2019 IL App (4th) 160168-U

NO. 4-16-0168

Rule 23 filed August 6, 2019

Modified upon denial of Rehearing October 2, 2019

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DAVID BEVERLY,	)	No. 15CF510
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Neither the admission of defendant's social media post nor testimony regarding other-crimes evidence constituted plain error. In sentencing defendant, the trial court considered an unconstitutionally void prior conviction as a factor in aggravation.

¶ 2 A jury found defendant, David Beverly, guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2014)). The trial court sentenced him to 75 years in prison. On appeal, defendant argues (1) the State presented irrelevant evidence that defendant posted violent lyrics from a rap song on a social media site, Facebook, shortly before the murder; (2) the State presented inadmissible other-crimes evidence that defendant had been arrested and convicted on a prior occasion; (3) when considered cumulatively, the jury's consideration of improper evidence of defendant's Facebook post and his prior arrest and conviction resulted in the denial of a fair trial;

and (4) the trial court erred in considering a void prior conviction as an aggravating factor in sentencing defendant. We affirm defendant's conviction for first degree murder, vacate his sentence, and remand the matter to the trial court for resentencing with directions.

¶ 3 I. BACKGROUND

¶ 4 In April 2015, the State charged defendant with the first degree murder (720 ILCS 5/9-1(a)(1) (West 2014)) of Arsenio Carter who was shot and killed with a firearm. Defendant's jury trial was held in January 2016. The State presented evidence that around 6 p.m. on April 10, 2015, police officers responded to a shooting at a barbecue at Oakwood Trace Apartments in Champaign, Illinois.

¶ 5 Dreshana Caston, the victim's girlfriend, testified she witnessed the murder. On April 10, 2015, Caston attended a barbecue at Oakwood Trace Apartments with her brother, Robert Caston, and Carter, arriving at around 4 p.m. or 5 p.m. Caston drove to the barbecue in a Dodge Durango.

¶ 6 When they arrived at the barbecue, they sat in Caston's vehicle talking for about ten minutes. Caston testified she recognized several of the individuals in attendance. Her uncle, Christopher Hugger, came up to her vehicle to say hello. Caston subsequently left the barbecue for about five or ten minutes with her brother and Carter, going "[u]p the street" to Caston's grandmother's house.

¶ 7 Caston testified they returned to the barbecue with Caston in the driver's seat, Carter seated next to her in the front passenger seat, and Robert in the back. Caston parked in a lot located near Third Street and Burr Oak Court in the vicinity of Oakwood Trace Apartments.

¶ 8 When they returned to the barbecue, Caston saw her ex-boyfriend, Joseph Carter,

defendant, and Matt Carter. Caston stated, "[t]he first time [she] s[aw] [defendant], he was in the group talking" and then he "came around [a] truck." Caston could see defendant's face and recognized his tattoos as well as his dreadlocks. She further explained that when she initially saw defendant, he was wearing a black hoodie with the "hood on" but it "wasn't [drawn] tight and [defendant's] dreads [were] out."

¶ 9 When asked how "sure [she was] of [her] identification" of defendant at that time, Caston stated she was "pretty sure." Caston explained she knew defendant and she had seen him on about five prior occasions when he was "out" and "going into clubs and stuff like that ***." Caston stated that defendant had also been to her house for a "get-together."

¶ 10 Caston further testified that when she pulled into the parking lot she also saw Deveonta Lindsey, an individual she knew from the "neighborhood" and school. During the barbecue Lindsey "pulled [Caston's] brother to the side, talked to [her brother], and then after [Lindsey] [was] done talking to him, [Lindsey] was standing in the back of [Caston's] [vehicle]." Caston testified that she "didn't really hear what [Lindsey] was talking about ***." Caston "got out of [her] car to try [to hear] *** but [her] brother was getting back in [her] car by then."

¶ 11 Caston testified she was "very worried" when she got back inside her car because, in her side-view mirror, she saw Lindsey with a black hoodie that he pulled tight as he stared, "mean mugging," meaning Lindsey was "looking at [Caston's] car" with a "mean face" as though he had "a problem or something." Caston further testified that Lindsey "[j]ust stood there" toward the "back of [Caston's] car" on the "driver's side[.]" According to Caston, Robert said, "Man, I don't know what's going on." Carter, who was sitting in the front passenger seat smoking a cigarette with his window rolled down, replied, "Yeah, we need to get ready to go."

¶ 12 Caston testified that defendant then walked up to Caston's car. When asked how certain she was of defendant's identity as he approached, Caston responded, "[i]t was David." She further stated, "Yes[,]" it was "[t]he [d]efendant, Mr. Beverly[.]" Caston explained that she could see defendant's tattoos, face, and hair. She further explained that it was light outside and she could see "a blue glove on [defendant's] hand" as he approached her car. Caston stated, "[W]hy would [defendant] just be walking around with a blue glove on his hand unless he's going to do something to somebody[?]" When shown a picture of the blue glove depicted in the State's exhibit No. 7, Caston identified the glove in the picture as the same glove she saw defendant wearing at the time of the shooting.

¶ 13 As Caston attempted to back her car out of the parking space, defendant pulled out a short black gun. As she was trying to drive away, defendant "shot in [Caston's] car at Arsenio [Carter] and shot him in the chest." Defendant was standing about three feet away from Caston's car at the time. When Caston heard the gunshot, she "sped off."

¶ 14 Caston drove Carter to the hospital for medical treatment. Blood was coming out of his chest as she was driving. By the time they arrived at the hospital, Carter was unable to speak as he gasped for air. Carter subsequently died at the hospital that day.

¶ 15 At the hospital, police officers spoke to Caston about the shooter's identity. Caston testified that she "pulled up" defendant's Facebook photo on her cell phone. Caston testified she knew defendant by the nickname "Glocc" and his Facebook name was "Glocc Murdablock Krazi[.]"

¶ 16 On cross-examination, Caston stated she "didn't see [defendant]" when she first arrived at the barbecue. However, after visiting her grandmother's house and returning to the

barbecue, Caston saw defendant in a white truck with her ex-boyfriend, Joseph Carter, and Matt Carter.

¶ 17 Caston testified that when police officers questioned her at the hospital, she told them the shooter was wearing light jeans. Caston later spoke to Detective Funkhouser at the police department about the shooting. Detective Funkhouser showed Caston a picture of defendant, and Caston responded, "that was him." Caston testified the picture she was shown was a "mug shot."

