SECOND DIVISION
January 26, 2016

No. 1-14-0422

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 14942
	)	
ROMAIN OATIS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's trial counsel was not ineffective for failing to argue that defendant acted in self-defense after being shot at, where the trial testimony, physical evidence, and defendant's own custodial written statement revealed that defendant was the only shooter; but defendant's conviction for aggravated discharge of a firearm must be vacated on one-act, one-crime principles.

¶ 2 Following a bench trial, defendant Romain Oatis was found guilty of aggravated battery with a firearm, aggravated discharge of a firearm, and aggravated unlawful use of a weapon (AUUW) by a felon, and he was sentenced to concurrent prison terms of 12, 7, and 6 years respectively. On appeal, defendant contends he received deficient legal representation because

his trial counsel failed to argue self-defense to the charges of aggravated battery and aggravated discharge of a firearm. Defendant also asserts that his conviction for aggravated discharge of a firearm violated the one-act, one-crime doctrine. We vacate defendant's conviction for aggravated discharge of a firearm and affirm the trial court's judgment on the remaining charges.

¶ 3 Defendant and his cousin, Markalle Nellem, were charged by indictment with various felonies in connection with the drive-by shooting of Darryl Armstrong. The counts charging defendant included attempted first-degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, and AUUW by a felon. Defendant and Nellem were tried in a simultaneous but severed bench trial. Nellem has a separate appeal (No. 1-14-0593).

¶ 4 Darryl Armstrong testified that on July 24, 2012, he was driving a black van with tinted windows. At about noon he was in the vicinity of St. Louis and Fulton Avenue, driving south on St. Louis. He stopped at a stop sign at Walnut. He heard shots and ducked down inside his van. He was unable to see where the shots came from. Then he drove the van around the corner to a car wash on Lake Street where the people there told him that he was bleeding. He was taken by ambulance to Mt. Sinai Hospital where he was treated for two gunshot wounds to his back and glass fragments in his left arm. The doctors told him that one of the gunshot wounds was a through-and-through shot. Armstrong did not see who shot him.

¶ 5 Officer Michael Roman testified that on July 24, 2012, he was assigned to conduct a narcotics surveillance in his vehicle in the general vicinity of North St. Louis Avenue, West Fulton and West Walnut. He was parked on the north side of St. Louis facing south at Carroll Street, a block and a half from Walnut and St. Louis. At about noon, he observed a black four-door vehicle, later identified as a Buick driven by codefendant Nellem, traveling southbound down St. Louis to Walnut Street. Roman's attention was drawn to the Buick by its high rate of

speed. When the Buick reached Walnut Street, it started to turn eastbound onto Walnut, and then it stopped. At that time Roman heard gunshots coming from the direction of the Buick. He could not see the vehicle's occupants or who, if anyone, was being shot at. Roman contacted other officers with his police radio and gave a description of the Buick. It continued eastbound on Walnut and was eventually stopped in the alley at 3244 West Fulton. Roman subsequently went to that location and identified the Buick as the same vehicle that had stopped at North St. Louis and West Walnut from which the shots were fired.

¶ 6 Officer Camarillo testified that on July 24, 2012, he was involved in the narcotics investigation with Officer Roman. At around noon, he was a passenger in an unmarked police vehicle driven by Sergeant O'Shea. They "heard shots being fired from a weapon in the area." At that time their vehicle was on West Fulton near Homan. Walnut Street ran one block north of Lake Street, Fulton Street ran one block north of Walnut, and Carroll ran one block north of Fulton. The cross-street, Homan, was one block east of St. Louis. Within seconds after the shots were fired, Officer Roman radioed to them that a black vehicle sped up to the intersection of St. Louis and Walnut and then slowed down; Roman heard loud reports; and then the vehicle sped eastbound on Walnut. At that time O'Shea and Camarillo's vehicle was crossing Homan going west, so they performed a U-turn and proceeded eastbound on Fulton. They saw the Buick traveling at a high rate of speed, coming up north on Homan. It was turning eastbound on Fulton at a high rate of speed, and they followed it. The officers' unmarked police vehicle did not have lights on the top or hood of the car, but it had oscillating lights and a siren going at that time. The Buick kept going east on Fulton and then northbound on Kedzie; it turned left into the north alley of Fulton, and it stopped at about 3244 West Fulton in the alley. It stopped because it could not go around a large garbage truck. Camarillo's vehicle stopped behind it. The two occupants--

