2016 IL App (1st) 161016-U

No. 1-16-1016

Fifth Division
September 16, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re JAQUON W., a Minor (The People of the State of Illinois, Petitioner-Appellee, v. Jaquon W., a Minor, Respondent-Appellant).	)))))))))))	Appeal from the Circuit Court of Cook County. No. 16 JD 141 The Honorable Marianne Jackson, Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment adjudicating respondent delinquent based on finding him guilty of unlawful use of a weapon for not having a valid FOID card is vacated where the State failed to adduce sufficient evidence that respondent had not been issued a FOID card, and respondent's adjudication of delinquency for theft from a person is reversed on one-act, one-crime principles when respondent's armed robbery charge and theft were based on the same physical act and the theft is a less-serious offense.

¶ 2 The circuit court of Cook County adjudicated respondent delinquent based on finding him guilty of armed robbery, aggravated battery, theft from a person, and aggravated unlawful use of a weapon (AUUW) based on not having been issued a currently valid firearm owner's identification (FOID) card. Respondent was sentenced to five years of probation and ordered to complete 125 hours of community service.

¶ 3 On this appeal, respondent claims: (1) that the State failed to prove that he did not possess a valid FOID card, and (2) that his theft conviction violates the one-act, one-crime rule. The State agrees that the theft conviction must be vacated because it violates the one-act, one-crime rule,[1] but argues that it presented sufficient evidence to prove that respondent did not possess a valid FOID card. For the following reasons, respondent's adjudication for AUUW and theft from a person are vacated. In all other respects, the judgment of the circuit court is affirmed.

¶ 4 BACKGROUND

¶ 5 The State filed a petition for adjudication of wardship against respondent, Jaquon W., a minor (17 years old), charging him with having committed armed robbery, aggravated battery, theft from a person, and three counts of aggravated unlawful use of a weapon, including one count based on not having a valid firearm owner's identification card. The petition arose from an incident in which four males were involved in the striking of the victim on his head and the taking of his cellular telephone while the victim was waiting for the arrival of an Uber vehicle. The victim testified that after he was struck on the head he observed four men standing over him. One of the men pointed a gun at the victim while another took his phone. The four men fled when the Uber arrived. Police responded and four

[1] The trial court did not impose a sentence for the theft charge.

men fled from behind a vehicle in the vicinity of the robbery. Police recovered the victim's cell phone behind the vehicle. Police ultimately discovered one of the men who fled hiding on residential property and two other men hiding behind a truck. Police identified Marquise W., a minor, as the man hiding on the residential property, and he was tried jointly with respondent. The victim later identified respondent.

¶ 6 While pursuing the suspected offenders, police observed respondent throw an object over a fence. Police later recovered a gun from the area in which respondent threw the object, which the victim identified as the gun used in the robbery. Police testified that while "processing" respondent he was not able to produce a valid FOID card.

¶ 7 I. Evidence Presented

¶ 8 The State's evidence consisted of the testimony of five witnesses: (1) Peter Podlipni, the victim who was assaulted and robbed; (2) David Rosenberg, the Uber driver; (3) Chicago Police Officer George Georgopoulos, a responding officer; (4) Chicago Police Officer Harold Robinson, an arresting officer; and (5) Chicago Police Officer Robert Kellinger, a responding officer.

¶ 9 A. Peter Podlipni

¶ 10 Peter Podlipni testified that at 12:40 a.m. on January 17, 2016, he left the bar "Sofo Tap," where he had "about three drinks," located at the intersection of Clark and Argyle Streets in the Andersonville neighborhood of Chicago. As he proceeded to walk eastbound down Argyle Street, he stopped to call an Uber on his cellular telephone when he observed four males walking eastbound down Argyle Street towards him. He proceeded to cross the street toward Clark Street when he was struck on the right side of his head, causing him to fall to the ground. Once on the ground, he observed that the four individuals surrounding him

were the same four individuals he had just observed walking down the street. He was then held at gunpoint while one of the individuals took his iPhone 6. He made the following observations about the individuals at that point:

> "So at that point I made some observations about their outerwear more closely. The farthest to the left was wearing a dark jacket with a red-and-white stripe going across the chest, and the other three individuals had dark–solid dark outerwear jackets. One of them had like a dark head covering, either a hat or hood, and the other two had a gray and a black hood–I'm sorry, a gray and white hood."

The four individuals then fled as his Uber arrived.

