2017 IL App (2d) 140811-U
No. 2-14-0811
Order filed March 22, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-865
QUINTIZE D. BROWN,	)	Honorable Randy Wilt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Sufficient evidence proved defendant guilty beyond a reasonable doubt; trial counsel was not ineffective for failing to file a futile motion; defendant's lesser convictions are vacated per the State's confession of error.

¶ 2 Defendant, Quintize D. Brown, was arrested after police searched his girlfriend's car in which he was riding. The search uncovered a loaded .380-caliber Taurus handgun and a backpack. Inside the backpack were baggies containing a felony amount of cannabis as well as cocaine, which is a felony in any amount. See 720 ILCS 570/402 (West 2004) ("it is unlawful for any person knowingly to possess a controlled *** substance"). "Armed violence" is the

commission of any felony, including drug possession, while armed with a weapon such as a handgun. 720 ILCS 5/33A-2 (West 2012). In addition, when a person who has certain qualifying prior felonies is found in possession of a firearm, the offender has committed the crime of "armed habitual criminal." 720 ILCS 5/24-1.7 (West 2012).

¶ 3 A jury found defendant guilty of each of the following offenses as charged in the indictment: count 1, armed violence for possessing the handgun and possessing between 1 and 15 grams of a substance containing cocaine (720 ILCS 5/33A-2, 570/402(c)(2) (West 2012)); count 2, armed violence for possessing the handgun and between 30 and 500 grams of cannabis (720 ILCS 5/33A-2, 550/4(d) (West 2012)); count 3, armed habitual criminal for possessing the handgun and having been previously convicted of two prior qualifying felonies (720 ILCS 5/24-1.7 (West 2012)); count 4, possession with the intent to deliver between 1 and 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2) (West 2012)); count 7, possession with the intent to deliver between 30 and 500 grams of cannabis (720 ILCS 550/5(d) (West 2012)); and count 8, possession of a firearm with a defaced serial number (720 ILCS 5/24-5(b) (West 2012)). The trial court sentenced defendant on the two counts of armed violence and on the armed habitual criminal count to 18-year concurrent terms of imprisonment. The court also sentenced defendant on the lesser possession counts, but merged those convictions into his sentences for armed violence and armed habitual criminal.

¶ 4 Defendant appeals and raises three contentions, which we address in turn. Defendant's first contention is that no rational trier of fact could have found him guilty of any of the offenses beyond a reasonable doubt. Were he correct, we would be required to reverse his convictions. See *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 5 Defendant argues as follows. He does not dispute that the evidence of his prior convictions—of a 2007 felony conviction for aggravated unlawful use of a weapon and of a 2008 felony conviction for aggravated battery—sufficiently established his status as both a felon and as a habitual criminal (see 720 ILCS 5/24-1.7(a) (West 2012)). Defendant also does not challenge evidence of his intent to deliver (see 720 ILCS 570/501(c)(2) (West 2012)). Instead he argues that the evidence was insufficient to establish that he *knew* the handgun or the drugs were in the car, which is a prerequisite to his multiple convictions for the "possession" of those items. See *People v. Givens*, 237 Ill. 2d 311, 335 (2010) (evidence of criminal possession of contraband must indicate that the defendant had culpable knowledge that he or she was in possession of contraband).[1]

¶ 6 It is true, as defendant observes, that he was neither holding nor carrying the gun or the drugs at the time of his arrest. But that observation speaks to actual literal possession, not to the legal concept of possession which is a much broader idea. As the jury was instructed (see Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. Supp. 2009)), possession can be either actual or "constructive," which means that even if the item was not found clasped in the defendant's hands, he may still have "possessed" it. Constructive possession may be established by evidence that permits the inference the defendant knew what the object was, where it was located, had previously obtained it, or intended to obtain or retrieve it at some future point. *Givens*, 237 Ill. 2d at 335; *People v. Ingram*, 389 Ill. App. 3d 897, 900 (2009); see also *United States v. Rawlings*, 341

[1] Because of our resolution of defendant's sentencing claims below (see *infra* ¶¶ 27-29), we need not address the sufficiency of the evidence concerning defendant's convictions for possession with intent to deliver (counts 4 and 7) and possession of a defaced firearm (count 8). We note that defendant does not separately argue that the evidence was insufficient to support those convictions.