Nellem was the driver and defendant was the passenger--exited the Buick and ran in opposite directions. O'Shea pursued Nellem; Camarillo pursued defendant and detained him in back of 3242 West Carroll where he was "tucked away in a stairwell." Officer Roman arrived at the scene and identified the Buick as the one about which he had communicated to Camarillo. Another officer notified Camarillo that a gun had been found inside a white minivan.

¶ 7 Officer Angelo Marconi, an evidence technician, testified that at about 1:20 p.m. on July 24, he observed a white medical transport van that was parked at 3315 West Fulton. The rear glass window of the white minivan had been shattered. Marconi saw a firearm and broken glass between the rear storage area and the seat. He recovered the firearm, a 9-millimeter semi-automatic weapon. The weapon's magazine contained eight live rounds of ammunition.

¶ 8 Marconi went to Walnut and St. Louis where Armstrong had been shot. Marconi observed and photographed nine 9-millimeter spent casings of various brands scattered in the intersection. He went to the rear yards of 3244 Fulton and 3242 West Carroll where he took photographs of the locations where defendant and Nellem had been captured. He went to an alleyway at 3246 West Fulton where he saw and photographed the black four-door Buick. Marconi also went to West Lake Street where he saw, photographed, and processed Armstrong's black conversion van. Marconi found a fired bullet fragment in the rear seat, but no spent casings.

¶ 9 Detective John Salemme testified that on July 24, 2012, after learning of a shooting at St. Louis and Walnut, he and his partner went to 3313 West Fulton where a gun was found in a white Dodge Caravan that had a broken rear window. The owner of the residence at that address showed them the gun in the Caravan and gave the detectives a videotape from video equipment

on the outside of his house. The detectives viewed and later inventoried the videotape. They also went to the scene of the shooting at Walnut and St. Louis.

¶ 10 A DVD disc containing the videotape from the camera at the 3313 Fulton residence was played in court, with Salemme describing what was depicted. The videotape portrayed the white Dodge Caravan parked at the curb at that address on Fulton, a two-way street. It showed the black Buick traveling east on Fulton. As the Buick passed the Caravan, the rear window of the Caravan shattered as the weapon was thrown from the Buick into the Caravan. The Buick continued down the street. It was followed by a light-colored vehicle, and then by the unmarked police car containing Camarillo and O'Shea who had initiated a chase of the Buick.

¶ 11 Detective John Lally and Assistant State's Attorney (ASA) Heather Kent spoke with defendant at the Area North headquarters on the following afternoon, July 25. Defendant waived his *Miranda* rights and conversed with them about the shooting on the previous day. He gave a handwritten statement, which Lally read out loud at trial.

¶ 12 Defendant stated he was 23 years old and lived at 3442 West Fulton in Chicago. On July 23, 2012, defendant was shot in the hip while hanging out with some friends at Walnut and St. Louis. He was shot by someone he knew as J.R., who was "someone he has been 'into it' with." J.R. was from the Greens at Madison and California but hung out at Kedzie and Washington and at Kedzie and Maple. Defendant stated he was a Gangster Black Soul member and J.R. was a Gangster Disciple. Defendant's gang was "into it" with J.R.'s gang for the past four months, concerning to whose territory the intersection at California and Madison belonged. On July 23, the day he was shot, defendant "saw a black van with tinted windows parked in the same alley that J.R. and a guy named Melvin came out of." Melvin was also a Gangster Disciple, and defendant had seen Melvin drive the black van with the tinted windows in the past. Melvin and

J.R. had been shooting at defendant and other Gangster Black Souls for the past four months. Defendant saw Melvin shoot one of defendant's friends, Arias [*sic*] Brent, about a month earlier when Melvin was driving the same black van with tinted windows.

