert the tragedy that ensued.

¶ 37 Further, defendant's prior offenses were a pertinent factor in aggravation (see 730 ILCS 5/5-5-3.2(a)(3) (West 2010)), and they were numerous. Defendant had two previous felony convictions and had failed twice to complete her probation successfully. She also had numerous less serious offenses, including a DUI about a year before the offense here. And, as the judge noted, the sentencing statute allowed him to consider in aggravation the need to deter other people, especially adults entrusted with the well-being of minors, from committing the same

crime (see 730 ILCS 5/5-5-3.2(a)(7) (West 2010)). We cannot say that defendant's sentence is excessive, especially considering the aggravating circumstances that the record presented.

¶ 38 Defendant, nonetheless, raises three challenges to the reasonableness of her sentence. The first is that the trial judge's explanation of the sentence shows that he concentrated almost entirely on the nature of her offense and on the need to deter others and gave only minimal consideration to defendant's remorse and rehabilitative potential. We disagree.

¶ 39 If mitigating evidence was before the trial court, we presume that the court considered it, unless something other than the sentence imposed indicates otherwise. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). That presumption operates here, but we need not rely on it. At the resentencing hearing and afterward, the trial judge repeatedly stated that he had considered the mitigating evidence, and he specifically credited much of that evidence. In pronouncing sentence, the judge noted that defendant "appreciate[d] now just how horribly wrong" her acts were and that she had taken responsibility for her crime. The judge stated, "I think that's important ***. *** I am mindful of that or aware of that." In response to the prosecutor's inquiry, the judge assured the parties that he "ha[d] considered all the statutory factors in aggravation and mitigation." In denying defendant's motion to reconsider the sentence, the judge again said that he had considered "the material that [defendant] submitted to me by way of mitigation," including the rehabilitative measures that she had taken since the original sentencing.

¶ 40 Defendant has not persuaded us that the judge slighted the evidence of her rehabilitative potential; the record shows otherwise. Moreover, that defendant was sentenced to 12 years less than the maximum prison term hardly supports her position. Ultimately, defendant's first

challenge to the sentence comes down to a request that we reweigh the pertinent factors differently from how the trial court did. Of course, we decline this request.

¶ 41 Defendant's second specific challenge to her sentence is that it is excessive given the mental state with which she committed the offense. She notes that, when she delivered the fatal drug to Tanner, she did not intend to harm him and did not know that her action created a strong probability of death or great bodily harm to Tanner. Defendant concludes, without any elaboration, that this lack of knowledge helps to show that the 18-year sentence is disproportionate to the nature of her offense.

¶ 42 Defendant's conclusional argument is unconvincing. As we noted in our previous order, there was a sound basis to find that, when defendant gave Tanner a pill containing 60 milligrams of a controlled substance, she behaved recklessly. This is especially so given that defendant had allowed Tanner to partake of the large quantity of alcohol that she had purchased for him, Alyssa, and Shaylee. A conviction of drug-induced homicide does not require even recklessness (see 720 ILCS 5/9-3.3(a) (West 2010)) in order to make a defendant eligible for a sentence of as much as 30 years. Thus, it eludes this court how the fact that defendant was "merely" reckless implies that her 18-year sentence was an abuse of discretion.

¶ 43 Defendant's third specific challenge to her sentence is that, by finding that general deterrence was a factor in aggravation, the trial court applied an improper "double enhancement." Defendant argues that making drug-induced homicide a Class X felony "was in itself intended by the legislature to serve as a deterrent," so that the trial court could not properly consider general deterrence as an aggravating factor.

¶ 44 Defendant's argument borders on frivolous. General deterrence was undoubtedly a consideration in the legislature's choice of the proper sentencing range for practically *any*

offense on the statute books. Defendant has not shown that there is anything unique about the role of general deterrence in the legislature's choice of a penalty range for drug-induced homicide. Thus, defendant's argument implies that general deterrence is seldom, if ever, a proper consideration in sentencing. Not only is this inherently implausible, but the legislature has explicitly said otherwise.

¶ 45 The applicable sentencing statute allows a trial court to consider general deterrence as a factor in aggravation, regardless of the specific offense for which a defendant is being sentenced. See 730 ILCS 5/5-5-3.2(a)(7) (West 2010). Thus, even were we to conceive of the use of general deterrence as an aggravating factor in this case as a "double enhancement," that would not matter: the rule against double enhancements is merely a judicial rule of statutory construction, and a double enhancement is entirely permissible if the legislature has clearly intended it. *People v. Sharpe*, 216 Ill. 2d 481, 530 (2005). To accept defendant's argument would require us to ignore the legislature's unambiguous decision to allow the alleged "double enhancement" in this case.

¶ 46 We also agree with the State that, in any event, the use of general deterrence in this case was not a "double enhancement" as the case law defines that term. A double enhancement occurs when either (1) a single factor is used both as an element of the offense and as a basis for imposing a harsher sentence than otherwise; or (2) the same factor is used twice to elevate the severity of the offense itself. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). Neither circumstance was present here.

¶ 47 We hold that the trial court did not abuse its discretion in sentencing defendant to 18 years' imprisonment for drug-induced homicide.

¶ 48 We turn to defendant's other argument on appeal: that her convictions of unlawful delivery of a controlled substance and unlawful delivery of a controlled substance to a minor must be vacated, as they were based on the same act as her conviction of drug-induced homicide. The State confesses error, and we agree with the parties.

¶ 49 A defendant is prejudiced when more than one offense is carved from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977); *People v. Chanthaloth*, 318 Ill. App. 3d 806, 813-14 (2001). The remedy is to vacate the conviction(s) of the less serious offense(s). *Chanthaloth,* 318 Ill. App. 3d at 814. Here, defendant was convicted of three offenses based on the same physical act: her delivery of Kadian to Tanner. Therefore, we vacate both unlawful-delivery convictions.

¶ 50 The judgment of the circuit court of Winnebago County is affirmed in part and vacated in part.

Affirmed in part and vacated in part.