F.3d 657, 658-661 (7th Cir. 2003). In other words, constructive possession presumes that the contraband in question was *not* found on the defendant's person.

¶ 7 We find there was sufficient evidence for a reasonable trier of fact to find defendant guilty of constructively possessing both the gun and the drugs. At defendant's trial, the testimony of three police officers and a squad car video showed the following. Around 12:30 a.m., on March 29, 2013, Sergeant Jason Newell was on routine patrol in a marked squad car in Rockford. Newell was driving behind an early 2000s-era Mercury Cougar.[2] Newell then saw the Mercury swerve and cross the center line of traffic. Newell briefly followed the Mercury and then activated his emergency lights and pulled the Mercury over. The video of the lane swerve and the subsequent encounter was captured by the dashboard camera in Newell's squad car.

¶ 8 Newell approached the vehicle and spoke with the driver, Serrae Gills. Defendant was sitting in the front passenger seat of the car and remained seated. Sheriff deputies Brandon Straw and Andrew McCulloch arrived on scene to assist Newell. Newell then asked Gills to step out of the car and to perform field sobriety tests. Gills failed the tests and was arrested. From the beginning of the stop until Gills' arrest, defendant remained seated in the Mercury, alone. For context, we note that defendant's height is 6'4" and his weight was listed at 220 pounds.

¶ 9 After Newell arrested Gills, Straw and McCulloch approached the Mercury to conduct an inventory search so that the vehicle could be towed (see *Colorado v. Bertine*, 479 U.S. 367, 375 (1987) (permitting inventory searches of vehicles towed pursuant to standardized police

[2] Unlike the original "luxury coupe" Mercury Cougars, the car Gills was driving was from the eighth and final generation of Mercury Cougars, "a three-door sport compact *** aimed at younger buyers." (see https://en.wikipedia.org/wiki/Mercury_Cougar (last visited Mar. 20, 2017). Given its designation as a compact car, the vehicle's passenger compartment was small.

practices)). As Straw approached the vehicle, he noticed that defendant had the passenger seat pushed all the way back and that the seat back was pushed all the way down, so that it was resting against the car's rear bench seat. The deputies asked defendant to step out of the car. Defendant complied and stood next to McCulloch on the passenger side of the Mercury while Straw began searching the driver's side area and the floorboard around the driver's seat. Defendant gave McCulloch his name and identification, but while defendant was interacting with McCulloch, Straw noticed that defendant was "paying close attention" to him as he searched. Straw quickly observed a backpack on the floorbed between the driver's seat and the rear seat. When Straw moved the backpack to the rear, he discovered the handgun on the floorboard underneath the driver's seat; the barrel was facing toward the front of the car, and the grip was facing toward the rear of the car. Straw yelled out " '[G]un[!]' " to McCulloch. At that point, defendant took off running "full sprint," and Straw and McCulloch gave chase. The deputies apprehended defendant two blocks away and brought him back to the scene of the car stop. On the walk back, defendant told the officers, "Whatever you found underneath the seat wasn't mine." "[O]r under the dash," defendant added, after a moment.

¶ 10 The deputies handcuffed defendant and placed him in their squad car. Then, they resumed the search of the Mercury. The deputies secured the handgun (its serial number had been filed off) and also opened the backpack. Inside the backpack was a bag containing cannabis, one large bag containing several smaller baggies with a white rock-like substance inside (later determined to be cocaine), a box of sandwich bags, some razor blades, and a digital scale. The deputies impounded these items. Straw searched defendant and found $750 in cash in one pocket and a cell phone in another. When defendant was booked into jail, he told the police he was unemployed.