¶ 13 On July 24, defendant's cousin, Markalle Nellem, picked up defendant in his black Buick Regal at St. Louis and Walnut, where defendant had been hanging out again. Markalle drove defendant to the Walgreens store at Madison and Western so defendant could buy bandages for his gunshot wound. Markalle waited in the Buick while defendant went into the store and bought bandages and cigarettes and then returned to the car. Markalle drove him down St. Louis toward Walnut. Defendant got out of the car for a while and talked with his friends who were at that corner. Everyone was telling him to go home because he had just been shot. Markalle was still in the Buick on the side of Walnut facing Lake. Then defendant saw the same black van with tinted windows that he had seen the previous day when he was shot, driving up St. Louis toward Walnut and coming toward defendant. The black van stopped briefly at an alley on St. Louis between Walnut and Fulton, then it continued to drive toward where defendant was standing and where Markalle's Buick was parked. Everyone standing out there started to "freeze" and took off running. As defendant saw the black van approach, he dove into the front passenger seat of the Buick. He grabbed the black automatic gun he saw on Markalle's lap; that was the first time he saw the gun in the car. Defendant started shooting at the driver of the black van as it pulled up next to the passenger side of the Buick where defendant was sitting. Defendant shot at the person driving the black van. Defendant was "real close" to the van when he started shooting at the driver. Defendant would have hit the van with the door of the Buick if he had opened the passenger door. Defendant did not see who the van's driver was because the van's windows were tinted and the driver was rolling up his window as it drove past the Buick. The van's driver was

"a bigger, black guy." Defendant saw a passenger in the front seat of the van who had dreadlocks, but defendant did not know who he was. Defendant shot at the black van about four times, but he could not be certain of the number of shots because everything happened so fast. After defendant shot at the van, Markalle drove off. Defendant threw the gun out of the window. He did not see where the gun went but heard it hit something, maybe a van. Defendant did not remember seeing a police car until be passed his house on Fulton. Markalle drove to the alley behind defendant's house and then they both ran separate ways. Defendant was placed in custody a few minutes later.

¶ 14 Detective Lally testified that defendant had the opportunity to include or correct any portion of his statement as he went over it with Lally and ASA Kent. Defendant did not tell Lally that the reason everyone ran off was because gunfire was coming from the van. Lally did not ask defendant why everyone ran, but Lally believed they ran because they thought it was the same van that had shot defendant the day before.

¶ 15 The parties entered into a stipulation that, if called to testify, Jennifer Sher would testify she was a forensic scientist employed by the Illinois State Police Crime Lab and was qualified to render an expert opinion in the area of firearms and ballistics comparison and analysis. She received the 9-millimeter semi-automatic firearm and the nine separate 9-millimeter fired cartridge cases recovered in this case. All of the fired cartridge cases were compared and identified as being fired from the semi-automatic firearm. She also received one fired bullet and a fired bullet jacket fragment. The jacket fragment was fired from the semi-automatic firearm. Two other fired bullet jacket fragments were of a 9-millimeter .38 caliber class but could not be identified or eliminated as having been fired from that firearm. An additional fired bullet jacket fragment and one metal fragment were not suitable for comparison.

¶ 16 The State introduced a certified copy of conviction in case number 11 CR 12148 showing defendant's previous conviction for possession of a controlled substance. The State also introduced a certification from the Illinois State Police that defendant did not have a valid FOID card as of July 24, 2012. The State rested.

¶ 17 Defendant's motion for a directed finding was denied.

¶ 18 Eariss Brent testified that he had known defendant for many years. Around the first of July in 2012, Brent and defendant were at the corner of St. Louis and Walnut at about 5:30 or 6 p.m. when a black van pulled up, "and a gun came out and he started shooting." Brent was shot seven times. Defendant, who was about five or six feet away, got someone to take Brent to the hospital. Brent was able to tell the police only that there was a black van, and then he was rushed to surgery. After that, he never contacted the police about the shooting because he did not know who it was who shot him; he "just figured it's a random shooting." Brent did not observe the black van's license plate, but he associated the person who shot him with the black van. A lot of different people owned or spent time in that van, including J.R., Mel, and "Took." They hung out in the area of Madison and California. Brent did not know Darryl Armstrong or Terrance McDaniel. Brent identified a photograph of a man whom he knew as Took. He has seen Took in the black van multiple times and has seen him drive the van. Brent was not with defendant on July 24 when defendant was arrested for another shooting.

