2015 IL App (4th) 130637-U

NO. 4-13-0637

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 13, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JAKE WILLIAMS,	)	No. 12CF1196
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) At trial, defendant acquiesced to the admission of the prior inconsistent statements of the State's witness, thereby waiving his argument for purposes of this appeal that said statements were inadmissible.

(2) One of defendant's convictions of aggravated unlawful use of a weapon is void, where the supreme court held the particular statutory section unconstitutional on its face.

(3) Defendant's conviction of aggravated unlawful use of a weapon under a valid section of the statute does not violate the one-act, one-crime rule when compared to defendant's conviction of aggravated battery with a firearm, where the latter offense required a separate act.

¶ 2 After a jury trial, defendant, Jake Williams, was convicted of several weapon-related charges as a result of a shooting in Bloomington. The trial court sentenced him to 18 years in prison. He appeals, claiming (1) he was denied a fair trial when the State introduced multiple prior inadmissible statements from a key witness, and (2) his conviction of aggravated unlawful use of a weapon violated the one-act, one-crime rule. Although one of defendant's

convictions of aggravated unlawful use of a weapon is void as unconstitutional, the other two remain valid. We affirm defendant's remaining convictions and subsequently find no violation of the one-act, one-crime rule.

¶ 3 I. BACKGROUND

¶ 4 In November 2012, the grand jury indicted defendant on four counts: (1) attempt (murder) (720 ILCS 5/8-4 (West 2010)) (count I); (2) aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2010)) (count II); (3) aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)) (count III); and (4) possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1) (West 2010)) (count IV). In January 2013, the grand jury indicted defendant on three additional counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2010)) (counts V, VI, and VII). Before trial, the trial court granted the State's motion to *nolle prosequi* count IV.

¶ 5 The charges stemmed from a November 5, 2012, altercation between two rival street gangs: Money Over Bitches (M.O.B.) and Black Out Mafia (B.O.M.). Defendant was a member of M.O.B. Three members of B.O.M. were injured: two were shot (Marcus Winlow, a/k/a "Lil Dude," and Robert Jackson) and one suffered a broken jaw (Kaythiese Fitch, a/k/a "KK").

¶ 6 Michelle Brown, Winlow's mother, witnessed the altercation and provided a recorded statement to Bloomington police. In her statement, she said she was walking behind Winlow and KK on her way to a bus stop, when the two men stopped to speak with Jackson. Six male members of M.O.B., including defendant, approached the three members of B.O.M. The entire group walked across the street to an empty lot and began fighting. According to Brown, defendant was squared up with Winlow to fight, when defendant pulled out a gun. Winlow

turned, ran away, and was shot in the back. Other members of M.O.B. began pulling out guns. Jackson turned to run and was shot in the leg.

¶ 7 At the jury trial, which began on March 11, 2013, the State presented the testimony of Bloomington police officers Eric Riegelein and Michael Luedtke and detectives Clayton Arnold and Scott Mathewson. Riegelein, Luedtke, and Arnold arrived at the scene within minutes of the shooting. They saw approximately six to eight people in the immediate vicinity. Winlow was lying in the roadway, with Brown tending to him. Winlow had been shot in the back. They also saw Jackson and KK leaning against a nearby vehicle. Jackson had been shot in the leg and KK said he had been punched in the jaw. Riegelein said he asked Winlow who had shot him, but Winlow said he did not know.

¶ 8 Officer Luedtke spoke with Brown and asked her to describe what she had seen. Brown said when she walked outside of her apartment building, she saw a group " 'run up and start shooting.' " Luedtke described Brown as "upset [and] angry," but "genuine," in that, in his opinion, she wanted to explain what had occurred and to identify those individuals responsible. She named defendant and four others as suspects. She said defendant " 'had ran up on [Winlow] and shot him [] in the back.' " Brown did not say she had merely heard this information from someone else. According to Luedtke, Brown "saw people and knew who they were." Luedtke said he asked Brown if she was willing to speak to a detective. She agreed and another officer transported her to the police station for a formal statement.

