2015 IL App (4th) 130725-U

NO. 4-13-0725

FILED
June 12, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ROBERT P. MEREDITH,	)	No. 12CF650
Defendant-Appellant.	)	
	)	
	)	Honorable
	)	Patrick W. Kelley,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Because both of the defendant's convictions for aggravated driving under the influence were based on the same physical act in violation of the one-act, one-crime doctrine, the appellate court remanded the matter to the trial court to determine the appropriate conviction to vacate. The appellate court also directed the court to determine whether the defendant was entitled to additional sentencing credit. In all other respects, the appellate court affirmed the court's judgment.

¶ 2 In September 2012, the State charged defendant, Robert P. Meredith, with two counts of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(1), (2) (West 2012)). Following a February 2013 trial, a jury found defendant guilty of both counts. In July 2013, the trial court sentenced defendant to six years in prison for each conviction, to be served concurrently.

¶ 3 Defendant appeals, arguing that (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the trial court erred by sustaining an objection to testimony regarding his

emotional state; (3) the State improperly diminished the reasonable-doubt standard during its opening statement and closing argument; (4) the court erred by imposing a Class X sentence; (5) the State failed to provide proper notice as required by section 111-3(c) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/111-3(c) (West 2012)); (6) he was subjected to an improper double enhancement; (7) his convictions violated the one-act, one-crime doctrine; and (8) he was entitled to an additional sentencing credit. For the following reasons, we affirm in part and remand in part with directions.

¶ 4 I. BACKGROUND

¶ 5 A. The Evidence Presented at Defendant's Trial

¶ 6 At defendant's February 2013 trial, the parties presented the following evidence.

¶ 7 1. *The State's Evidence*

¶ 8 Brittany Etchill, a Springfield police officer, testified that on June 17, 2012, she ended her police shift at midnight, and shortly thereafter, she drove her marked squad car to her second job, providing security for five automobile dealerships. Although Etchill was not wearing her police uniform, she wore (1) her police badge, (2) her issued weapon, and (3) a police radio.

¶ 9 Etchill explained that the five dealerships were separated by a four-lane road. A person driving east on that road would pass the following pertinent properties located to the south in the following order: (1) a Chevrolet dealership, (2) an access road, (3) a Honda dealership, (4) a Cadillac dealership, (5) an abandoned Saturn dealership, and (6) a retention pond. Directly across from the Honda dealership—on the north side of the road—was a Ford dealership. A Chrysler/Jeep dealership was located to the east of the Ford dealership.

¶ 10 At about 4 a.m., Etchill was in her squad car, located on the access road between

the Chevrolet and Honda dealerships, when she heard "tires squealing." After observing a black car "zipping in behind or between the parked cars" of the Ford dealership, Etchill drove approximately 50 feet west toward the Chevrolet dealership. Etchill then noticed the black car speed south across the four-lane road toward the access road where Etchill had been parked. Etchill reversed direction, and as she headed east, she observed the driver exit his car, which was facing south on the access road. The driver, whom Etchill identified as defendant, then walked toward the Chevrolet dealership.

¶ 11 Because Etchill thought defendant might be looking at cars, she did not approach him, explaining that the dealerships did not want security personnel questioning patrons who were looking at cars after normal business hours. Instead, Etchill parked her squad car under a lit portion of the access road not more than 25 yards south of defendant's car. Etchill observed defendant "walking fast" between the Honda and Chevrolet dealerships and surmised that defendant was comparing vehicles.

¶ 12 After 10 minutes had passed, Etchill realized that she had lost sight of defendant. For the next 20 minutes, Etchill searched the front and rear lots of the five dealerships while periodically observing defendant's car in case he returned. Before calling fellow officers for assistance, Etchill drove south on the access road and saw defendant behind the Honda dealership with a cellular phone in his hand. Etchill approached defendant and, while still in her squad car, asked defendant what he was doing. Defendant responded that his friends had dropped him off, and he was waiting for a ride home. Etchill told defendant that (1) she did not believe his explanation because she had seen him driving, (2) he had "no business being behind the buildings," and (3) he needed to return to his vehicle. Etchill called for additional police assistance.

¶ 13 When defendant returned to his vehicle, Etchill parked her squad car behind de-

fendant's car and approached. Etchill again asked defendant what he was doing behind the dealership. Defendant explained that his friends had dropped off a truck that they had test driven. At that moment, Etchill noticed the strong odor of alcohol coming from defendant. Etchill informed defendant that his explanation was not possible given it was 4:30 a.m. Thereafter, Etchill awaited the arrival of additional police. Etchill noted that when defendant initially exited his car, he was not carrying anything in his hands.