¶ 18 On re-direct examination, Caston testified that at the time of the shooting, she saw a blue glove "hanging out of [defendant's] pocket." She explained defendant pulled the glove from his pocket and then held the gun with the glove when he shot Carter.

¶ 19 Police Officer Justus Clinton testified he was on duty at 6 p.m. on April 10, 2015, when he received a report of shots fired near "Fourth and Beardsley [Avenue]." He stated the parking lot where the shooting occurred was west of Oakwood Trace Apartments. Another police officer, Arthur Miller, stated he located "a single spent shell casing" in the parking lot.

¶ 20 Dr. Shiping Bao testified that he performed an autopsy on Carter. Dr. Bao stated the cause of death was a gunshot wound to the chest.

¶ 21 Police Officer Thomas Petrilli testified he went to the hospital after the shooting. He secured Caston's car and observed "blood on the passenger *** side step board" and the "center console area of the vehicle." Officer Petrilli also testified that he spoke to Caston at the hospital. He stated Caston was "flustered" and "pacing back and forth." She seemed "pretty worked up at the time." He testified that Caston showed officers a picture of defendant on her phone.

¶ 22 Detective Dustin Sumption testified he was asked to assist with investigating defendant's Facebook information. Detective Sumption received a picture of defendant's

Facebook page. He testified that State's exhibit No. 5 depicted "a snapshot" of a Facebook profile picture. Beneath the profile picture was the name "Glocc Murdablock Krazi." Detective Sumption testified that the Facebook profile picture depicted defendant "wearing a black Adidas coat and a black stocking cap." Detective Sumption identified State's exhibit No. 15 as another "shot" of defendant's Facebook page displaying defendant's profile picture and "one post."

¶ 23 Detective Sumption testified that during his investigation, he obtained photographs of defendant from the Secretary of State that included defendant's "driver's license photograph as well as an Illinois Department of Corrections photograph." Detective Sumption explained he was able to compare those photographs to defendant's Facebook profile picture that Caston had showed officers at the hospital. Detective Sumption testified he was able to identify defendant as the individual in the Facebook profile picture Caston had showed to officers the day of the shooting.

¶ 24 Cynthia Lubamba testified next. She began dating defendant after they met in February 2015. She identified defendant in court. Lubamba testified that defendant was "close friends" with Kytiece Boosie Frazier who had been shot in April 2015, and defendant was "upset" about Frazier having been shot.

¶ 25 Lubamba stated she told defendant she could not attend the April 10 barbecue. Around 6 p.m. on the night of the barbecue, defendant "kept calling" her. When she finally answered the phone, defendant asked her for "a ride." Defendant initially asked to come over to Lubamba's home, but she told him she was busy. Defendant then asked Lubamba for a ride to a "friend's house" instead. Lubamba testified she picked defendant up at Panera Bread in Champaign "around 7:00 or 8:00" p.m. that day.

¶ 26 Lubamba testified that when she arrived, defendant was inside Panera Bread.

Lubamba texted defendant that she was outside. When asked what defendant was wearing at the time, Lubamba testified, "He was wearing whatever he was arrested with[.]" She stated defendant had changed into "different" clothes when she saw him at Panera Bread and she believed defendant was wearing "jean shorts" at the time. Lubamba drove defendant from Panera Bread to Brookstone Court. Lubamba then went to her aunt's house.

¶ 27 Lubamba next heard from defendant later that night when defendant asked about a hat he left in her car. Lubamba dropped off defendant's hat and went home. When she arrived at her home, police officers pulled in behind her vehicle. They asked her to contact them the next time she saw defendant. Later that night, around 11 p.m., defendant called and asked Lubamba to pick him up.

¶ 28 In the early morning hours on April 11, 2015, Lubamba picked defendant up from Brookstone Court. Lubamba testified defendant sat in the backseat of Lubamba's vehicle even though nothing was in her front passenger seat preventing him from sitting there. She explained the windows in the back of her vehicle were tinted. As they drove, a black truck followed behind them. Lubamba asked defendant what was going on but he "didn't say much." Defendant "just wanted cigarettes." When they arrived at a gas station, Lubamba exited the vehicle and police officers subsequently arrested defendant.

¶ 29 Officer Benjamin Newell testified he was present for defendant's arrest on April 11, 2015. Officer Newell stated no weapons were found on defendant at that time.

¶ 30 Brandy Coakley, Carter's sister, testified she frequently saw Carter and his best friend, Tarrell "Rat" Boatman, together. She stated Boatman and Carter were often together in public. They were "like brothers."

¶ 31 Officer Jim Bednarz testified he executed a search warrant on April 13, 2015, at "1302 Brookstone, [a]partment 102." He testified to photographs depicting two hooded sweatshirts found in an upstairs bedroom of the apartment. Officer Bednarz testified another photograph showed a small purse hanging in a closet in the same upstairs bedroom. In the purse, he found a plastic bag containing 9-millimeter bullets and casings in addition to a .40-caliber bullet. Officer Bednarz testified he did not find "anything that put [defendant] in that apartment[.]"

¶ 32 Detective Patrick Simons testified that he was an expert in cellular forensics. He explained he performed an analysis of defendant's cell phone. Detective Simons testified defendant's cell phone number was linked to his Facebook account. Detective Simons located a Facebook post originating from defendant's cell phone on the day of the murder at approximately 11:10 a.m. The Facebook post stated as follows: "I put it on my soul… u aint goin b da only one wit a headstone my nigga[.]"

¶ 33 The parties stipulated that deoxyribonucleic acid (DNA) collected from defendant was compared to DNA taken from the black hooded sweatshirts found in apartment 102. The comparison was deemed "inconclusive."

¶ 34 The parties stipulated the 9-millimeter cartridge casing recovered from the parking lot at Oakwood Trace Apartments was tested for latent fingerprints, but none were found.

¶ 35 Detective Patrick Funkhouser testified next. He explained he was primarily responsible for the investigation of Carter's murder. He explained he also investigated a case in which Tarrell Boatman pled guilty to shooting Kytiece Frazier on April 8, 2015. Detective Funkhouser testified he obtained and reviewed video surveillance footage from Carle Hospital where Frazier was recovering from his gunshot wounds.