¶ 19 Defendant testified in his own behalf. He was with his cousin Markalle and a few of his friends at St. Louis and Walnut at about noon on June 24, 2012. Earlier that day, Markalle had driven him to Walgreens in a Buick Regal to get bandages for his gunshot wound. After leaving Walgreens, defendant told Markalle to drop him off at his girlfriend's house at St. Louis and Walnut. When they pulled up at St. Louis and Walnut, defendant stepped out of the Buick for

about 5 or 10 minutes. He spoke with "some of the guys," including Chello and T.Y., whom he was with the night he was shot. Then the black van with tinted windows turned the corner from Fulton. "It was coming from Fulton, from Homan, but it was coming to St. Louis." It was the same van defendant had seen at the prior shooting at Madison and Sacramento in late June when Eariss was shot. It was also the same van defendant had seen on July 23 when he was shot. On that day, the van had come out of the alley on St. Louis and Walnut and a man with dreadlocks came out and started shooting--defendant was shot twice. On July 24, as defendant was talking with his friends, the van appeared again and everyone was frozen in shock. The van's windows were down and then gunshots went off. Defendant could see the flashes of the gunshots coming out of the driver's window of the van. He started shooting back at the van four or five times with the gun he pulled out of his waist. Defendant had the gun on him when he got out of Markalle's car. He got the gun from a friend. He knew he was not supposed to be carrying a gun. His shots hit the side of the van. He was not shooting at the van's door; he was shooting at the tire, trying to scare off the driver. After that, he got back in the Buick and told Markalle to take him home. Markalle sped off, and the police started to follow them. Defendant threw the gun out of the car. Markalle pulled into an alley and stopped behind defendant's house. Defendant got out of the car and ran, and the police caught him.

¶ 20 Defendant testified that Darryl Armstrong, the man who was shot, was the owner of the van and was known by his street name, "Toot." Defendant knew Toot from the neighborhood. He believed Toot was driving the van and was involved with the person who shot defendant on July 23. Defendant admitted that he thought he knew who was in the van doing the shooting on that date, but he did not report it to, or cooperate with, the police. When he saw the van again on July 24, he had a cell phone on him but did not call the police. At the time he signed the handwritten

statement with the ASA, he did say that Toot, the person in the van, started shooting first. Defendant testified, "There's a lot of stuff I told [Detective Lally and ASA Kent] that's not in my statement." Defendant knew there were at least three persons in the van because he could see shadows from their body movements, behind the slight tint of the windows. One of them was in the driver's seat, one was in the passenger seat, and one was in the back. Defendant told Lally and Kent that "Melvin and J.R." and Toot were in the van, but that information was not in the statement. Then the following exchange occurred between defendant and the trial prosecutor:

A. I told them Melvin and J.R. But the bigger guy supposed to be Toot. He more heavy-set.

Q. That wasn't added to the handwritten [statement], correct?

A. I told them.

Q. You didn't ask to add that to your handwritten statement, did you?

A. It's a lot of stuff I didn't ask.

Q. So it wasn't that they didn't include it, you just didn't say anything that day, correct?

A. I guess you can say that.

¶ 21 The parties stipulated that over a nine-year period, the victim, Darryl Armstrong, was alleged to have hung out at four locations in the area of California and Madison and eight locations in the area of Maypole and Kedzie.

¶ 22 In rebuttal, ASA Heather Kent testified that when she took defendant's statement on July 25, 2012, she subsequently went over the statement with him and told him that he would be allowed to make changes or corrections to it. Defendant never asked Kent to include things in the statement that she refused to include. He never told her that any occupants of the van fired at him

first. He never identified any individual as having fired at him first. He never told her he had the gun inside of his waistband at the time of the shooting. He never told her that he was aiming only at the tires of the van to scare off the van's occupants; he told her he was aiming at the driver.