¶ 14 Robert Jones, a Springfield police officer, responded to Etchill's request for assistance. Upon his arrival, Jones spoke with defendant and noticed his slurred speech, bloodshot eyes, and the strong odor of alcohol on his breath. A recording of the conversation between Jones and defendant, which the trial court admitted into evidence, showed the following.

¶ 15 Defendant explained that at approximately noon on the previous day, he drove a friend to the automobile complex to test drive a truck at either the Ford or Chevrolet dealership. He left his car at the dealership and someone else gave him and his friend a ride back to his friend's house, where "they were partying." Defendant admitted that he had consumed "less than a dozen" beers. Someone later gave defendant a ride back to the dealership. Upon arriving at his car, defendant realized he could not drive because he was intoxicated. After defendant attempted unsuccessfully to call several friends to pick him up, he called for a taxi cab, which he expected would arrive shortly.

¶ 16 When Jones informed defendant of the sequence of events that Etchill had observed, defendant disputed that Etchill's squad car had been at the location where his car was now parked. Defendant admitted seeing Etchill's squad car further south on the access road but denied driving his car that morning. Jones then had defendant perform five field sobriety tests to determine if he was impaired. Defendant agreed to the administration of a preliminary field

Breathalyzer test, which showed a blood alcohol content (BAC) of 0.180. Thereafter, Jones placed defendant under arrest for DUI.

¶ 17 Jones continued his testimony by noting that defendant failed three of five field sobriety tests. Jones opined that based on his training and experience, defendant was under the influence of alcohol. Jones acknowledged that (1) he did not see defendant operating a vehicle; (2) a cab did arrive at the dealership at approximately 4:45 a.m.; and (3) when Jones walked defendant to a squad car for transport to the police station, defendant told him that he had been drinking at the retention pond located east of the dealerships.

¶ 18 The parties stipulated that testing conducted at the Sangamon County jail later that morning showed that defendant's BAC was 0.158.

¶ 19 2. *Defendant's Evidence*

¶ 20 Defendant testified that at some point during his marriage to Deborah Meredith, she became the sole legal guardian of a minor they named Felicity. About six months before his June 17, 2012, arrest, Deborah relinquished custody of Felicity without defendant's knowledge.

¶ 21 On June 16, 2012, at about 7:30 p.m., defendant dined with Deborah at a local restaurant. No alcohol was consumed during their dinner. Sometime after their return home, defendant had a conversation with Deborah about establishing a schedule to visit Felicity. Deborah demurred, stating that she did not want to speak further about it. Defendant persisted, which caused a brief argument. Deborah eventually went to bed. Defendant stayed in the living room and began watching video recordings of Felicity. At approximately 2 a.m., Deborah asked defendant if he was coming to bed. Although defendant responded that he would soon join her, he continued watching recordings of Felicity and eventually became upset. Defendant decided to leave his home to "clear" his head. As he left, defendant grabbed a pint of rum.

¶ 22 Defendant drove to the dealerships and parked his car on the access road in between the Chevrolet and Honda dealerships, stating that he intended to go to the retention pond east of the abandoned Saturn dealership. Defendant did not notice any police officers when he arrived at the access road. Defendant exited, walked in front of his vehicle, and then headed west toward the Chevrolet dealership. When defendant reached the displayed vehicles lining the access road, he turned south. Eventually, defendant began walking east across the access road toward the Honda dealership. Thereafter, defendant walked through three dealership lots to the retention pond, explaining that he used to take Felicity to the pond to feed the ducks.

¶ 23 When defendant reached the pond, he walked out to the concrete spillway and drank the pint of rum he had brought with him. Deborah eventually called defendant on his cell phone to inquire about his whereabouts. Because defendant told Deborah that he had been drinking, she offered to drive defendant back home. Defendant declined, opting instead to call a cab. Defendant estimated that he had been at the pond for approximately 25 minutes.

¶ 24 Defendant provided the following reason why he initially lied to the police:

> "I wasn't expecting to run into an officer. I was upset because of the little girl, and you know, I had just gotten in another argument with my wife. I was walking along, here comes an officer, and *** I thought in the middle of the night I'm out here in a dealership—and you know, just been drinking, walked through there, and [Etchill] approaches me, asked me what I was doing, and I—I just came up with a story."