¶ 9 The State called Brown to the witness stand. She testified she lived in an apartment with three of her children across the hall from her oldest child, Winlow. Brown said she had known Ervina Daniels, defendant's mother, for approximately 20 years. Since she has

known Daniels for so long, she "kind of look[s] out for [Daniel's] kids as [she] would [her] own." Brown admitted she did not want to testify, but she had been subpoenaed.

¶ 10 At trial, Brown described the events leading up to the shooting as follows. Early in the afternoon on November 5, 2012, Winlow and KK came to Brown's apartment complaining Winlow had just been in an altercation. After being reminded, Brown said she recalled previously indicating she had seen a knot on Winlow's head. Brown said she was getting ready to leave her apartment to go downtown when her younger children informed her Winlow had been shot. She did not hear gunshots or see the shooting. She ran outside and saw Winlow lying in the road. She grabbed a towel and applied it for pressure. She recalled screaming, but she did not remember what she was saying. She recalled telling the officer that defendant had shot Winlow and she named the other individuals in the group. However, now she did not know if those individuals were responsible because she had not actually seen them that day. She had told the officer that defendant was present at the time of the shooting because she "was going by hearsay and making up [her] own story *** because [she] wanted somebody, you know, to go down."

¶ 11 Brown recalled telling the officer she had seen a black-colored gun, but that was false because, she said, she "didn't see anything, sir. [She] wasn't out there." She "probably" told the officer the name of the individual who shot Jackson, but that was false, too, because she "didn't see it." She recalled speaking with a detective and was aware the statement would be recorded.

¶ 12 Contrary to her recorded statement, Brown testified at trial, she had not actually seen anything leading up to the shooting or the shooting itself. The following exchange occurred:

"Q. [Assistant State's Attorney:] Okay, so anything that you would have said during your interview that day were not things that you saw with your own eyes?

A. No.

Q. Even though you said you saw them with your own eyes, correct?

A. Yes."

¶ 13 Brown said she recalled testifying before the grand jury on November 20, 2012, to events consistent with her recorded statement to the police. However, Brown had prepared a written statement on December 11, 2012, which stated in full as follows:

"To Whom It May Concern:

I, Michelle Brown, is [*sic*] serving as a witness in the felony case in which my son Marcus Winlow was the victim. I am choosing to remove my statement as a witness in this case. My son had been shot in a result of a fight, and I was very frustrated and confused at the time the original statement was written.

I began to name several gentlemen who had previously been in a verbal altercation with Marcus. I did not see these gentlemen: [defendant and other named individuals] at the crime scene. I do not hold any of these men accountable for the crime, and according to me they are not defendants in this case. I will not be attending trial as a witness nor testifying. I would like for all charges to be dropped.

Lastly, I am not being forced by anyone to remove my statement, nor have I been promised anything in return to withdraw this statement, and I do not feel threatened or that my life is in danger.

I would like the gentlemen, upon release, to be ordered to attend several churches and give their testimonies why they thank God for a second chance in life."

¶ 14 During cross-examination, the following exchange occurred:

"Q. [Defense attorney:] And you actually repeated the same details that you made up or that were supplied by somebody else, you repeated those same details to the grand jury when you testified?

A. Yes. Yes, I did.

Q. And you understand that both then and today you are testifying under oath and you're obligated to tell the truth?

A. Yes.

Q. Let me ask you then. What is the truth? You did testify inconsistently.

A. I'm telling the truth, sir.

Q. You're testifying truthfully today?

A. Yes.

Q. And the document that you wrote and had notarized on December 11 of 2012, that was an attempt to set things right; wasn't it?

A. Yes.

Q. Or at least information that you didn't have true knowledge of?

A. Yes.

Q. And your testimony today is that you—anything that you said that you saw, you didn't really see?

A. No, sir.

Q. And your recollection of what you might have said isn't that great today; is it?

A. Excuse me?

Q. It appeared when the State was questioning you, you didn't recall a lot of things you might have said?

A. Right.

Q. But you do specifically recall that day and the events that took place?

A. Yes.

Q. And you're testifying today under penalties of perjury; you understand that?

A. What?

Q. Your testimony today has to be truthful or you're violating the law?

A. Yes.

Q. Now you said some of this information you'd gotten from your children and some information you'd gotten from the woman that lives down the street?