¶ 11 The deputies later determined that the Mercury Gills had been driving belonged to a man named Richard Overton.[3]

¶ 12 Barbara Schuman, a specialist in drug chemistry for the Illinois State Police, testified that the total weight of the cannabis recovered was 52.9 grams. With respect to the cocaine, Schuman stated that there were six "items" in the plastic evidence bag. Schuman analyzed two of the baggies, determined that they contained cocaine, and determined that the weight of the substance in all five of the baggies was 11.7 grams (of cocaine). Schuman testified that she "believe[d]" the evidence receipt indicated five "items" were in the evidence bag, yet she found six—the five baggies with cocaine, and the larger sandwich bag that contained the five smaller baggies.

¶ 13 Deputy Bob Juanez, an investigator with the county sheriff's office, testified as an expert in the area of "street-level narcotic sales." According to Juanez, "[m]ost [of] the drug dealers" would not be found with drugs in a vehicle titled "in their own name," but would use a vehicle titled in the name of a friend, or relative to facilitate narcotic sales. "A lot of times," according to Juanez, "they will actually use or rent vehicles from [drug] users in exchange for drugs and then *** take the vehicles for a day or two [and use] that for a while." Juanez opined that a person, who reported being unemployed, who was "found to have six baggies of cocaine and seven baggies of cannabis, a scale, a razor blade, baggies, a [defaced] firearm, $750 [cash,]" and was apprehended in a vehicle titled in someone else's name, was likely "a drug dealer."

[3] Overton's connection to either Gills or defendant is unclear. During opening statements, the defense implied that Overton and Gills were dating, but there was no evidence offered to establish any sort of relationship. In any event, it appears Overton's primary significance is that the car was titled in his name and not that of Gills or defendant.

¶ 14 Defendant argues that this evidence was sufficient only to establish his "mere proximity" to the gun and the backpack and that the evidence was insufficient to establish he knowingly possessed those items. We disagree with defendant. Of course, the State could not rely on an inference of knowledge stemming merely from defendant's presence in the car; it had to present other evidence from which it could be reasonably inferred that defendant possessed the gun and the backpack. See *Ingram*, 389 Ill. App. 3d at 900. We find that the evidence reasonably permits such inferences. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009) (a defendant's criminal convictions may be affirmed based on circumstantial evidence from which his knowledge or intent may be inferred).

¶ 15 Here, although the gun was not in plain view in the passenger compartment, contraband may be considered under the defendant's immediate control if it is within his easy reach. *Ingram*, 389 Ill. App. 3d at 900. The evidence showed that defendant is a large man and that the Mercury was a small car. Defendant's passenger seat was tilted all the way down resting against the rear bench seat. The location of the gun, just under Gills' seat—and specifically the fact that it was closer to the center console, flat on its right side, with the barrel facing forward and the grip to the rear—indicates that it could have been quickly stored and retrieved by defendant with either hand. We do not know whether defendant was predominantly right or left handed, and we acknowledge that it would have been harder to store or retrieve the gun with his right hand; but those facts are hardly dispositive. The point remains that the weapon could have been stored and (for the most part) easily reached. See *id.*

¶ 16 In addition, defendant's acts, declarations, and conduct permit the reasonable drawing of inferences that the defendant had knowledge of the presence of contraband. See generally *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 41. Defendant's apparent nervousness while Straw

searched the car, defendant's flight upon the gun's discovery, and defendant's specific statement—"Whatever you found *underneath the seat* wasn't mine"—followed by a misleading statement a moment later ("[O]r under the dash," as nothing was found under the dashboard) all support the inference that defendant *knew* the gun was there.