¶ 25 Defendant (1) stated that he parked on the public access road because the dealerships were on private property, (2) admitted that the differing accounts he provided to Etchill and

Jones were not true, and (3) confirmed that he did not tell Etchill or Jones that he went to the retention pond to mourn Felicity's absence.

¶ 26 3. *The State's Rebuttal Evidence*

¶ 27 Deborah testified that on the evening of June 16, 2012, Felicity had not been living with her and defendant for about "a year or two." Deborah confirmed that during that time, she did not have any visitation with Felicity. On that night, Deborah remembered being home with defendant and her son. Deborah went to sleep at approximately 11 p.m. but awoke sometime around 3:30 a.m. and noticed that defendant was not in bed. Deborah's son informed her that defendant had left. Deborah attempted to contact defendant by phone. After failing to do so, Deborah tracked defendant's location using her phone. Deborah then borrowed her neighbor's van and drove to that location. When she arrived, she observed several police officers around defendant's car. Etchill informed Deborah that defendant had been arrested for DUI.

¶ 28 Deborah confirmed that (1) she takes medication for multiple sclerosis, which sometimes causes short-term memory loss; (2) she remembered the events that occurred on the evening of June 16, 2012; (3) she did not argue with defendant on the evening of June 16, 2012; and (4) defendant was not drunk before she went to bed that night.

¶ 29 B. The Jury's Verdict and the Trial Court's Sentence

¶ 30 The jury found defendant guilty of both counts of aggravated DUI. The trial court later sentenced defendant to six years in prison for each conviction, to be served concurrently.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 A. Sufficiency of the Evidence

¶ 34 1. *The Applicable Statutory Provisions and the Standard of Review*

¶ 35 Sections 11-501(a)(1) and 11-501(a)(2) of the Illinois Vehicle Code—the provisions under which defendant was convicted—provide, as follows:

> "(a) A person shall not drive or be in actual physical control of any vehicle within this State while:
>
> (1) the alcohol concentration in the person's blood or breath is 0.08 or more ***;
>
> (2) under the influence of alcohol[.]" 625 ILCS 5/11-501(a)(1), (2) (West 2012).

¶ 36 When reviewing a challenge to the sufficiency of the evidence, we determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Phillips*, 2014 IL App (4th) 120695, ¶ 19, 14 N.E.3d 1. In so doing, we allow all reasonable inferences from the record in favor of the State. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011). "The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence." *People v. Burney*, 2011 IL App (4th) 100343, ¶ 25, 963 N.E.2d 430. "We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 267-68 (2005).

¶ 37 2. *Defendant's Claim*

¶ 38 Defendant argues that the State failed to prove his guilt beyond a reasonable doubt. Specifically, defendant contends that the State's direct evidence merely proved that he drove his car to the dealership and approximately 30 minutes later, an officer found him intoxi-

cated while he was away from his car. Defendant acknowledges that the State may satisfy its burden of proof through the presentation of circumstantial evidence from which a jury could infer other connected facts that usually and reasonably follow from human experience. Defendant asserts, however, that based on the evidence presented, "no reasonable jurist" could have concluded that the State satisfied its burden of proof. We disagree.

¶ 39 In this case, the State's evidence showed that in the early morning hours of June 17, 2012, an off-duty police officer in a marked police squad car observed defendant driving aggressively through a car dealership located on the north side of a road. Defendant then sped through four lanes to the south side of the road and parked his vehicle on an access road three automobile dealerships away from where defendant testified he intended to go. At that moment, the squad car was located less than 50 feet away, traveling east on the road toward defendant's location. Defendant exited his vehicle and for the next 10 minutes, he walked several times from the west side to the east side of the access road, acknowledging that the squad car had parked just 25 yards south of his location. When questioned by police, defendant admitted that he was intoxicated as a result of consuming less than a dozen beers earlier that evening. A preliminary Breathalyzer test conducted within 45 minutes of defendant's arrival at the dealership showed a BAC of 0.180.

¶ 40 Evaluating this evidence in the light most favorable to the prosecution, a rational trier of fact could have reasonably inferred the following: (1) defendant was intoxicated when he drove aggressively through a parking lot of new cars and then at a high rate of speed through four traffic lanes; (2) defendant parked his car on the access road and exited his car upon noticing that a squad car was approaching his location; and (3) defendant was pacing back and forth—contemplating his next action—given that if he returned to his car, he risked being stopped by

the parked police officer.