A. I don't know if the woman lived down the street or not, sir.

When Marcus Winlow was laying on the ground, she approached me when I was axing [*sic*] who shot my son, and she was telling me that a group, you know what I'm saying, had came up and whatsoever, and that's where I got the information from and I used it.

Q. When you heard there was a group, you filled in the details?

A. That the lady said, yes."

¶ 15 The State also called Bloomington police detective Steven Fanelli. He conducted the interview of Brown immediately after the incident. Without objection, the recorded interview was played for the jury.

¶ 16 Also without objection, the State introduced and the trial court admitted a certified transcript of Brown's testimony before the grand jury on November 20, 2012, wherein Brown testified to events consistent with those she had relayed in her interview with Fanelli.

¶ 17 The State called Winlow as a witness. He said he was testifying only because he had been subpoenaed. He identified defendant by name in the courtroom. He said he and defendant "grew up together." He said they are not exactly friends, but he does not dislike defendant. He said they "play ball together." Winlow said he had "fought" defendant earlier in the day on November 5, 2012. He clarified by stating: "We was rassling; we weren't fighting." He said "rassling" means no punches were thrown. He could not recall where they fought, only that it was outside near Winlow's apartment. Nor could he recall what they had fought about. He denied having a knot on his head.

¶ 18 Winlow described the shooting incident as follows. He said he was outside his apartment "minding [his] own business," when he "saw people coming, coming out of the field with all black on, and they was masked up. They was looking at [him], and they asked [him] what [he] was doing, and then [he] ran." He said: "I wouldn't know their faces. They had on black ski masks so I couldn't really identify the person who shot me." He said there were about "20 guys with guns." He was shot in the back as he turned to run toward his apartment.

¶ 19 The prosecutor asked Winlow if he was now "friendly with [defendant]." Winlow said: "I mean I wouldn't want nothing to happen to him. I wouldn't want nothing to happen to somebody that didn't do nothing, that was innocent. I don't want to put nobody behind bars that didn't do nothing."

¶ 20 The State next called Kaytrel Fitch, KK's older brother. On the afternoon of November 5, 2012, Fitch was sleeping when KK woke him to say that somebody had jumped him. Fitch said he went outside but did not see anything. Approximately 20 minutes later, "a bunch of guys came around the corner." He guessed the group consisted of between 5 and 10 guys. They all went to the empty lot. Fitch saw KK fighting with one of the guys, but he did not

know who it was. Fitch was on his way to help KK, when he heard a gunshot. Fitch grabbed KK and ran. He did not see a gun, he did not see anyone get shot, and he did not see the shooter. When they got behind a fence, Fitch said he heard more gunshots. Fitch could not identify anyone in the group of guys. The prosecutor asked what defendant was doing, and Fitch replied: "Just standing there, I guess."

¶ 21 The State also called Tamika Alexander, KK's mother. She had just arrived home from work when she saw a "crowd of boys fighting in the lot across the street from [her] house." She could not estimate how many were in the "group of boys." She began walking toward the lot. Winlow passed her and told her to call 9-1-1. Alexander did not notice that Winlow was injured. While she was on the phone with emergency dispatch, she heard gunshots. She had not heard any shots before that.

¶ 22 Alexander said she had initially agreed to go the police station to give a statement, but she needed to find someone to watch her children. She emerged from her house and advised police she had found someone to watch her children, but she wanted to speak with KK first. She said she told KK the police wanted her to go to the police station. After that conversation, Alexander told the police she did not want to subject herself or her children to any more violence, so she decided not to go to the police station.

¶ 23 The State called Jared Roth, the lead detective. Roth learned, through his investigation, that M.O.B. and B.O.M. were both groups of primarily black males that produced rap music. A rivalry had developed during the months and weeks leading up to November 5, 2012. During the investigation, Roth and other detectives attempted to get statements from numerous individuals about the shooting. No one cooperated, except Brown.