¶ 36 Detective Funkhouser testified he made screenshots of still images from the video surveillance footage at Carle Hospital that depicted defendant inside the hospital at around 11 a.m. on April 10, 2015.

¶ 37 Detective Funkhouser testified that in the Carle Hospital surveillance video, defendant was wearing a "flat-billed ball cap" with a "black zippered hoodie" and "frosted" camouflage pants. He testified defendant's clothing in the surveillance video "appears to be the same exact clothing that [defendant] was wearing when he was taken into custody with the exception of the fact that when he was taken into custody, [defendant] was not wearing a black hoodie."

¶ 38 Detective Funkhouser stated two still images of defendant at Carle Hospital depicted defendant with a cell phone in his hand at 11:19 a.m.

¶ 39 He testified that in Frazier's hospital room, there were dispensers mounted on the wall containing blue latex gloves. Detective Funkhouser explained, when defendant was searched at the police department following his arrest, two blue gloves were found in his right front pants pocket that "appeared to be identical" to the blue gloves in Frazier's hospital room. Detective Funkhouser acknowledged the gloves found in defendant's pocket were tested and no gunshot residue was found.

¶ 40 Detective Funkhouser obtained video surveillance footage from the Walmart located at 2610 North Prospect Avenue in Champaign, Illinois, from the day of the murder. Detective Funkhouser testified the footage showed defendant was at Walmart with his girlfriend, Wendy Driver. Detective Funkhouser testified the surveillance footage showed defendant entering the Walmart at around 4:38 p.m. and exiting at 4:44 p.m. Detective Funkhouser stated the shooting

occurred around 6 p.m. and was reported at around 6:03 p.m. on April 10, 2015.

¶ 41 Detective Funkhouser testified he found a text message on defendant's cell phone "between [defendant] and Cynthia Lubamba that described [Lubamba] picking [defendant] up at Panera" on the day of the shooting. Detective Funkhouser testified the "time listed" on the "Panera text" was 6:23 p.m. He also stated the "driving time" between Panera Bread and where the shooting occurred at Oakwood Trace Apartments was approximately 10 to 11 minutes.

¶ 42 Detective Funkhouser, along with Detective Baltzell, interviewed the victim's girlfriend, Caston, after the shooting on April 10, 2015. During the first recorded interview with Caston, she stated that before the shooting at the barbecue, "she saw her brother get out of [her] vehicle and speak with Deveonta Lindsey right outside [Caston's] vehicle[.]" When asked whether Caston told Detective Funkhouser if she had overheard her brother and Lindsey discussing another murder that occurred in 2014 involving Rakim Vineyard, Detective Funkhouser responded that he believed Caston "mentioned the Rakim Vineyard murder in relation to the conversation" between her brother and Lindsey. Detective Funkhouser testified that Caston told him two groups of individuals at the barbecue had an "ongoing dispute with Arsenio [Carter] and [Carter's] friends over the murder of Rakim Vineyard[.]" Detective Funkhouser acknowledged that Caston was "very upset" and crying during the initial interview, which took place shortly after the subject murder.

¶ 43 With respect to the bullet recovered from Carter's body, Detective Funkhouser testified it was a 9-millimeter bullet.

¶ 44 Detective Funkhouser further testified Landriana Walker, one of Deveonta Lindsey's girlfriends, lived in apartment 102 located at 1302 Brookstone Court. Detective

Funkhouser indicated apartment 102 was located "right in [the] area where the [d]efendant was picked up by Cynthia Lubamba" on the day of his arrest.

¶ 45 The court read a stipulation to the jury, stating no gunshot residue was detected on the latex gloves found in defendant's pocket after his arrest. It also stated gunshot residue was not detected on the black hooded sweatshirts found in apartment 102. The stipulation further reflected that, "[i]f [gunshot] residue settles, it may or may not remain in place long enough to be detected. It can be washed away and wiped away with casual contact. It can also be in quantities too small to be detectible ***. *** The absence of [gunshot residue] on a person does not mean that that person has not discharged a firearm, only that if they did, the [gunshot residue] was not detectible."

¶ 46 The State rested, and the trial court denied defendant's motion for a directed verdict.

¶ 47 Defendant presented the testimony of Officer Edward Sebestik. He testified he went to the hospital after Carter was shot. Upon arrival at the emergency room, there was "a little bit of chaos" and Caston was "covered in a large amount of blood." Caston was "pacing back and forth" and both Caston and her brother "appeared to be in hysterics after having just experienced a pretty traumatic incident firsthand."

¶ 48 Officer Sebestik acknowledged that he wrote in his report that Caston was "initially uncooperative." However, Officer Sebestik testified he believed Caston was "as cooperative as she could be given the circumstances."

¶ 49 When Officer Sebestik asked Caston if she had any information about the shooter, "[s]he did not verbally respond" and she "pulled out her cell phone and went to her Facebook page" to show Officer Sebestik "a photo of an individual." Officer Sebestik asked Caston if "that was who had *** shot her boyfriend Arsenio [Carter], [and] she said [']yes.[']" Officer Sebestik

testified that Caston "again bec[a]me uncooperative [after] further question[ing]," she "lock[ed] her phone," and Officer Petrilli persuaded Caston to unlock her phone again. Officer Sebestik testified that he subsequently took Caston to his squad car to have a "one-on-one" conversation.

¶ 50 According to Officer Sebestik, during Caston's recorded interview, Caston described the shooter as wearing a black hooded sweatshirt and black jeans with medium length dreadlocks. Caston also told Officer Sebestik that the shooter was "wearing a rubber hospital glove" and had "a tattoo[.]" Caston was "not sure what the tattoo was of but *** she was sure that it was on [the shooter's] face."

¶ 51 Wendy Driver testified next. She stated that in April 2015, she lived at 1301 North Brookstone Court, apartment 104. She testified she was a friend of defendant's.

¶ 52 Driver testified to the timeline of events on April 10, 2015. Driver explained she dropped defendant off at Carle Hospital that morning. Later that day, Driver called defendant and asked if he would go to Walmart with her "to buy a shirt."

¶ 53 At around 4 p.m. on April 10, 2015, Driver picked defendant up from the barbecue at Oakwood Trace Apartments. They went "directly" to a Walmart located in Champaign. After purchasing a shirt at Walmart, Driver and defendant went back to her house where they "hung out" for "a little while" before defendant left.