¶ 41 More important, the State presented direct evidence to rebut defendant's claim that he was not drunk when he drove to the access road but, instead, drank a pint of rum at the retention pond because he was mourning the six-month anniversary of losing custody of Felicity. Deborah's testimony, which defendant did not challenge during his cross-examination, revealed that on June 16, 2012, (1) Felicity had not resided in the home she shared with defendant for about "a year or two," (2) Deborah did not argue with defendant about Felicity, and (3) Deborah did not speak to defendant after he purportedly drank a pint of rum at the retention pond.

¶ 42 In reviewing a challenge to the sufficiency of the evidence, our role is not to retry the defendant. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). Instead, we determine whether the evidence presented could have reasonably supported a finding of guilt beyond a reasonable doubt. *Id*. Because we conclude that the evidence presented in this case was sufficient to support the jury's guilty verdict, we reject defendant sufficiency claim.

¶ 43 B. The Plain-Error Doctrine

¶ 44 We note that in his brief to this court, defendant—who acknowledges his forfeiture of three issues by failing to properly preserve them for our review—urges this court to excuse his forfeiture and consider these claims under the plain-error doctrine.

¶ 45 "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Failure to do so results in the forfeiture of that claim on appeal. *Id.* at 612, 939 N.E.2d at 412. A defendant can avoid the harsh consequences of forfeiture under the plain-error doctrine. *Id.* at 613, 939 N.E.2d at 413.

¶ 46 The plain-error doctrine permits a reviewing court to reach a forfeited error affect-

ing substantial rights in the following two circumstances: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

¶ 47 As a matter of convention, reviewing courts *typically* undertake plain-error analysis by first determining whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010). See also *People v. Bowens*, 407 Ill. App. 3d 1094, 1108, 943 N.E.2d 1249, 1264 (2011) (where this court held that "the usual first step in plain-error analysis is to determine whether any error occurred"). "If error is found, the court then proceeds to consider whether either of the [aforementioned] two prongs of the plain-error doctrine have been satisfied." *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. In this case, however, we choose to consider the following claims under the plain-error doctrine.

¶ 48 1. *The Trial Court's Evidentiary Ruling*

¶ 49 Proceeding only under the first prong of the plain-error analysis, defendant argues that the trial court erred by sustaining an objection to testimony regarding his emotional state. Specifically, defendant contends that the court did not permit the jury to consider his testimony that it was painful to talk about Felicity. In his brief to this court, defendant asserts, as follows:

> "On re[]direct examination, defense counsel asked [defendant] if it was painful for him to talk about Felicity. When [defendant] affirmatively answered, the [State] objected, arguing a lack of relevance. The [trial court] sustained the State's objection. The

[court's] ruling was erroneous because [defendant's] testimony was materially relevant to the issue of his credibility."

Defendant asserts that had the jury been allowed to consider the stricken testimony, it would have bolstered his credibility by providing an innocent explanation for his not telling Etchill and Jones the true reason why he was in the vicinity of the retention pond. We disagree with defendant's characterization of the testimony at issue.

¶ 50 During defendant's case in chief, defense counsel conducted a redirect examination of defendant, where the following exchange occurred:

"[DEFENSE COUNSEL]: Is it painful for you to talk about [Felicity]?

[DEFENDANT]: Yes, it is very painful.

[DEFENSE COUNSEL]: Is it painful for you today to talk about your daughter?

[DEFENDANT]: It is still painful.

[THE STATE]: Objection as to relevance and it is outside the scope of ***

[THE COURT]: Sustained.

[DEFENSE COUNSEL]: No further questions."

¶ 51 Contrary to defendant's contention, the State did not object to defendant's general testimony that it was painful for him to talk about Felicity, and thus, the jury was not prohibited from considering that evidence. The relevancy objection the trial court sustained pertained only to defendant's testimony that as of February 20, 2013—the date defense counsel conducted its redirect examination of defendant—it was still painful for defendant to speak about Felicity. In

its brief on appeal, the State maintains that such testimony was irrelevant. We note that in his reply brief, defendant does not address the relevancy of this testimony to explain the false statements defendant made to the police approximately seven months earlier. See *People v. Barnes*, 2013 IL App (1st) 112873, ¶ 41, 3 N.E.3d 330 ("Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action either more or less probable than it would be without the evidence.").