¶ 24 Brentais Hawkins, a McLean County jail inmate, testified he was incarcerated on a pending burglary charge. He said he used to date Ervina Daniels, defendant's mother. Hawkins and defendant were in jail together in December 2012. The prosecutor asked what defendant said to him about the November 5, 2012, shooting. Hawkins responded:

"A. Um, I can't remember the details, that they was into a fight.

Q. Who was they?

A. Some M.O.B. members of theirs. I'm not sure of their names.

Q. M.O.B. members?

A. Yeah.

Q. Did he indicate that he was part of M.O.B.?

A. Yeah.

Q. He said they were in a fight?

A. Yeah.

Q. Did he tell you who they were in a fight with?

A. I think B.O.M.

* * *

Q. Did he say why they had the fight?

A. I think it had something to do with a rap battle or something of that nature.

* * *

Q. What else did he say?

A. Only that they was fighting, and one of the opposing M.O.B. members was getting the best of someone. He shot at him.

* * *

Q. Did he tell you who he shot?

A. Um, nah. Lil Dude, I believe he said.

* * *

Q. You know of him? How do you know Lil Dude?

A. I know his mom.

Q. Did he tell you why he shot him?

A. He said he was getting the best of one of his friends.

Q. While they were fighting on Orchard?

A. Yeah.

Q. Did he tell you what he shot him with?

A. I believe it was a 380 handgun.

Q. A .38?

A. 380, 38, something like that.

Q. Okay, did he tell you what he did with the gun afterwards?

A. No.

Q. Did he tell you anything about what happened afterwards?

A. He said they jumped in the van and they drove off."

¶ 25 Hawkins said he was not promised leniency or any other favors in exchange for his testimony. He said he was testifying as a "good citizen" but hoped for leniency.

¶ 26 Mary Wong, a forensic scientist with the Illinois State Police, tested the hoodie defendant was wearing but found no gunshot residue on the sleeves.

¶ 27 Bloomington police detective Richard R. Barkes testified he interviewed defendant after his arrest on November 6, 2012. The recorded interview was played for the jury. The lengthy recording portrays defendant initially denying he was at the scene at the time of the shooting. He eventually admits he was there but only to fight members of B.O.M. He said during the fight, he heard gunshots and ran.

¶ 28 Both sides rested. After considering the evidence, arguments, and instructions, the jury found defendant guilty of aggravated battery with a firearm (count II), aggravated discharge of a firearm (count III), and aggravated unlawful use of a weapon (counts V, VI, and VII). The jury found defendant not guilty of attempt (murder) (count I). The trial court sentenced defendant on counts II and V (merging the remaining counts) to 18 years in prison for aggravated battery with a firearm and a concurrent 3-year term for aggravated unlawful use of a weapon. This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Defendant raises two issues on appeal. First, he claims he was denied a fair trial when the trial court admitted multiple prior statements from Brown, wherein she said she saw defendant shoot Winlow in the back. Defendant claims these multiple identical statements constitute inadmissible prior inconsistent statements. Defendant claims "the unnecessary repetition of this evidence improperly elevated Brown's prior statements over her trial testimony and suggested their truth by sheer force of repetition."

¶ 31 Second, defendant claims his conviction for aggravated unlawful use of a weapon violates the one-act, one-crime rule because that conviction was based on the same physical act as his aggravated-battery-with-a-firearm conviction. We address each of defendant's contentions of error in turn.

¶ 32 A. Prior Inconsistent Statements

¶ 33 At trial, Brown testified she had *not* witnessed the shooting and did *not* see defendant shoot Winlow. However, she admitted she had previously told police and the grand jury differently. She claimed at trial, her initial version came only from what she had learned from others. She said her prior statements were untrue. In response to Brown's trial testimony, the State introduced her video-recorded statement to police *and* the certified transcript of her testimony before the grand jury. Defendant's counsel agreed to the admission of both prior statements. Defendant now argues it was error to admit Brown's prior statements because (1) the admission violated the common law rule against corroboration of substantive evidence through prior statements, and (2) introducing the statement more than once was cumulative and unnecessary.