¶ 23 Following closing arguments, the trial court reviewed the evidence and found:

> "Just taking the law in his own hands, a young man running around the street with a gun, shooting indiscriminantly [*sic*] in the van, whoever may be in it, numerous times. Then giving flight. He sees the police coming, gets rid of the gun immediately. He has a consciousness of guilt.
>
> ***
>
> The van came near where he was at. He reacted as he did. I don't know that he was looking to kill somebody necessarily. He absolutely was unjustified in shooting. He did shoot Armstrong, caused injuries to him, shooting at the van on the street. All kinds of people present.
>
> Accordingly, [t]he State met their burden of proof on count three and four, aggravated battery with firearm, aggravated discharge with firearm."

¶ 24 The court also found defendant guilty on one count of AUUW and merged the other AUUW counts into it. The court found defendant not guilty on the two counts of attempted first-degree murder. The court sentenced defendant to concurrent prison terms of 12 years for aggravated battery, 7 years for aggravated discharge of a firearm, and 6 years for AUUW.

¶ 25 On appeal, defendant contends that his trial counsel was ineffective for failing to argue that defendant acted in self-defense in firing upon the black van in response to gunfire coming from the van. He asserts that his counsel focused only on defending against the attempted murder

charge and abandoned any available defense to the counts of aggravated battery and aggravated discharge of a firearm, in effect conceding defendant's guilt on those two charges.

¶ 26 Claims of ineffective assistance of counsel are evaluated under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Under that test, the defendant must demonstrate that (1) counsel's performance was objectively unreasonable compared to prevailing professional standards, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81. To establish prejudice under the second prong, defendant must show there was a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Satisfying the prejudice prong of *Strickland* requires a showing of actual prejudice and not simply speculation that the defendant may have been prejudiced. *Id.* The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

¶ 27 Defendant posits that self-defense was a viable defense raised by defendant's own trial testimony and statement, and that his trial counsel was ineffective for failing to present this defense in argument to the court. We disagree. Defendant's trial counsel was not required to advance a futile position. *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000). On this evidence, that is precisely what defendant's self-defense claim would have been. The court specifically found there was no justification for the shooting, and that finding was amply supported by the evidence. Defendant's trial testimony, that someone inside the black van initiated the shooting, was contradicted by his own custodial written statement and by considerable trial evidence which would have rendered the self-defense theory futile.

¶ 28 Most damaging to defendant's assertion of self-defense in his trial testimony was the fact that he had failed to mention the claim in his custodial written statement and that the statement contradicted much of his trial testimony. At trial, he first testified he had told the detective and the ASA that there were three men in the van, Melvin, J.R., and Toot, and that an occupant of the van fired first. Defendant later acknowledged in his testimony that he was allowed to make changes and corrections to his statement, and he conceded that he did not tell the detective and the ASA everything when he gave his statement. Defendant also testified at trial that he merely aimed his shots at the van's tires. However, that claim was contradicted by his written statement that he shot at the van's driver and by the fact Darryl Armstrong was shot twice and cut by flying glass by bullets coming through the driver's side window. Defendant also testified that, from where he was standing on the sidewalk, he returned the van driver's gunfire with a gun that he pulled out of his waist. This was contradicted by his written statement that he jumped into Markalle's Buick and grabbed the gun from Markalle's lap. Defendant also testified that he was at St. Louis and Walnut when the van turned the corner onto Fulton and that the van was coming "from Homan." He would not have known that the van had come from Homan if he was already at St. Louis and Walnut at that time. However, he would have known it if he and Markalle were driving *behind* the van, following it as it traveled north on Fulton from Homan and turned onto St. Louis.

¶ 29 The physical evidence contradicted defendant's claim that shots were fired from the black van. Nine 9-millimeter shell casings were recovered from the site of the shooting, and all of them were fired from defendant's firearm. Defendant's testimony, that he left the Buick to speak with acquaintances at Walnut and St. Louis and that the black van approached and emitted gunfire,

was contradicted by Officer Roman. Roman testified that the Buick raced to Walnut and St. Louis, turned and stopped, and that Roman heard gunshots fired from that vehicle.

¶ 30 We conclude that defense counsel's failure to argue self-defense as a defense to aggravated battery and aggravated discharge of a firearm would have been futile and did not constitute ineffective assistance of counsel, as trial counsel's decision not to argue that theory was not unreasonable. Under the first prong of *Strickland*, defendant has failed to present evidence that his trial counsel's conduct was so deficient that it fell below an objective standard of reasonableness.