¶ 52 As previously noted, our consideration of defendant's evidentiary argument proceeds only under the first-prong of the plain-error analysis. Thus, defendant must prove that "prejudicial error" tipped the scales of justice against him in an otherwise close case. *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 479 (2005). However, defendant fails to explain the nature or extent of the prejudice caused by the omission of evidence regarding his reluctance to speak about Felicity seven months after the events at issue in this case. Accordingly, we find no plain error occurred.

¶ 53 2. *The State's Opening Statement and Closing Argument*

¶ 54 Defendant's next argument concerns the following portions of the State's opening statement and closing argument.

¶ 55 During opening statements at defendant's February 2013 trial, the State addressed the jury, as follows:

> "It is not going to be a case where there is any debate over the defendant's drinking. *** It's a case about this defendant driving his car while he's under the influence.
>
> The State, we have the burden, and that burden, reasonable doubt, proof beyond a reasonable doubt, not about speculation,

wild expectations, but it is about the truth, what's reasonable, what your common sense tells you happened that night, and the State's case will show, which we must prove, the defendant was drunk *** while driving his car that night[.]"

¶ 56 During closing arguments, defense counsel made the following statements to the jury:

"The State has not met their burden of proof. There is some doubt. There should be some doubt in your mind as to whether or not my client was intoxicated at the time he drove. If there is, you are left with a not guilty verdict, the only verdict that's just and fair in this case."

¶ 57 During the State's rebuttal argument, the prosecutor responded, as follows:

"The standard is reasonable doubt, not beyond all doubt, beyond any doubt. Some doubt isn't the standard, its reasonable doubt. Courts use the [phrase] reasonable doubt, not wild speculation, strange possibility, not some doubt, reasonable doubt[.]"

¶ 58 Defendant argues that the State improperly diminished the reasonable-doubt standard during its opening statement and closing argument. We disagree.

¶ 59 "Attempts to explain the reasonable-doubt standard have been disfavored by the courts because 'no matter how well-intentioned, the attempt may distort the standard to the prejudice of the defendant.' " *Burney*, 2011 IL App (4th) 100343, ¶ 67, 963 N.E.2d 430 (quoting *People v. Keene*, 169 Ill. 2d 1, 25, 660 N.E.2d 901, 913 (1995)). However, improper commentary constitutes plain error only when it is either "so inflammatory that the defendant could not

have received a fair trial or so flagrant as to threaten a deterioration of the judicial process." (Internal quotation marks omitted.) *People v. Burman*, 2013 IL App (2d) 110807, ¶ 45, 986 N.E.2d 1249.

¶ 60 Defendant contends that the State's remarks during its opening statement "injected confusion into the proceedings *** regarding the meaning of proof beyond a reasonable doubt." We conclude, however, that the brief, isolated statements the State made about the appropriate burden of proof during its opening statement were unlikely to mislead the jury and were certainly not of the magnitude that would justify reversal of defendant's conviction. See *People v. Naylor*, 229 Ill. 2d 584, 602, 893 N.E.2d 653, 665 (2008) ("Absent reversible error, there can be no plain error.").

¶ 61 In addition, we note that the statements defendant claims were improper during the State's surrebuttal were in response to defendant's claim during his closing argument that "[t]here should be *some doubt* in your mind as to whether or not my client was intoxicated at the time he drove." (Emphasis added.) In response, the State sought to clarify the proper standard of review by reminding the jury that "[s]ome doubt isn't the standard, it's reasonable doubt." Based on this exchange, the State's comments were appropriate. See *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 420 (2009) ("Statements will not be held improper if they were provoked or invited by the defense counsel's argument.").

¶ 62 3. *Defendant's Sentencing Claim*

¶ 63 Defendant argues that the trial court erred by imposing a Class X sentence. Specifically, defendant contends that section 11-501(d)(2)(E) of the Vehicle Code (625 ILCS 5/11-501(d)(2)(E) (West 2012)) requires six or more *aggravated* DUI convictions to justify the imposition of a Class X sentence. Defendant takes issue with the court's consideration of his five

nonaggravated DUI convictions under section 501(a) of the Vehicle Code (625 ILCS 5/11-501(a) (West 2012)) to impose a Class X sentence, which defendant posits was improper. We disagree.