¶ 11 Podlipni further testified that he entered the Uber driver's vehicle and the driver called 911 while following the four individuals in the Uber vehicle. He informed the 911 operator that the suspects had a gun. Podlipni and the Uber driver followed them until the police began to arrive at the corner of Clark Street and Carmen Avenue. When the police arrived, the individuals began to run in different directions. At this point, he was asked by the police to remain in the Uber vehicle while the police continued to pursue the individuals.

¶ 12 Podlipni testified that he positively identified respondent as one of the four individuals apprehended by the police as the man who had participated in assaulting him and who took his phone. He testified that he did not positively identify one of the men the police brought to him to identify. He also testified the iPhone found was his iPhone, and he identified the gun recovered by the police as the same gun used in the attack.

¶ 13 B. Police Officer George Gerogopoulos

¶ 14 Officer George Georgopoulos testified that he and his partner, Officer Harold Robinson, responded to a call at 12:40 a.m. at Clark Street and Carmen Avenue. He observed four

individuals "crouched behind" vehicles on Carmen Avenue who fled as he approached them with his vehicle. He exited his vehicle to pursue them on foot, and when he returned to where he originally observed the four individuals, he observed an iPhone on the ground which was later identified by Podlipni as his phone.

¶ 15 C. Police Officer Harold Robinson

¶ 16 Officer Harold Robinson testified that after he pursued the individuals on foot, he met his partner, Officer Georgopoulos, back where they originally sighted the four individuals. From that point, he retraced his steps because he remembered observing that one of the individuals threw an object while fleeing. Proceeding westbound on Winnemac Avenue, he spotted human feet underneath a U-Haul vehicle. After calling for backup, Officer Robinson then apprehended respondent from behind the U-Haul. The officer positively identified respondent as the individual he apprehended.

¶ 17 Officer Robinson testified that he then processed respondent when he became aware that respondent was under 18 years old and unable to produce a firearm owners' identification card. The officer had observed respondent throw an object near 5060 North Clark Street during his original pursuit.

¶ 18 D. Police Officer Robert Kellinger

¶ 19 Officer Robert Kellinger testified that he was informed by Officer Robinson that Officer Robinson thought one of the apprehended individuals threw an object into a fenced-in lot at the corner of Carmen Avenue and Clark Street. He then recovered a .357 Ruger LCR handgun, which held three live rounds of .357 ammunition, at that location.

¶ 20 ANALYSIS

¶ 21 Respondent appeals only the offense of theft from a person, and the offense of aggravated unlawful use of a weapon without a FOID card. He argues: (1) that his theft conviction violates the one-act, one-crime rule because the trial court also entered a sentence for armed robbery and theft from a person is a lesser offense; and (2) that the State failed to prove that he did not possess a valid FOID card. The State agrees that the theft conviction must be vacated, but argues that there was sufficient evidence to prove beyond a reasonable doubt that respondent did not possess a valid FOID card.

¶ 22 I. Standard of Review

¶ 23 "When a defendant challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. McGee*, 398 Ill. App. 3d 789, 793 (2010); *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). " '[T]he critical inquiry *** must be *** to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.' " *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)).

¶ 24 "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008); *McGee*, 398 Ill. App. 3d at 793. A reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009).

¶ 25 II. Aggravated Unlawful Use of a Weapon

¶ 26 Respondent argues that the State failed to prove beyond a reasonable doubt that he had not been issued a currently valid FOID card. The State does not dispute that the only evidence in support of finding that respondent had not been issued a valid FOID card is an officer's testimony that respondent failed to produce a valid FOID card during processing. Respondent argues that the officer's testimony fails to establish respondent had not been issued a valid FOID card. Respondent also argues evidence that respondent is a minor (respondent was 17 at the time of the offense) is insufficient to support his adjudication because a minor under 21 years old is permitted to obtain a FOID card with his or her parents' consent. See 430 ILCS 65/4(a)(2)(i) (West 2014).

¶ 27 Section 4 of the Firearm Owners Identification Card Act (FOID Card Act) states that an applicant for a FOID card must "[s]ubmit evidence to the Department of State Police that: (i) He or she is 21 years of age or over, or if he or she is under 21 years of age that he or she has the written consent of his or her parent or legal guardian to possess and acquire firearms and firearm ammunition." 430 ILCS 65/4(a)(2)(i) (West 2014). Even without consent, respondent argues, a minor may appeal to the director of the Illinois State Police, who may issue a FOID card to the minor. *Horsley v. Trame*, 808 F.3d 1126, 1132 (7th Cir. 2015) (citing 430 ILCS 65/10(c) (West 2014)). In *Horsley*, the Seventh Circuit held that Illinois, specifically section 4(a)(2)(i) of the FOID Card Act, "does not impose a categorical ban on firearm possession for 18-to-20-year-olds whose parents do not consent." *Horsley* 808 F.3d at 1127. The court found:

> "the FOID Card Act does not in fact ban persons under 21 from having firearms without parent or guardian consent. Having a parent or guardian signature may speed

> up the process, but it is not a prerequisite to obtaining a FOID card in Illinois. Rather, a person for whom a parent's signature is not available can appeal to the Director of the Illinois State Police. Upon a sufficient showing regarding the applicant's criminal record, lack of dangerousness, and the public interest, the Director may issue a card. 430 ILCS 65/10(c). And if the Director were to deny the application, the denial is subject to judicial review. 430 ILCS 65/11(a)." *Horsley*, 808 F.3d at 1131-32.

¶ 28 We note the *Horsley* court's focus on the ability of 18-to-20-year-olds to obtain a FOID card. See *Horsley*, 808 F.3d at 1132 ("The absence of a parent or guardian signature is not a 'veto' on the ability of a person *between 18 and 21* to get a FOID card in Illinois.") (Emphasis added.)). Respondent is under 18 years old. Nonetheless, that fact is not sufficient to prove beyond a reasonable doubt respondent had not been issued a valid FOID card. The FOID Card Act does not impose a minimum-age requirement on applying for a FOID card (see 430 ILCS 65/4 (West 2014) (application for FOID card)), and being under 18 years old is not grounds to deny an application (see 430 ILCS 65/8 (West 2014) (grounds for denial and revocation)). We agree the evidence does not prove respondent was not issued a valid FOID card. We have no need to reach respondent's alternative argument that the State failed to prove respondent possessed the gun for purposes of the AUUW charge. Thus, the trial court's adjudication as to AUUW for having not been issued a currently valid FOID card is vacated.

¶ 29 III. Theft Conviction

¶ 30 Next, respondent argues his conviction for theft should be vacated under one-act, one-crime principles because his adjudications for armed robbery and theft from a person were based on the same physical act, and theft from a person is the less-serious offense. Although

this claim of error was not preserved for review, respondent argues a violation of one-act, one-crime principles affects the integrity of the judicial process and therefore is plain error under the second prong of the plain-error rule.

¶ 31 The Illinois Supreme Court has held that a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). When a defendant has failed to preserve an error for review, we may still review for plain error. *Piatkowski*, 225 Ill. 2d at 562-63 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (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." *Piatkowski*, 225 Ill. 2d at 565; *Woods*, 214 Ill. 2d at 471.

¶ 32 Under the one-act, one-crime rule, "a defendant may not be convicted of multiple offenses that are based upon precisely the same single physical act. [Citations.] Thus, if a defendant is convicted of two offenses based upon the same single physical act, the conviction for the less serious offense must be vacated." *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). The one-act, one-crime rule applies to juvenile proceedings, and "it is well established that a one-act, one-crime violation affects the integrity of the judicial process, thus satisfying the second prong of the plain-error test." *In re Samantha V.*, 234 Ill. 2d 359,

378-79 (2009). The State concedes that the armed robbery and theft stem from the same physical act; thus, respondent's multiple delinquency adjudications cannot stand. We agree.

¶ 33 "In this context, an 'act' is any overt or outward manifestation which will support a different offense. [Citations.]" (Internal quotation marks omitted.) *People v. Kotero*, 2012 IL App (1st) 100951, ¶ 20. We look to the charging instrument to determine whether the two offenses were based on the same act. *Kotero*, 2012 IL App (1st) 100951, ¶ 22. The State's petition for adjudication charged respondent with committing armed robbery in that he knowingly took a cell phone from the victim by the use of force or threatening the imminent use of force. The theft charge alleged that respondent "obtained by threat control over property" of the victim, "to wit: cell phone." The two adjudications were based on the same act of taking the victim's cell phone and both cannot stand. In this case, the adjudication for the less serious offense must be vacated. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). Common sense indicates that the legislature will provide a greater punishment for the crime it deems to be more serious. *Johnson*, 237 Ill. 2d at 97. Here, theft, a Class 3 felony (720 ILCS 5/16-1(b)(4) (West 2014)) is less serious than armed robbery, a Class X felony (720 ILCS 5/18-2(a)(2), (b) (West 2014)). Accordingly, respondent's adjudication for theft from a person is vacated.

CONCLUSION

¶ 34 For the foregoing reasons, respondent's adjudication for AUUW and theft from a person are vacated. In all other respects, the judgment of the circuit court is affirmed.

¶ 35 Affirmed in part, and reversed in part.