2018 IL App (1st) 153656-U

No. 1-15-3656

August 14, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 11 C6 60992
	)	
ALFRED BERRY,	)	Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

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ORDER

¶ 1 *Held*: Defendant was properly convicted of Class 2 felony of unlawful use of a weapon by a felon, as State proved his prior conviction for attempted armed robbery was a forcible felony.

¶ 2 Following a 2015 bench trial, Alfred Berry, the defendant, was convicted of a Class 2 felony of unlawful use of a weapon by a felon (UUWF) and sentenced to eight years' imprisonment. On appeal, defendant contends his conviction should be reduced to a Class 3

felony because the State failed to prove his prior conviction for attempted armed robbery was a forcible felony. For the reasons stated below, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with UUWF for, on August 9, 2011, allegedly knowingly possessing a firearm with a prior felony conviction for attempted armed robbery in case 05 CR 9946. The State presented at trial evidence that police saw defendant standing next to the back of a pickup truck, then bending over and dropping a silver revolver under the truck as the police approached. Three men standing near the front of the truck did not bend over. A loaded silver revolver was found under the truck. A certified copy of defendant's 2005 guilty-plea conviction for attempted armed robbery in case 05 CR 9946 was entered into evidence.[1] After hearing the defense's evidence including defendant's testimony, the court found defendant guilty of UUWF.

¶ 5 The presentence investigation reports (PSIs) indicated defendant had two criminal convictions: the 2005 conviction for attempted armed robbery in case 05 CR 9946, and a 2015 conviction in case 13 CR 15173 for aggravated battery and failure to report an accident. The PSIs indicated the 2005 conviction involved defendant's March 2005 arrest at age 16 and September guilty plea to an amended charge with a sentence of probation, which was revoked the end of November 2005 for an eight-year prison sentence.

¶ 6 At sentencing, the defense argued at length for a minimum sentence but did not dispute the State's assertion that this offense was a Class 2 felony. The court noted defendant's attempted armed robbery case while a juvenile "must have started off as an armed robbery" and the State agreed the charge was amended from armed robbery as part of a plea agreement. The

[1] The record on appeal does not include this document.

court sentenced defendant on the Class 2 felony of UUWF to eight years' imprisonment, consecutive to his sentence in 13 CR 15173. The court admonished defendant of his appeal rights, including the need for a written post-sentencing motion to preserve sentencing challenges. Defendant filed a notice of appeal that day without filing a motion challenging his sentence.[2]

¶ 7 ANALYSIS

¶ 8 On appeal, defendant contends his UUWF conviction should be reduced to a Class 3 felony because the State failed to prove his prior conviction for attempted armed robbery was a forcible felony. The State responds defendant has forfeited this claim by not raising it in a post-sentencing motion, and cannot show plain error to overcome forfeiture because he cannot show error. See *People v. Polk*, 2014 IL App (1st) 122017, ¶¶ 42-48 (forfeiture of a claim that a prior conviction was not a forcible felony, and forfeiture of plain error by not arguing it on appeal). Unlike *Polk*, defendant invokes plain error on appeal, and we must therefore determine as a threshold matter whether a clear or obvious error occurred. *Id* at 46.

¶ 9 Generally, UUWF is a Class 3 felony, but it is a Class 2 felony if the defendant was previously convicted of a forcible felony. 720 ILCS 5/24-1.1(e) (West 2014). Forcible felonies are:

> "treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use

[2] Defendant filed a motion to correct his credit, raising no other sentencing challenges, over three months after his sentencing and notice of appeal.

> or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2014).

Our supreme court stated, "a defendant's knowledge that his actions *might* involve the threat or use of force or violence against an individual is not sufficient *** to make a felony a forcible felony under section 2–8." (Emphasis in original.) *People v. Belk*, 203 Ill. 2d 187, 197 (2003). Instead, "[i]t is the contemplation that force or violence against an individual might be involved combined with the implied willingness to use force or violence against an individual that makes a felony a forcible felony under the residual category of section 2–8." *Id.* at 196.

¶ 10 In *People v. Brown*, 2017 IL App (1st) 150146, a defendant convicted of armed habitual criminal on prior convictions for robbery and attempted armed robbery contended that the latter did not constitute a forcible felony and thus was not a predicate for armed habitual criminal.

> "Specifically, [defendant] argues that the offense of attempted armed robbery is not an inherently forcible felony because 'the use or threat of force against an individual is not inherent in every attempt[ed] armed robbery.' Accordingly, because the State simply presented certified copies of his convictions and did not detail the circumstances surrounding his attempted armed robbery conviction, defendant argues that there was insufficient evidence that his crime involved the use or threat of force against another individual." *Brown*, ¶ 17.

Noting that in *Brown*, the residual clause of the forcible felony definition does not require the use of force, but merely the use or threat of physical force, this court concluded:

> "by virtue of his conviction of [attempted armed robbery], defendant necessarily demonstrated the requisite contemplation or willingness to use force by virtue of

> the fact that he was armed with a firearm or other dangerous weapon and took a substantial step to deprive another person of property by threat or use of force." *Id* ¶ 17.

¶ 11 A person commits robbery by knowingly taking property from another "by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2014). A person commits attempt by doing any act constituting a substantial step towards committing an offense with the intent to commit that specific offense. 720 ILCS 5/8-4(a) (West 2014). Thus, the intent of attempted robbery is to take the property of another by force or threat of force. *Brown*, ¶ 21.

¶ 12 Here, defendant was previously convicted of attempted armed robbery. Regardless of his substantial step, the defendant was proven by the State or pled by the defendant to have *contemplated* using force or violence against another and was *willing* to do so. His substantial step(s) would not have constituted attempted armed robbery without the requisite intent to take property by force or threat of force while armed. See *Polk*, ¶ 53 ("In contrast to *** *Belk*, the present case involved conspiracy to commit *murder*, that is, conspiracy to commit one of the specifically enumerated forcible felonies under section 2–8.")(Emphasis in original.). A defendant convicted of attempted armed robbery *intended* to use or threaten to use force.

¶ 13 While defendant argues we should find *Brown* contrary to *Belk* and disregard *Brown*, we decline. Although *Belk* indeed refers to the circumstances of the particular case, *Belk* does not require the trial court or this court to examine the particular circumstances of the prior case when the prior offense inherently involves a contemplation of, and willingness to use, force or the threat of force. Defendant also argues, against the proposition that attempted armed robbery is inherently a forcible felony, the legislature would have included it as a listed forcible felony if it

so intended. We reject this argument, noting the legislature did not include any attempt offense in the list of forcible felonies. See *Polk*, ¶ 54 ("We find that the offense of conspiracy to commit murder *necessarily* contemplates that violence would be necessary to enable the conspirators to carry out their common purpose, *i.e.*, murder, and it is wholly irrelevant whether the object of the conspiracy was ever completed or attempted.")(Emphasis added).

¶ 14 Conclusion

¶ 15 We find no clear or obvious error here——and indeed find no error at all——and thus no plain error overcoming forfeiture. Accordingly, the judgment of the circuit court is affirmed.

¶ 16 Affirmed.