¶ 64 Section 11-501(d)(2)(E) of the Vehicle Code provides, in pertinent part, as follows:

> "A sixth or subsequent violation of this Section or similar provision is a Class X felony." 625 ILCS 5/11-501(d)(2)(E) (West 2012).

¶ 65 In *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 29, 2 N.E.3d 333, this court considered and rejected the same argument defendant now raises—that is, that "section 11-501(d)(2)(E) of the Vehicle Code *** includes, for purposes of counting the number of prior violations, only aggravated DUIs under subsection (d) and not nonaggravated DUIs under subsection (a)." In rejecting that argument, this court held, as follows:

> "While defendant contends the phrase 'this Section' refers just to subsection (d), our reading of the statute reveals the phrase 'this Section' refers to section 11-501 as a whole. To begin, the statute does not reference subsection (d) as a 'section.' Instead, the statute specifically and repeatedly references that provision as 'subsection (d).' See 625 ILCS 5/11-501(d)(2)(F), (d)(2)(G), (d)(2)(H), (d)(2)(I), (d)(2)(J), (d)(3) (West 2010). If the General Assembly intended to limit the application of Class X sentences to only aggravated DUI violations under subsection 11-501(d), it knew how to do so. Indeed, specific subsections are repeatedly referenced throughout section 11-501. See, *e.g.*, 625 ILCS 5/11-

> 501(c), (d), (e), (g) (West 2010). In the case of subsection 11-501(d), however, the legislature specifically chose the phrase 'this Section,' not 'this subsection,' when referencing what constitutes a qualifying violation for calculating Class X eligibility. Thus, the plain language of section 11-501(d)(2)(E) shows the phrase 'this Section' was intended to encompass all of section 11-501. The legislature's use of the capitalized 'S' in the phrase 'this Section' supports our finding. See *People v. Kennedy*, 372 Ill. App. 3d 306, 308, 867 N.E.2d 1154, 1156 (2007) (finding section 6-303 (d-3) of the Vehicle Code is not ambiguous where the term 'this Section' as used in subsection (d-3) refers to section 6-303)." *Id.* ¶ 34, 2 N.E.3d 333.

¶ 66 Defendant acknowledges *Halerewicz* but asserts that our interpretation of section 11-501(d)(2)(E) of the Vehicle Code was "wrongly decided." Defendant urges this panel to "construe the statute in [his] favor and find that sections [11-]501(d)(2)(B-E) require prior convictions for aggravated DUI to justify an enhanced sentence." See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440, 892 N.E.2d 994, 1006-07 (2008) ("[T]he opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels.").

¶ 67 We adhere to our decision in *Halerewicz* and disagree with defendant that the plain language of section 11-501(d)(2)(E) of the Vehicle Code requires a different interpretation.

¶ 68 C. Improper Notice of Enhanced Sentence

¶ 69 Defendant argues that the State failed to provide proper notice as required by sec-

tion 111-3 of the Procedure Code. We disagree.

¶ 70 Section 111-3(c) of the Procedure Code provides, as follows:

> "When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c) (West 2012).

¶ 71 As previously noted, in September 2012, the State charged defendant with two counts of aggravated DUI. Both counts alleged that defendant violated section 11-501(a) of the Vehicle Code "for a third or subsequent time." See 625 ILCS 5/11-501(d)(1)(A) (West 2012) (every person convicted of violating subsection 11-501(a) a third or subsequent time shall be guilty of aggravated DUI). As the State correctly notes, the classification of the two charges against defendant depended on whether defendant had any previous DUI convictions. See 625 ILCS 5/11-501(d)(2)(A) (West 2012) ("Except as provided otherwise, a person convicted of ag-

gravated [DUI] *** is guilty of a Class 4 felony."); 625 ILCS 5/11-501(d)(2)(B) (West 2012) ("A third violation of this Section or a similar provision is a Class 2 felony."); 625 ILCS 5/11-501(d)(2)(C) (West 2012) ("A fourth violation of this Section or a similar provision is a Class 2 felony, for which a sentence of probation or conditional discharge may not be imposed."); 625 ILCS 5/11-501(d)(2)(D) (West 2012) ("A fifth violation of this Section or a similar provision is a Class 1 felony ***."); 625 ILCS 5/11-501(d)(2)(E) (West 2012) ("A sixth or subsequent violation of this Section or similar provision is a Class X felony.").