¶ 17 But when we examine all of the evidence together, it supports the inference that defendant knew the gun was under the seat *and knew* that there were drugs in the backpack. We note the following: (1) the fact that the gun was found right next to a backpack containing significant amounts of cocaine, cannabis, and drug-distribution paraphernalia; (2) that the gun was accessible and had a defaced serial number, which is of course illegal (see 720 ILCS 5/24-5(b) (West 2012)); and (3) that defendant, though unemployed, was in possession of $750 cash. It would not be unreasonable to infer, given defendant's lack of employment, that the cash was drug profits. See *People v. Neylon*, 327 Ill. App. 3d 300, 311 (2002) (implying that defendant's unexplained possession of $770 cash—as well as cocaine, cannabis, a gun, and a digital scale—was from drug sales). But when all of the facts are taken together, however, they reasonably establish defendant's possession of both the gun and the drugs. Federal courts, for example, permit a factfinder to infer that a gun was used *in furtherance* of a drug-trafficking offense (see 18 U.S.C. § 924(c)(1)(A))—which is a categorically higher hurdle to clear than simple possession—using the following principles:

> "As numerous cases explain, the mere fact that a weapon is present at the scene of a drug crime is not enough to show a gun furthered a drug crime; there must be a showing of some nexus between the firearm and the drug selling operation. One legal theory that has been advanced, and unanimously accepted, is that a possessed gun can forward a drug-trafficking offense by providing the dealer, his stash or his territory with protection.

> Of course, this type of possession-for-protection can be confused easily with circumstantial or innocent weapon possession; therefore, in cases such as this one, the evidence must specifically tie the weapon to the drug-dealing activity to ensure there was not innocent possession of a wall-mounted antique or an unloaded hunting rifle locked in a cupboard. Factors that can be, but will not always be, useful in drawing this distinction include: the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found. At bottom, however, this is an arena where common sense must be our guide." (Internal quotation marks and citations omitted.) *United States v. Duran*, 407 F.3d 828, 840 (7th Cir. 2005).

¶ 18 We find those principles relevant to establish defendant's possession of the gun and the drugs in this case. As our colleagues in the Fourth District have noted, "The drug trade is a cash-and-carry business with a large profit margin and dealers frequently use guns for protection." *Neylon*, 327 Ill. App. 3d at 311. The jury in this case heard as much from the State's expert, Deputy Bob Juanez. Here, the inferences that the jury drew were that defendant knew what was in the backpack, and that defendant had either placed the gun under Gills' seat or at the very least knew that the gun was there. Those inferences were not unreasonable. See *Givens*, 237 Ill. 2d at 335; *Ingram*, 389 Ill. App. 3d at 900. Defendant notes that Gills had "access" to the same items that he did, but that does not indicate that the gun and the drugs belonged to Gills *to the exclusion* of defendant. See *Givens*, 237 Ill. 2d at 335 ("If two or more persons share the intention and power to exercise control, then *each* has possession") (emphasis added). Although defendant disputes the significance of some of the evidence—*e.g.*, that his flight from the scene was due to his "criminal

record," that many unemployed adults have cell phones, etc.—his arguments are unpersuasive. "[T]he question is not whether a rational jury could have acquitted defendant; the question is whether a rational jury could have convicted him." *People v. Milka*, 336 Ill. App. 3d 206, 230 (2003), *aff'd*, 211 Ill. 2d 150 (2004). Given the evidence, and the foregoing common-sense considerations, we cannot say that it was unreasonable for the jury to infer that there was a nexus between the pistol and backpack, and that defendant knowingly possessed both the gun and the drugs. Therefore, there was sufficient evidence to sustain each of defendant's convictions.

¶ 19 As noted, at trial, the State argued that, since defendant was unemployed, it was reasonable to infer that he used his cell phone for and obtained $750 due to dealing drugs. Defendant disagrees with at least part of that assertion. In his appellate brief, he notes that many people who are unemployed may have a cellular phone, and in the appendix to his brief, he has attached articles from Business Week and the Pew Research Center, that show there are programs to make cell-phone service more affordable and that roughly 91% of Americans have a cellular phone. See http://www.bloomberg.com/news/articles/2011-01-13/free-cell-phone-service-for-the-poor; http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/. The State has asked us to strike the appendix to defendant's brief. We deny the motion. Although those articles are not properly before the court, we need not strike them. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 36. Rather, defendant's inclusion of these articles is but a mere aside to a larger point that we have already rejected. Thus, striking them would serve little purpose.