¶ 34 Defendant admits he failed to preserve this issue for appeal. However, he requests this court review his claim under the plain-error doctrine. Pursuant to Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), we may review an otherwise forfeited claim if:

> " '(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.' [Citation.] As a matter of convention, reviewing courts typically undertake plain-error analysis by first determining whether error occurred at all. [Citation.] However, under the

> closely-balanced-evidence prong, defendant 'must show *both* that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him.' (Emphasis added.) [Citation.]" *People v. Scott*, 2015 IL App (4th) 130222, ¶ 32.

¶ 35 Defendant argues this court should review the issue under either prong, as both may be satisfied. He argues, not only was the evidence closely balanced, but the claimed error was of such magnitude that it affected the integrity of the trial.

¶ 36 For this argument, we address the distinction between waiver and forfeiture. As this court has previously explained, "[w]aiver is the intentional relinquishment of a known right, whereas forfeiture is the failure to make a timely assertion of a known right." *People v. Bowens*, 407 Ill. App. 3d 1094, 1098 (2011). That is, an attorney may "(1) make a tactical decision not to object to otherwise objectionable evidence or argument, which waives such issues on appeal, or (2) fail to recognize the objectionable nature of the evidence or argument, which results in procedural forfeiture." *Lovell v. Sarah Bush Lincoln Health Center*, 397 Ill. App. 3d 890, 898 (2010). The difference between the two is important because if defendant has *waived* an issue, our review under the plain-error doctrine is not available. *People v. Scott*, 2015 IL App (4th) 130222, ¶ 21 (explaining plain-error analysis applies to cases involving procedural default, not affirmative acquiescence).

¶ 37 In this case, defense counsel affirmatively agreed to the admission of both exhibits, stating he had no objection. He agreed the jury could consider both Brown's video-recorded interview with the police and the certified transcript of Brown's grand jury testimony. He did not stand silent while missing his opportunity to object. Rather, he affirmatively

acquiesced to the admission of both prior statements, and therefore, the trial court did not have an opportunity to rule on any allegedly objectionable argument. See *Lovell*, 397 Ill. App. 3d at 898. Counsel's acquiescence to the admission of Brown's prior statements effectively relinquished any legal argument he may have pursued in his direct appeal challenging that admission. *People v. Dunlap*, 2013 IL App (4th) 110892, ¶¶ 11-12. Because defendant has waived this issue, the plain-error doctrine is unavailable to allow our review of an otherwise unpreserved issue for purposes of appeal. See *Scott*, 2015 IL App (4th) 130222, ¶ 21.

¶ 38 B. One-Act, One-Crime

¶ 39 Defendant next contends his conviction for aggravated unlawful use of a weapon must be vacated because it was based on the same physical act as his aggravated-battery-with-a-firearm conviction. Aggravated unlawful use of a weapon requires proof of the element of possession of a firearm. See 720 ILCS 5/24-1.6(a) (West 2010). Aggravated battery with a firearm requires proof of the element of the discharge of a firearm. See 720 ILCS 5/12-3.05(e) (West 2010). Defendant argues the two offenses arose from the same physical act. He claims he could not have discharged the firearm without possessing it. Because the State did not allege a separate time when defendant possessed the firearm from when he discharged the firearm, he claims this single act cannot sustain multiple convictions. Therefore, defendant contends, this court should vacate his conviction and sentence for aggravated unlawful use of a weapon, as the less serious offense.

¶ 40 The State disagrees with defendant's assessment and claims the indictment for the offense of aggravated unlawful use of a weapon does not mention the shooting or discharge of the firearm. The State claims that, because the indictment does not reference the shooting, it is clear the State intended to treat defendant's conduct of possessing the firearm as a separate act

from his discharge of the firearm, thereby allowing the conviction of both offenses to stand. We agree with the State. See *People v. Crespo*, 203 Ill. 2d 335, 345 (2001) ("the indictment must indicate that the State intended to treat the conduct of defendant as multiple acts in order for multiple convictions to be sustained").

¶ 41 However, before further addressing the one-act, one-crime issue, we note the following point raised by the State and acknowledged by defendant. Our supreme court held unconstitutional on its face the particular section of the aggravated-unlawful-use-of-a-weapon statute upon which defendant was convicted and sentenced. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010); *People v. Aguilar*, 2013 IL 112116, ¶ 22.