¶ 72 On February 19, 2013, the State filed a notice, informing defendant of the State's intent to "prove up five prior [DUI] offenses at sentencing." The notice provided the respective case numbers and the counties in which defendant's prior offenses occurred. At a hearing conducted that same day, the parties discussed (1) a guilty plea offer the State had tendered and (2) the State's notice filing, as follows:

> "THE COURT: [T]he court was advised last week *** that there is a plea offer *** that's been made[.] [The court] wanted to *** make sure that *** [defendant knows] what the potential sentence is her[e] and that you want to reject the plea offer, okay?
>
> [THE DEFENDANT]: Yes, your honor.
>
> THE COURT: [The court] understand[s] that we are ready to go to trial tomorrow, but the plea offer, as I recall, was for three years in the Department of Corrections?
>
> [THE STATE]: Yes, your honor.
>
> THE COURT: You know, as currently filed[,] it is a Class 2 felony, so that would be the minimum sentence for a [C]lass 2.

Do you understand that ***?

[DEFENDANT]: Yes, your honor.

THE COURT: If we go to trial and all these convictions hold, you would be facing a Class X felony, do you understand that, if you are convicted.

[DEFENDANT]: Yes, your honor.

THE COURT: For a Class X felony probation is not an option, and the minimum sentence there is from six years to thirty years, to be followed by three years mandatory supervised release and a $25,000 fine.

Do you understand that?

[DEFENDANT]: Yes, your honor.

THE COURT: So in other words[,] after the trial if you are convicted, potentially the least you could get is six years, as compared to your three[-]year plea offer.

Do you understand that?

[DEFENDANT]: Yes, your honor.

THE COURT: And knowing that, it is your desire to proceed to jury trial tomorrow?

[DEFENDANT]: Yes, your honor."

¶ 73 We first note that the primary purpose of section 111-13(c) of the Procedure Code is to provide a defendant notice that the State intends to seek an enhanced sentence. 725 ILCS 5/111-3(c) (West 2012). See *People v. Easly*, 2014 IL 115581, ¶ 18, 7 N.E.3d 667 (quoting

People v. Jameson, 162 Ill. 2d 282, 290, 642 N.E.2d 1207, 1211 (1994) (" '[T]he legislature enacted section 111-3(c) to ensure that a defendant receive notice, before trial, of the *offense* with which he is charged.' " (Emphasis in original.)).

¶ 74 In this case, defendant acknowledges that the State filed its February 2013 notice, but he claims that the State sought only a "sentencing enhancement" and "never sought to enhance the classification of the charged offenses." Assuming *arguendo* that defendant's claim is true, no need would exist for the State to comply with section 111-13(c) of the Procedure Code by filing its February 2013 notice. See *Jameson*, 162 Ill. 2d at 288, 642 N.E.2d at 1210 ("[I]t is evident that the legislature intended that statute to reach those instances in which a prior conviction elevates the classification of the offense with which a defendant is charged and convicted, rather than simply the sentence imposed." (Emphasis in original.)).

¶ 75 Here, the State essentially concedes that it did not satisfy the written provisions of section 111-13(c) of the Procedure Code by informing defendant in the *charging instrument* that it intended to seek an enhanced sentence. However, the State asserts that it complied with the spirit of the statute by filing its February 2013 notice. We agree.

¶ 76 The record shows that at the February 2013 hearing on the State's notice filing, the trial court clearly informed defendant that, in lieu of accepting the State's guilty-plea offer of three years, defendant would go to trial on a Class X offense that mandated a minimum six-year sentence if convicted and if his criminal history—as outlined by the State—was accurate. In response, defendant confirmed to the court that not only did he understand the court's admonishments, he was willing to forego the State's guilty-plea offer and proceed to trial. Because we conclude that defendant effectively received the pretrial notice that section 111-13(c) of the Procedure Code is intended to provide, we reject defendant's claim that the State's failure to comply

with the formal requirements of the statute requires reversal of his convictions.

¶ 77 D. Double Enhancement

¶ 78 Defendant argues that he was subjected to an improper double enhancement. Specifically, defendant contends that "the same factor was used to both enhance the class of offense from a misdemeanor to a felony and to justify the imposition of a Class X sentence." We disagree.