¶ 54 According to Driver, approximately 10 or 20 minutes after leaving her apartment, defendant called and asked Driver for "a ride to Panera Bread[.]" Driver dressed her children and met defendant at her apartment complex. Defendant was already there waiting for her outside. They proceeded to Panera Bread. When they arrived, Driver and defendant "sat there for a while" in Driver's vehicle. Defendant told Driver "he was waiting on a ride." They talked for "a little bit"

and then defendant got out of Driver's car. Driver returned to her apartment because she had to work later that evening. Driver admitted she "[didn't] really remember any of the times."

¶ 55 On cross-examination, Driver testified defendant called her after he was arrested and in custody. Driver stated, "When I first spoke to [defendant], I asked him *** [']how are you accused of the killing when you was with me? We went to Walmart. Wasn't that the time we went to Walmart?[']" Driver acknowledged she did not know what time the shooting occurred. When asked about what she told Detective Funkhouser, Driver testified she "didn't know what time [she] was there" at Walmart and she did not think that she "gave [him] a time." Driver also admitted that, when she spoke to Detective Funkhouser, she did not know at what time she drove defendant to Panera Bread.

¶ 56 Driver testified that "the sun was setting and it was shining in [her] eyes as [she] [was] driving" defendant to Panera Bread. Driver explained she "specifically remember[ed] that because [her] glasses [were] broke and [she] could barely see."

¶ 57 Sergeant Dennis Baltzell testified he investigated the shooting on April 10, 2015. That evening, he and Detective Funkhouser interviewed Dreshana Caston. Sergeant Baltzell wrote a report summarizing the interview. When asked about the first time Caston saw defendant on the day of the shooting, Sergeant Baltzell testified that the way "[s]he phrased it[,] [Caston] didn't see [defendant] prior to [defendant] walking up to the car with a latex glove on." Sergeant Baltzell explained that "from the very beginning" Caston was "very clear about who did it."

¶ 58 Defendant testified on his own behalf. He met Caston in March 2015 at a small party. Defendant next saw Caston at a barbecue on his birthday several days later. Defendant testified that Arsenio Carter was not at either of these events in March 2015. Defendant denied

ever meeting Carter. He denied shooting Carter or "even [being] in the vicinity of where this took place[.]"

¶ 59 Defendant testified that on the morning of April 10, 2015, Driver took defendant to visit Frazier at Carle Hospital. Afterwards, defendant went to an apartment complex and saw Tiwanda Winkins, who was pregnant with defendant's child. Winkins and Driver lived in the same apartment complex. Defendant visited with Winkins for about an hour and then left for the barbecue at Oakwood Trace Apartments.

¶ 60 At the barbecue, defendant had a disagreement with David Dalton, "the guy *** who the barbecue was for." Defendant testified that he "really had words" with Dalton "so [defendant] left." Defendant testified that he did not return to the barbecue.

¶ 61 Driver picked defendant up from the barbecue at about 4 p.m. and asked him to go to Walmart. When they left Walmart, they drove back to Driver's apartment and defendant stayed there for "[p]robably like 30, 45 minutes."

¶ 62 Defendant testified that he left Driver's apartment and went to the home of "Iresha," Frazier's "auntie" who lived on Beslin Street. Defendant explained that he went to Iresha's home because he wanted her to "drop [defendant] off on Kirby [Street] ***." Defendant testified that Iresha "had her *** kids so she wouldn't" drive him there. Defendant explained "that's why [he] had to call Wendy [Driver]" and asked for a ride to "Kirby [Street.]"

¶ 63 Defendant testified he walked from Beslin Street to Driver's apartment complex. He asked Driver to take him to Kirby Street because defendant was "going to meet another girl." Defendant explained Driver took him to "Panera Bread right along Kirby and Mattis in the plaza."

¶ 64 According to defendant, he arrived at Panera Bread with Driver at "6 something."

Defendant testified that the "sun [was] setting" at "the time [he] [was] on [his] way there [to Panera Bread]." As they drove to Panera Bread, it was "still light" outside. Defendant explained the sun "was setting" but it "wasn't set" yet.

¶ 65 Upon arrival, defendant and Driver stayed at Panera Bread for "probably like ten or [fifteen] minutes" and talked.

¶ 66 Defendant testified that Lubamba subsequently picked him up from Panera Bread at "probably like 6:40, 6:50." Defendant stated that it was "getting dark" but it still "wasn't dark." He later testified that Lubamba picked him up from Panera Bread "around 7:00."

¶ 67 Defendant stated Lubamba contacted him later about his hat he had left in Lubamba's vehicle. Lubamba brought defendant his hat and "left again."

¶ 68 The next time defendant saw Lubamba was the day of defendant's arrest. Defendant testified that Lubamba met him at "Hamilton [apartments] [at Brookstone Court] and she drove *** to the gas station *** [where] [defendant] [was] apprehended by the police." Defendant testified that he sat in the backseat of Lubamba's vehicle because he was "intoxicated." Defendant further explained that Lubamba was "acting real funny" so defendant sat in the backseat "in case something happened" and defendant was "going to jump out ***."

¶ 69 Defendant testified that after he was arrested, blue latex gloves were found in his pocket. He took two gloves from "the hospital when [he] was there earlier." Defendant explained that he took the latex gloves because he has eczema on his hands. He "usually" wears gloves such as "baseball gloves" "especially if [he is] going somewhere." He testified that he wears gloves "a lot." Defendant explained that "people who know [him]" "don't see [him] actually with hospital gloves, but they [have] seen [defendant] with baseball gloves a lot ***." He chose to take hospital

gloves from Frazier's hospital room because he "didn't have any gloves" that day so he "just grabbed some." Defendant testified that it was a "normal practice" for him to do this. Defendant further stated, "Like every time I'm at the hospital, like my baby mama or any one of my friends, they'll tell you every time I go like I grab some gloves. Like the girl I used to go with, she was pregnant. I grabbed some gloves."

¶ 70 Defendant testified that he took the blue gloves from Frazier's hospital room "close in time" to when he posted the following on Facebook: "I put it on my soul… u aint goin b da only one wit a headstone my nigga[.]" He explained that he posted it "from [his] phone" when he was visiting Kytiece Frazier at the hospital at around 11:20 a.m. on April 10, 2015. Defendant further explained the name beneath his Facebook picture, "Glocc Murdablock Krazi" referred to him.