¶ 20 Defendant's second contention is that counsel was ineffective for failing to file a motion *in limine* to exclude the cocaine based on the discrepancy with the number of "items" Schuman received and tested. According to defendant, had such a motion been filed, based on the testimony

heard at defendant's trial, it would have raised "[q]uestions about the integrity of the exhibit." The contention is meritless.

¶ 21 The right to effective assistance of counsel is a matter of constitutional dimension. See *Glasser v. United States*, 315 U.S. 60, 75-76 (1942). The two-prong test for evaluating posttrial claims of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Establishing ineffective assistance requires a showing that: (1) counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) defendant suffered prejudice as a result of counsel's deficient performance. *Id*. at 687. Failure to establish either prong is fatal to a defendant's ineffective-assistance claim. *Id*. The failure to file a motion does not establish deficient representation, however, when the motion would have been futile. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 22 At no point does defendant assert that the "[q]uestions" raised by a motion to exclude reasonably would have warranted the *exclusion* of the cocaine. Therefore, counsel cannot be ineffective on those grounds. See *id*.; *People v. Paige*, 378 Ill. App. 3d 95 (2007); see also *People v. Carroll*, 227 Ill. App. 3d 144, 146 (1992) (evidence "raising the possibility of tampering" goes to the evidence's weight, not its admissibility). Defendant also faults trial counsel for failing to argue that the evidence was unreliable to the jury; however, that is a matter of trial strategy and not a basis for finding counsel ineffective. See *Strickland*, 466 U.S. at 689. Counsel may well have had a sound strategic reason for avoiding this point, as dwelling on it would only serve to highlight the amount of cocaine that was in evidence. Moreover, on this record, defendant cannot prove prejudice. But for the discrepancy as to the number of bags (the sixth "item" may well have been the larger bag in which the five small baggies were found), there was no evidence of tampering with the cocaine. In the absence of evidence of "actual tampering, alteration, or substitution"

(*People v. Anderson*, 2013 IL App (2d) 111183, ¶ 22), counsel's decision not to argue an unproven point could not constitute ineffective assistance.

¶ 23 Defendant's final contention concerns his sentence. As noted defendant was sentenced to two concurrent 18-year prison terms for armed violence (counts 1 and 2) concurrent to an 18-year term for armed habitual criminal (count 3). The trial court also sentenced defendant to a 5-year term for possession with the intent to deliver a controlled substance (count 4) concurrent to a 5-year term for possession with the intent to deliver cannabis (count 7), concurrent to a 5-year term for possession of a defaced firearm (count 8). In his opening brief, defendant argued that his convictions on counts 4, 7, and 8, could be "broadly described" as the predicate offenses for his armed violence and armed habitual criminal sentences. Accordingly, defendant asked that we "vacate the convictions on [c]ounts 4, 7, and 8" on one-act, one-crime grounds. That request presented a largely straightforward sentencing matter. See, *e.g.*, *People v. Payne*, 98 Ill. 2d 45, 54 (1983) (a defendant cannot be sentenced both for armed violence and the underlying felony).

¶ 24 The State's response to defendant's argument is somewhat puzzling. In its brief, the State asserted that we should "merge[ ], but not vacate[ ]" the sentences for counts 4, 7, and 8 with counts 1, 2, and 3 respectively. The State then requested that we decline to follow *People v. White*, 2015 IL App (1st) 131111, and refrain from vacating either of defendant's convictions for armed violence (counts 1 and 2). In *White*, the appellate court held that a defendant should not be sentenced on two counts of armed violence where each armed-violence count was based on a distinct controlled-substance predicate—possession of the psychedelic drug 5-Methoxy-Diisopropyltryptamine and possession of the stimulant Benzylpiperazine. *Id*. ¶¶ 3, 16, 43-49. Here, the State asked us to distinguish *White* on the basis that defendant was convicted of armed violence based on a controlled-substance predicate *and* a cannabis predicate, as opposed to

two controlled-substance predicates. In the alternative, the State asked us to "re-examine the reasoning in *White* and find that both armed violence counts should be affirmed."