¶ 79 "The general prohibition against double enhancements is 'merely a rule of statutory construction,' premised on the assumption that the legislature considered the factors inherent in the offense in fashioning the appropriate range of punishment for that offense." *People v. Phelps*, 211 Ill. 2d 1, 15, 809 N.E.2d 1214, 1222 (2004) (quoting *People v. Rissley*, 165 Ill. 2d 364, 390, 651 N.E.2d 133, 145 (1995). "[W]here the legislature has made clear an intention to enhance the penalty for a crime, even in a way which might constitute double-enhancement, this court will not overrule the legislature." *People v. Sharpe*, 216 Ill. 2d 481, 530, 839 N.E.2d 492, 522 (2005). "In determining whether the legislature intended a double enhancement, we look to the statute itself as the best indication of legislative intent." *Rissley*, 165 Ill. 2d at 390-91, 651 N.E.2d at 145. If the statutory language is clear and unambiguous, "our duty is to enforce the law as enacted without resort to further principles of statutory construction." *Id*.

¶ 80 Under the circumstances at issue in this case, the pertinent statutory provision provides as follows:

> "A sixth or subsequent violation of this Section or similar provision is a Class X felony." 625 ILCS 5/11-501(d)(2)(E) (West 2012).

Given our aforementioned discussion of the statutory scheme and the plain, unambiguous mean-

ing of section 11-501(d)(2)(E) of the Vehicle Code, we conclude that the legislature intended to subject a defendant to a Class X offense provided the requisite number of qualifying violations exists. See *Halerewicz*, 2013 IL App (4th) 120388, ¶ 36, 2 N.E.3d 333 ("We note the statute uses the term 'violation' and not 'conviction.' Accordingly, dispositions resulting in supervision would also count toward the sentencing calculus.").

¶ 81 E. The One-Act, One-Crime Doctrine

¶ 82 Defendant argues that his convictions violate the one-act, one-crime doctrine. We agree.

¶ 83 In *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844-45 (1977), the supreme court articulated the one-act, one-crime doctrine, as follows:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act', when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered."

Under *King*, "[m]ultiple convictions are improper if they are based on precisely the same physical act." *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306 (1996). See *People v. Artis*, 232 Ill. 2d 156, 168, 902 N.E.2d 677, 685 (2009) (declining to abandon the one-act, one-crime doctrine).

¶ 84 Defendant contends that because both of his convictions for aggravated DUI were based on the same physical act, this court should remand his case to the trial court with instruction to correct his sentencing order consistent with that doctrine. The State agrees, conceding that both of defendant's convictions were based on the same physical act of driving under the influence. We accept the State's concession. When, as here, "it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination." *Id.* at 177, 902 N.E.2d at 690. Accordingly, we remand the matter to the trial court to determine the less serious offense and order that conviction vacated.

¶ 85 F. Sentencing Credit

¶ 86 Defendant argues that he is entitled to an additional 60 days of sentencing credit, contending he was in custody from the date of his arrest, June 17, 2012, until he posted a recognizance bond on August 15, 2012. The State was allowed to supplement the record with the Sangamon County sheriff's booking-history report, which shows defendant was booked into the jail at 6:32 a.m. on June 17, 2012, and released at 7:01 a.m. that same morning. The State was also allowed to supplement the record with a certified copy of the notice to appear issued to defendant and signed by him on June 17, 2012, directing him to appear in court on August 7, 2012, at 9 a.m. The State filed a complaint for aggravated DUI on August 3, 2012, and issued a notice to appear to defendant directing him to appear in court on the felony charge on August 15, 2012,

at 1:30 p.m. On that date, defendant appeared with counsel and the record does not reflect he was then in custody. (On dates after the jury returned its verdict, following revocation of defendant's bond, the record reflects defendant appeared in custody of the sheriff.) The parties agreed to a $10,000 personal-recognizance bond. Thus, other than the morning of his arrest, defendant was never in custody between June 17, 2012, and August 15, 2012. Further, the record reflects defendant was given a day of credit for the day of arrest and both his attorney and the State agreed defendant was entitled to 158 days' credit. The record supports that agreement. Defendant is not entitled to any additional credit. We note a simple consultation with defendant should have enabled counsel to withdraw this argument, rather than persist in it, especially once the State supplemented the record with the sheriff's booking-history report.

¶ 87 III. CONCLUSION

¶ 88 For the foregoing reasons, we remand to the trial court with directions to determine (1) the less serious conviction for aggravated DUI and vacate that conviction and (2) whether defendant is entitled to additional sentencing credit. In all other respects, we affirm the court's judgment. As part of this judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 89 Affirmed in part; cause remanded in part with directions.