¶ 71 Defendant denied the Facebook post was intended to be a threat or an "expression of being upset about Kytiece Frazier ***." Defendant explained it was "actually [Frazier's] favorite song." Defendant further explained that, "since [Frazier] was hurt, [defendant] just wanted to post something for him ***." He stated the song in the Facebook post was about "shooting people based on other people having been shot ***." Defendant testified that the song was "[n]ot really [about] revenge." But he acknowledged "[i]t's a violent song[.]" Defendant also acknowledged that when he posted it to Facebook, he knew Frazier had been shot two days earlier. But defendant "didn't know [Tarrell Boatman] was in custody yet" for shooting Frazier.

¶ 72 Prior to the defense resting, the court read the following stipulation to the jury: "the Court has taken judicial not[ic]e of the fact that on April 10 of 2015 in Champaign, Illinois, Central Daylight Time, sunset was at 7:26 p.m."

¶ 73 The State then presented Dreshana Caston as a rebuttal witness. On rebuttal, Caston

testified that on the occasions she saw defendant in March 2015, "[h]e never had on any gloves." Caston stated she only saw him wearing gloves on April 10, 2015.

¶ 74 Caston further testified that her uncle, Christopher Hugger, sent her a text after the shooting. He texted "words to the effect of [']sorry, that wasn't supposed to happen.[']" Caston testified, "I don't know what [Hugger] meant by that." When asked whether it could have been Hugger who shot Arsenio Carter," Caston responded, "[t]he face I see[] plays in my head every day, and it is [defendant's] face." She further explained that Hugger had no tattoos on his face but he did have a "RIP Rakim" tattoo on his neck. She testified that there was no "possibility that [she] could mistake [her] uncle for the [d]efendant[.]"

¶ 75 The State also presented Cynthia Lubamba as a rebuttal witness. Lubamba testified she did not recall defendant "ever wearing gloves" when they dated from February 2015 until the beginning of April 2015. She also could not remember defendant wearing baseball gloves. When asked how many times she saw defendant wearing "blue plastic gloves," Lubamba responded, "[n]ot at all."

¶ 76 Lubamba clarified that on April 10, 2015, the day of the shooting, she picked defendant up from Panera Bread "around 7:30" that evening.

¶ 77 Detective Funkhouser testified next as a rebuttal witness. Detective Funkhouser testified he spoke with Driver on April 13, 2015, to discuss defendant's whereabouts on the day of the shooting. Detective Funkhouser testified Driver told him she was at Walmart with defendant "[b]etween 5:00 p.m. and 7:00 p.m." on April 10, 2015. Detective Funkhouser explained this was important to his investigation because it encompassed the time that included the murder. Detective Funkhouser testified that by the time he spoke with Driver on April 13, 2015, she had already

spoken with defendant following his arrest. When Detective Funkhouser first spoke with Driver, she did not mention going to Panera Bread with defendant. She only said that after going to Walmart "[Driver] drove [defendant] back to her residence, and within a very short amount of time [defendant] received a text message and he left[.]" Driver told Detective Funkhouser that she "never saw [defendant] again."

¶ 78 The second time Detective Funkhouser spoke with Driver, she said that on the day the shooting occurred, "she gave [defendant] a ride to West Kirby Avenue in Champaign" where the Panera Bread was located.

¶ 79 The third time Detective Funkhouser spoke to Driver, she told him, "I can't even say that [defendant] and I were together a whole hour that day." Detective Funkhouser testified that, during this interview, Driver never mentioned going to Panera Bread with defendant.

¶ 80 Detective Funkhouser stated the approximate "driving time" between Panera Bread and Oakwood Trace Apartments where the shooting occurred was "ten to eleven minutes."

¶ 81 Defendant, in surrebuttal, testified Lubamba would not have seen him wearing gloves when they dated because he only wore gloves when he was outdoors "around, like, grass or dirt" and he generally spent time with Lubamba "late at night[,] [when] [defendant] needed a ride[,] or [when they would] get a hotel room ***." Defendant testified that he "normally" wears "baseball gloves." He further explained that the "only reason" he had the hospital gloves on April 10, 2015, "was because [he] was at a hospital."

¶ 82 In closing argument, the State asserted defendant shot and killed Carter on April 10, 2015. The State argued that Carter's friend, Boatman, shot defendant's friend, Frazier, on April 8, 2015, and that Carter's murder was "retribution for the shooting of Kytiece Frazier."

¶ 83 With respect to the sequence of events, the State stressed that on the morning of the shooting, defendant was at the hospital visiting Kytiece Frazier when defendant "ma[de] this post, 'Put it on my soul, you ain't goin' be the only one with a headstone.' " The State argued that this was a "window" into "what's going on inside the [d]efendant's head, he wrote down what he was thinking." The State noted defendant took blue gloves from Frazier's hospital room when he was writing the Facebook post. "[C]learly he's intending that there be more than one headstone, and that's why he takes the gloves."

¶ 84 The State asserted that after leaving the hospital, defendant "h[ung] out with friends" before going to the barbecue at Oakwood Trace Apartments where he "sees [Carter,] the guy who is best friends *** with the fellow who shot [defendant's] own friend." The State argued that defendant "puts on that glove, takes that gun out, points it through the window at Arsenio Carter[,] and [defendant] shoots him [around 6 p.m.] ***." The State noted Detective Funkhouser's testimony, stating it is a 10 minute drive from the area of Oakwood Trace Apartments to Panera Bread. At the time of defendant's arrest, "[t]he biggest coincidence" occurs where he "just happens to have those gloves in his pocket."

¶ 85 Defense counsel argued the lyrics in defendant's Facebook post referencing a "headstone" lacked relevance because Frazier was "alive" and "didn't have a headstone." Further, no one else at the barbecue identified defendant as the shooter, the physical evidence could not be connected to defendant's DNA, the State's case "rest[ed] solely" on Caston's testimony that "significantly" differed from what she initially told officers, and Caston was only "pretty sure" defendant was the shooter.