¶ 25 In his reply brief, defendant drafted on the State's argument and asked us to vacate one of his armed violence convictions. However, in his opening brief, the defendant asked us to vacate the sentences on counts 4, 7, and 8 for what he asserted were the predicate, lesser-included offenses of his armed violence and armed habitual criminal sentences. The State conceded that point, but then proceeded to discuss an argument defendant did not make concerning prison sentences defendant did not question (*i.e.*, counts 1 and 2), all based on a case, *White*, that defendant did not cite. We observe that the decision in *White* was issued two full months before defendant's opening brief was filed, and after his opening brief was filed, defendant could not have raised the issue without leave of court. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). These points notwithstanding, there is no indication defendant sought to raise the issue prior to the State having raised it.

¶ 26 We therefore determine that any argument concerning defendant's armed violence convictions (counts 1 and 2) has been forfeited because defendant did not raise that issue in his opening brief. Moreover, in the absence of developed arguments, we express no opinion on the application of *White* or on the significance of the fact that defendant received two armed violence sentences (counts 1 and 2). See *People v. Kastman*, 2015 IL App (2d) 141245, ¶ 24 (refusing to address issues without adequate briefing). We note that, although defendant forfeited the issue in this appeal, it does not mean the issue cannot be considered in a collateral postconviction proceeding. See, *e.g.*, *People v. Newbolds*, 364 Ill. App. 3d 672, 677 (2006).

¶ 27 With that said, we determine that the State's request that we merge rather than vacate defendant's lesser sentences is "merely a lexical tempest in a legal teapot ***." (*People v.*

Lambert, 288 Ill. App. 3d 450, 464 (1997) (Doyle, J., dissenting)). When a lesser conviction is "merged" into the sentence for a greater offense, the practical effect is to "vacate" the sentence for the lesser conviction precisely because that lesser sentence should not have been entered. See *People v. Lee*, 213 Ill. 2d 218, 226-27(2004) ("This court has always held that, under the one-act, one-crime rule, the less serious offense *must be vacated*." (emphasis added)); see also *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 61 ("The effect of a trial court merging one conviction into another conviction is vacatur of the merged conviction").

¶ 28 Nevertheless, we accept the parties' overall agreement concerning the lesser sentences in this case. Application of the one-act, one-crime doctrine involves a two-step analysis. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010). The first step in the analysis is to determine whether the defendant's conduct involved multiple acts or a single act. *Id*. If the defendant's conduct consisted of a single act, multiple convictions are improper. *Id.* If the defendant's conduct involved multiple acts, then the second step of the analysis is to determine whether any of the offenses are lesser included offenses. *Id*.

¶ 29 Here, we accept the State's confession because each of the lesser convictions was predicated on the same acts as punished by the greater offenses. Accordingly, defendant's possession-with-intent convictions should have merged with defendant's armed-violence convictions because each was carved from the same underlying physical act—namely, possession of the cannabis and possession of the cocaine. See *Miller*, 238 Ill. 2d at 165 ("Multiple convictions are improper if they are based on precisely the same physical act"). Similarly, defendant's conviction for possession of a defaced firearm should have merged with his conviction for armed habitual criminal since each was carved from the same physical act of gun possession. See *People v. Pena*, 317 Ill. App. 3d 312, 323 (2000). We note that even though defendant was in possession

of only one gun, there is no one-act, one-crime issue with defendant's convictions for armed violence and armed habitual criminal as the latter offense was based on an additional act, which resulted in defendant's status as a felon. See *id*.

¶ 30 Accordingly, the judgment of the circuit court of Winnebago County is affirmed as modified. We affirm defendant's convictions and sentences on counts 1, 2, and 3, and vacate defendant's sentences on counts 4, 7, and 8. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 31 Affirmed as modified.