¶ 42 In this case, the State charged defendant by indictment with three counts of unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (a)(3)(C), (a)(3)(I) (West 2010)), all Class 4 offenses. Count V alleged defendant knowingly carried the firearm at a time when he was not at home and the firearm was not in a case, was loaded, and was immediately accessible (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). Count VI alleged defendant knowingly carried the firearm at a time when he was not at home and he had not been issued a currently valid Firearm Owners Identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)). Count VII alleged defendant knowingly carried the firearm at a time when he was not at home and he was under 21 years of age (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2010)). The jury found defendant guilty of all three offenses, but the trial court sentenced defendant only on count V, merging counts VI and VII.

¶ 43 The statutory section upon which count V is based was found facially unconstitutional. See *Aguilar*, 2013 IL 112116, ¶ 22 (the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the statute violates the right to keep and bear arms, as guaranteed by the second

amendment, because it prohibits the possession and use of a firearm for self-defense outside of the home). Therefore, defendant's conviction based upon count V is void and must be vacated.

¶ 44 As stated above, the jury also found defendant guilty of two other counts of the offense of aggravated unlawful use of a weapon, based upon sections of the statute which have not been found unconstitutional. Thus, we vacate defendant's conviction for aggravated unlawful use of a weapon under section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)) (count V) and remand with directions for the trial court to enter a judgment of conviction against defendant under one of the other two provisions of the offense and impose a sentence. See *People v. Campbell*, 2013 IL App (4th) 120635, ¶ 16 (this court reversed the void conviction but remanded for the trial court to enter a conviction and impose a sentence upon another offense of aggravated unlawful use of a weapon where the jury had found the defendant guilty of that offense under a valid section of the statute).

¶ 45 We now continue to analyze defendant's one-act, one-crime argument as it relates to the other remaining counts of aggravated unlawful use of a weapon. Under either of the remaining two counts, defendant was found to have possessed a firearm when he was not at home and when he had not been issued a FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)), and he possessed a firearm when he was not at home and when he was under 21 years of age (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2010)). Defendant was found to have committed aggravated battery with a firearm when he knowingly discharged a firearm, causing bodily harm (720 ILCS 5/12-3.05(e)(1) (West 2010)). For his argument, defendant claims he had to possess the firearm at the same time he discharged it, thereby causing the two offenses to be charged from the same act.

¶ 46 In *King*, our supreme court held that a defendant's conduct cannot result in multiple convictions if the convictions are based on precisely the same physical act and any of the offenses are included offenses. *People v. King*, 66 Ill. 2d 551, 566 (1977). However, two separate acts do not become one act solely because they occur close together in time. *People v. White*, 311 Ill. App. 3d 374, 385 (2000). "[T]he fact that the defendant's possession of the gun was common to both convictions *** is not dispostive." *White*, 311 Ill. App. 3d at 385.

¶ 47 We conclude the defendant's convictions for aggravated battery with a firearm and aggravated unlawful use of a weapon were based on separate acts. Although defendant may have possessed the firearm at the time he discharged it, each offense alleged a separate act. Indeed, both offenses shared the common act of possession of a firearm, but aggravated battery with a firearm required the additional act of discharging the firearm, and aggravated unlawful use of a weapon required the additional act of either not having a valid FOID card or being under the age of 21. See *White*, 311 Ill. App. 3d at 386. Accordingly, the two offenses did not result from the same physical act.

¶ 48 Because defendant does not assert the offenses are lesser included offenses of each other, we need not consider that issue. We conclude defendant's convictions of aggravated battery with a firearm and aggravated unlawful use of a weapon are separate offenses and did not result from precisely the same physical act. Both convictions stand, as they do not violate the one-act, one-crime rule.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we vacate defendant's conviction for aggravated unlawful use of a weapon as stated in count V, filed pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), as unconstitutional on its face. We affirm

defendant's convictions on the remaining counts. We remand with directions for the trial court to enter a judgment of conviction against defendant under count VI or VII and impose a sentence accordingly. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 51 Affirmed in part and vacated in part; cause remanded with directions.