¶ 86 As for the sequence of events on April 10, 2015, defense counsel asserted defendant

was not present when the shooting occurred, noting defendant and Driver arrived at Walmart at 4:38 p.m. and left at about 4:44 p.m. before returning to Driver's residence around 5 p.m. and staying there for about 30 minutes. Defendant left Driver's apartment "briefly," and thereafter met Driver and her children in the parking lot of Driver's apartment complex at which time they drove to Panera Bread. After they arrived at Panera Bread, defendant and Driver "stay[ed] there for a few minutes talking ***." Defense counsel then noted Lubamba sent defendant a text message at "6:2[3] p.m." describing Lubamba picking defendant up at Panera Bread, and thus establishing defendant "wasn't at the barbecue" when the shooting occurred. The jury subsequently found defendant guilty of first degree murder.

¶ 87 On March 3, 2016, defense counsel filed a motion for a new trial, which the trial court denied. The court conducted defendant's sentencing hearing that same day. The court stated defendant's criminal history was "extensive" and noted the recency of his "last conviction out of Cook County *** for aggravated unlawful use of a weapon" in May 2013. The court then sentenced defendant to 75 years in prison.

¶ 88 This appeal followed.

¶ 89 II. ANALYSIS

¶ 90 Defendant argues (1) the State presented irrelevant evidence that defendant posted violent lyrics from a rap song on a social media site, Facebook, shortly before the murder; (2) the State presented inadmissible other-crimes evidence that defendant had been arrested and convicted on a prior occasion; (3) when considered cumulatively, the jury's consideration of improper evidence of defendant's Facebook post and his prior arrest and conviction resulted in the denial of a fair trial; and (4) the trial court erred in considering a void prior conviction as an aggravating

factor in sentencing defendant.

¶ 91 A. Defendant's Facebook Post

¶ 92 Defendant argues he was denied a fair trial because the State presented irrelevant evidence he posted violent song lyrics on Facebook shortly before Carter's murder. The State maintains the Facebook post was admissible as a party admission that was relevant to defendant's motive and intent to commit murder. Defendant argues the Facebook post was inadmissible because it was not relevant as either direct or circumstantial evidence of motive or intent. Defendant claims the Facebook post was merely a tribute to his friend, Kytiece Frazier, who had recently been shot.

¶ 93 Defendant concedes he failed to object to the challenged Facebook post at trial or raise the issue in a posttrial motion. He maintains, however, that his forfeiture may be excused under the plain error doctrine. A reviewing court may consider an unpreserved error in the following 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. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

Defendant maintains the evidence in this case was closely balanced under the first prong of the plain error doctrine. He argues "this prejudicial evidence [of the Facebook post] denied him a fair trial in [a] closely balanced case" and any error was not harmless because the verdict "hinged" upon assessing the credibility of defendant and the State's eyewitness, Dreshana Caston, who made allegedly inconsistent statements. To evaluate the closeness of the evidence, this court considers the totality of the evidence and conducts "a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53, 89 N.E.3d 675. On review, "[t]he ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo.*" *People v. Johnson*, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010).

¶ 94 We first consider whether any error occurred with respect to the admission of the Facebook evidence. Generally, "[a]ll relevant evidence is admissible, except as otherwise provided by law." Illinois Rule of Evidence 402 (eff. Jan. 1, 2011). The Illinois Rules of Evidence define the term "relevant" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011).

¶ 95 Here, defendant's Facebook post stated as follows: "I put it on my soul… u aint goin b da only one wit a headstone my nigga[.]" The State argues this evidence established defendant's motive and intent. The State contends "that any evidence which tends to show that an accused had a motive for killing the deceased is relevant because it renders more probable that the accused did kill the deceased." While we agree with the asserted proposition of law, we find the Facebook post does not tend to establish defendant had a motive for killing the deceased. First, the words "you ain't gonna be the only one with a headstone" imply someone has died. Indeed, the

State suggests defendant was alluding to his friend, Frazier, the victim of a shooting, on whose behalf defendant would exact revenge. However, Frazier was very much alive at the time of Carter's murder. Therefore, the State's attempt to connect the rap song lyrics with the circumstances here is somewhat flawed at the outset.

¶ 96 Second, and more important, the Facebook post did not identify Carter, either expressly or inferentially, as defendant's intended victim. See *People v. Watkins*, 34 Ill. App. 3d 369, 374, 340 N.E.2d 92, 96 (1975) ("Defendant concedes that threats against a victim are admissible to show malice and criminal intent [citation], but those threats must in some way be linked to the victim."); see also *People v. Williams*, 85 Ill. App. 3d 850, 856, 407 N.E.2d 608, 613 (1980) ("A threat by the accused to kill or injure a person other than the deceased or a mere charge of a general nature not directed to any particular person is not admissible to show malice toward the deceased. *** The threat must in some way be linked to the victim.").

¶ 97 In its brief, the State suggests the jury could have reasonably inferred that in posting the rap song lyrics, defendant revealed his motive or intent to kill Carter, arguing as follows:

> "Defendant's revenge motive was to shoot Boatman in return for Boatman shooting his friend Frazier but, in his desire for revenge and haste, he shot [Carter] who was in Caston's car thinking him to be Boatman. Another reasonable inference from the record is that with a revenge motive, defendant shot a close friend of Boatman because Boatman shot his close friend, Frazier."

We reject the State's argument that the jury could reasonably infer defendant's motive or intent to kill Carter from the rap song lyrics. As noted, the lyrics were inapt to the circumstances as they existed at the time defendant posted them to his Facebook account because Frazier was alive.

Further, they fail to identify the victim, Carter, either expressly or by inference. The State's suggested inferences are simply too strained. The lyrics in the Facebook post were not relevant of any fact of consequence, and thus, evidence of the Facebook post was inadmissible.

¶ 98 Notwithstanding our determination that the evidence of defendant's Facebook post was inadmissible, the State otherwise presented strong evidence of defendant's guilt and we cannot say the admission of, and references to, the song lyrics in defendant's Facebook post was an error that "alone threatened to tip the scales of justice against the defendant ***." *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413 (quoting *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410).

¶ 99 Caston, the victim's girlfriend, positively identified defendant as the shooter. She knew defendant from having seen him previously at social events and at her home. When Caston first saw defendant at the barbecue, he was standing with a group of people. She recognized his face, tattoos, and dreadlocks. Defendant then approached Caston's car wearing "a blue glove on his hand" and "pulled the gun out." Caston testified she saw defendant shoot Carter in the chest. According to Caston, it was light outside and defendant was only about three feet from the car when he shot Carter. At the hospital, Caston showed police officers a photo of defendant from defendant's Facebook page. In his testimony, Officer Baltzell stated, "[Caston] came in from the very beginning *** and was very clear about who did it."