¶ 31 Even if defense counsel's failure to argue self-defense was objectively unreasonable, defendant cannot establish under *Strickland*'s second prong that this alleged deficiency substantially prejudiced him. *People v. Evans*, 209 Ill. 2d 194, 220-22 (2004). He has not demonstrated how failing to argue self-defense resulted in prejudice when such an argument, in the context of a bench trial and against the tide of evidence contradicting self-defense, would have been unsuccessful. Accordingly, defendant's contention of ineffective assistance of counsel is without merit.

¶ 32 Defendant next contends that his convictions and sentences for both aggravated battery with a firearm and aggravated discharge of a firearm was error, as it violated the one-act, one-crime doctrine. The State asserts as a threshold matter that defendant forfeited this argument by failing either to object at the sentencing hearing or to include the issue in his motion to reconsider sentence. The State also argues that convictions for both aggravated battery and aggravated discharge of a firearm were proper. Although an issue may be forfeited, plain errors affecting substantial rights may be reviewed by this court despite forfeiture. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). A one-act, one-crime violation affects the integrity of the judicial process

and, therefore, invokes the second prong of the plain error rule. *People v. Lee*, 213 Ill. 2d 218, 226 (2004). Thus, we are authorized to consider defendant's argument for plain error.

¶ 33 Multiple convictions are barred where more than one offense is carved from the same physical act (*People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 46, citing *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996)), or where one is the lesser included offense of the other (*People v. King*, 66 Ill. 2d 551, 566 (1977)). For purposes of the one-act, one-crime rule, an "act" is defined as any overt or outward manifestation that will support a separate conviction. *Id.*; *People v. Crespo*, 203 Ill. 2d 335, 342 (2001).

¶ 34 Count three of the charging instrument (indictment) charged defendant with aggravated battery in that he, in committing a battery, "knowingly without legal justification, discharged a firearm," causing an injury to another person by shooting Darryl Armstrong. Count four charged defendant with aggravated discharge of a firearm in that he "knowingly discharged a firearm in the direction of a vehicle they knew or should have known to be occupied by a person." Neither the indictment nor the State's theory at trial indicated that, in discharging a firearm, defendant fired a specific number of separate and distinct shots for purposes of justifying two separate convictions. His one act, discharging a firearm, was the basis of both convictions. Under the one-act, one-crime rule, only the more serious version of the offense--here, aggravated battery with a firearm--should have survived. *People v. Nunn*, 357 Ill. App. 3d 625, 641 (2005).

¶ 35 The State contends that two distinct convictions for both aggravated battery with a firearm and aggravated discharge of a firearm must stand. The State asserts that defendant's conduct consisted of separate acts where he fired multiple shots, only two of which struck the victim and constituted the aggravated battery count while the remaining shots fired at the black van constituted the aggravated discharge of a firearm count. We reject the State's argument

because that was not the theory under which the State charged defendant and did not conform to the manner in which the State presented the case to the trial court. The indictment evinced the State's intent to treat defendant's conduct as a single act. The counts charging defendant with aggravated battery and aggravated discharge of a firearm did not differentiate between the separate shots fired; they did not apportion the number of shots so as to support separate offenses. Rather, here, as in *Crespo*, the separate counts charged defendant "with the same conduct under different theories of criminal culpability." *Crespo*, 203 Ill. 2d at 342. Moreover, the State offered no argument at trial in support of separate offenses for the single act of discharging a firearm. Consequently, only the conviction on count three, aggravated battery, the more serious of the counts, may be upheld. The conviction for aggravated discharge of a firearm must be vacated. *People v. Cortes*, 181 Ill. 2d 249, 281-82 (1998).

¶ 36 For the foregoing reasons, and in the exercise of our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999) to modify a judgment, we affirm the decision of the trial court finding defendant guilty of aggravated battery (count three) and aggravated unlawful use of a weapon by a felon (count seven), and vacate the conviction for aggravated discharge of a firearm (count four).

¶ 37 Affirmed in part and vacated in part.