¶ 100 Detective Funkhouser testified that during a search of defendant following his arrest, two blue gloves were found in defendant's pants pocket. Detective Funkhouser testified the gloves appeared to be identical to the blue gloves contained in Frazier's hospital room. Although no gunshot residue was found on the gloves located in the search of defendant, the parties stipulated such residue might not be detectible due to a number of possible circumstances such as

being wiped away with casual contact.

¶ 101 During his testimony, defendant admitted he took the two blue latex gloves found in his pants pocket from the hospital when he visited Frazier earlier on the day of the shooting. He stated he did so because he had eczema on his hands. Defendant asserted he "usually" wore gloves of some type, "especially if [he was] going somewhere." However, Caston testified that on the multiple prior occasions she had seen defendant in public, "[h]e never had on any gloves." Further, Lubamba, who testified she and defendant began dating about two months prior to Carter's murder, stated she could not recall ever seeing defendant wearing gloves.

¶ 102 As an alibi, defendant asserted that he arrived at Panera Bread around 6 p.m., the time the murder occurred. Wendy Driver testified she drove defendant to Panera Bread as "the sun was setting" and "shining in [her] eyes." Defendant likewise indicated the sun was setting when he went to Panera Bread, and Lubamba testified that she picked up defendant from Panera Bread around 7:30 p.m. The parties stipulated the sun set at 7:26 p.m. that day. Based on this evidence, the jury could have reasonably discounted defendant's alibi that he was at Panera Bread when the shooting occurred at 6 p.m.

¶ 103 We find Caston's eyewitness testimony, evidence of the blue gloves, and defendant's weak alibi constituted strong evidence of his guilt. Accordingly, the evidence was not so closely balanced as to require a finding that the admission of the Facebook post was plain error. We also reject defendant's remaining contentions concerning the cumulative effect of the Facebook evidence and the State's references to it during closing argument for the same reason.

¶ 104 B. Other-Crimes Evidence

¶ 105 Defendant next argues on appeal that he was denied a fair trial because the State

presented inadmissible other-crimes evidence where two witnesses referenced defendant's "mug shot" and an Illinois Department of Corrections (DOC) picture taken when he was arrested and convicted on a prior occasion.

¶ 106 Defendant acknowledged the other-crimes evidence was not objected to at trial or raised in a posttrial motion. He again argued the evidence in this case was closely balanced and the unpreserved errors may be reviewed under the plain error doctrine. We will first consider whether any error occurred at all with respect to the alleged other-crimes evidence. See *People v. Harvey*, 2018 IL 122325, ¶ 15, 115 N.E.3d 172 (citing *People v. Staake*, 2017 IL 121755, ¶ 33, 102 N.E.3d 217) ("The initial step under either prong of the plain error doctrine is to determine whether the claim presented on review actually amounts to a 'clear or obvious error' at all.").

¶ 107 "Evidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime." *People v. Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247. It is "admissible to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged." *Id.* "Evidence of other offenses may also be admissible if the evidence is procured, invited, or acquiesced to by the defendant." *People v. Liner*, 356 Ill. App. 3d 284, 292, 826 N.E.2d 1274, 1283 (2005). "Moreover, when a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, [defendant] cannot contest the admission on appeal." *People v. Bush*, 214 Ill. 2d 318, 332, 827 N.E.2d 455, 463 (2005). "The court should exclude evidence of other crimes where its prejudicial effect substantially outweighs its probative value." *People v. Placek*, 184 Ill. 2d 370, 385, 704 N.E.2d 393, 400 (1998).

¶ 108 Evidence relating to a "mug shot" that tends to "inform the jury of a defendant's

commission of other, unrelated criminal acts should not be admitted." *People v. Nelson*, 193 Ill. 2d 216, 224, 737 N.E.2d 632, 637 (2000). However, "[w]hen admitted in error, 'mug shot' evidence will not warrant a reversal when competent evidence establishes the defendant's guilt beyond a reasonable doubt, and it can be concluded that retrial without the challenged evidence would produce no different result." *Id.*

¶ 109 Here, defendant contends two witnesses improperly referenced other-crimes evidence. First, during the cross-examination of Caston, defense counsel elicited the following testimony regarding a "mug shot" of defendant:

> "MR. JACKSON [(DEFENSE COUNSEL):] *** Did [Detective Funkhouser] show you a picture of [defendant]?
>
> A. Yes.
>
> Q. And did you point out—did you say that that was the picture that you *** thought was the shooter?
>
> A. Yeah, I said that was him.
>
> Q. That was a picture he showed you, correct?
>
> A. The investigator, yes.
>
> Q. Yes, the investigator?
>
> A. It was a *mug shot*.
>
> Q. Pardon?
>
> A. It was a *mug shot*." (Emphasis added.)

¶ 110 The second reference to alleged other-crimes evidence occurred during the State's direct examination of Detective Sumption when he twice referenced a DOC photograph of

defendant. Detective Sumption testified as follows:

"MR. LOZAR [(THE STATE):] The Facebook profile that you viewed, did you preserve a screen shot of it exactly as it appeared at the time you were able to view it then?

A. Yes, I did.

* * *

Q. Was a connection made through Secretary of State records?

A. Yes.

Q. And did you receive a photograph of some kind related to that?

A. Yes. I received a photograph from the Illinois Secretary of State. It was a driver's license photograph as well as an *Illinois Department of Corrections photograph.*

Q. *** [D]id it have corresponding actual identifiers, name, date of birth and so forth?

A. Yes, it did. It was for—

Q. And what was the name?

A. [Defendant] David Beverly with a date of birth of March 31st, 1987.

Q. Were you able to *** make any comparisons between the Secretary of State photograph and the name David Beverly and the Facebook page and the photograph of Dreshana Caston's phone in [exhibits] 15 and 5 as you observed them?

A. Yes, I was. I used the *Illinois Department of Correction's photograph—*

THE COURT: All right, counsel. May we [*sic*] approach?

[(A bench conference was held off the record.)]

Q. Officer, you did draw photographic information from a couple of locations; is that correct?

A. Yes, I did.

Q. As you drew photographic information and the Secretary of State data, you were able to come to the identification for David Beverly?

A. That's correct." (Emphasis added.)

¶ 111 Defendant contends, as stated, that references to his "mug shot" and "Illinois Department of Corrections" photograph constitute inadmissible other-crimes evidence. With respect to Caston's testimony regarding defendant's "mug shot," the record reflects this testimony was elicited by defense counsel during cross-examination. Defense counsel asked Caston, "Did [Detective Funkhouser] show you a picture of [defendant]?" The photograph defense counsel asked about was the "mug shot" of defendant. Because defense counsel's questioning elicited Caston's response relating to defendant's "mug shot," defendant cannot now complain about the testimony.

¶ 112 As for the testimony regarding defendant's DOC photograph, Detective Sumption referenced this photo during the State's direct examination when he was asked about photos he received from the Illinois Secretary of State. Detective Sumption volunteered that he had received a DOC photograph in addition to the Secretary of State photo. The trial court immediately called the attorneys to the bench and a conference was held off the record. Subsequently, no further references were made to the DOC photograph. Although we find the witness's volunteered

references to the DOC photo were improper, we cannot say they were sufficient to influence the jury's verdict. As previously discussed, the State presented strong evidence of defendant's guilt and the evidence was not closely balanced. Thus, contrary to defendant's contention, any error here does not warrant a retrial as the result would likely have been the same even without the improper testimony. Accordingly, we conclude there was no plain or obvious error. *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413.

¶ 113 C. Defendant's Sentence

¶ 114 Finally, defendant argues the trial court considered a void prior conviction as an aggravating factor in sentencing defendant. Defendant argues he is entitled to a new sentencing hearing and vacatur of his void conviction.

¶ 115 According to the record, in May 2013, defendant was convicted of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6 (West 2012)) in Cook County, Illinois, in case number 13C22013501. Defendant initially claimed in his supplemental brief on appeal that the section of the AUUW statute under which he was convicted, section "24-1.6(a)(1)/(3)(A)," was declared unconstitutional in *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321, as violating the second amendment to the United States Constitution (U.S. Const., amend. II). Defendant highlighted a reference to the AUUW conviction contained in a presentence hearing report, which we note failed to specifically identify the part of the AUUW statute under which he was convicted. Additionally, the record contained the Cook County sentencing judgment, which identified defendant's AUUW conviction as a violation of "720 [ILCS] 5/24-1.6(A)(2)."

¶ 116 In *Aguilar*, 2013 IL 112116, ¶ 22, our supreme court held that the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute was facially unconstitutional under the

second amendment to the United States Constitution. The section found to be unconstitutional in *Aguilar*, the Class 4 form of aggravated unlawful use of a weapon, prohibited knowingly "carr[ying] on or about his or her person or in any vehicle[,]" outside the home, a firearm that "was uncased, loaded and immediately accessible ***." 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008). The court in *Aguilar* found this section of the statute "categorically prohibits the possession and use of an operable firearm for self-defense outside the home" in violation of the second amendment. *Aguilar*, 2013 IL 112116, ¶ 21. In *People v. Burns*, 2015 IL 117387, ¶¶ 22, 25, 79 N.E.3d 159, the court clarified that the entirety of section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute was facially unconstitutional without limitation as to the "Class 4 form" of the offense because "[n]o such offense exists" as there was "no 'Class 4 form' or 'Class 2 form' of AUUW."

¶ 117 Subsequently, in *People v. Mosley*, 2015 IL 115872, ¶ 61, 33 N.E.3d 137, our supreme court found another section of the AUUW statute—section 24-1.6(a)(2), (a)(3)(A)—unconstitutional. Specifically, section 24-1.6(a)(2), (a)(3)(A) prohibited a person from knowingly "[c]arr[ying] or possesses[ing] on or about his or her person, upon any public street, alley, or other public lands" a firearm that "was uncased, loaded and immediately accessible ***." 720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (West 2012).

¶ 118 During the pendency of the appeal in the instant case, our supreme court, in *In re N.G.*, 2018 IL 121939, 115 N.E.3d 102, determined that a conviction resulting from a facially unconstitutional statute is void and courts are precluded from relying on the conviction in subsequent proceedings. See *id.* ¶¶ 40-42, 84, 86. In that case, the court considered an order terminating the respondent-father's parental rights based on a finding of depravity that was

premised on a void prior AUUW conviction. *Id.* ¶¶ 1-2. In holding that the depravity finding in the parental termination proceeding could not be premised upon a void prior conviction, our supreme court overruled its prior decision, *People v. McFadden*, 2016 IL 117424, ¶ 37, 61 N.E.3d 74, in which the court had upheld a conviction predicated upon a void AUUW conviction. The court later determined, in *N.G.*, that *McFadden* was not well reasoned because it failed to adequately distinguish prior convictions resulting from a "constitutionally deficient procedure" and a "facially unconstitutional statute ***." *In re N.G.*, 2018 IL 121939, ¶ 76. The court in *N.G.* explained that convictions "based on a facially unconstitutional statute have no legal force or effect" and void judgments stemming from a facially unconstitutional statute may be impeached in any proceeding at any time, regardless of whether the time for appeal has expired if the "constitutional infirmity is put in issue" during a pending proceeding before a court. *Id.* ¶¶ 52, 56-57; see also *People v. Cavette*, 2018 IL App (4th) 150910, ¶ 26, 118 N.E.3d 699 ("Applying the rationale of *N.G.* and the void *ab initio* doctrine, we find defendant's void AUUW conviction may not serve as a predicate felony conviction for armed habitual criminal.").

¶ 119 The parties herein filed supplemental briefs regarding the applicability of *N.G.* to the instant case. Defendant contends the trial court was precluded from considering his void conviction for AUUW as an aggravating factor in sentencing him.

¶ 120 In our original decision, we found that because the Cook County sentencing judgment only identified defendant's AUUW conviction as being pursuant to section "(A)(2)" of the statute, which was nonspecific and did not adequately describe his AUUW conviction, defendant had failed to establish he was convicted under an unconstitutional statute. We thus rejected his "void conviction" argument.

¶ 121 Defendant subsequently filed a petition for rehearing, claiming his AUUW conviction was instead based on a violation of section "24-1.6(a)(2)/(a)(3)(A)," which was found unconstitutional by our supreme court in *Mosley*. In support of his assertion, defendant asks us to look at count I of the charging instrument in his AUUW case.

¶ 122 As we previously noted, the sentencing judgment from defendant's 2013 AUUW conviction in Cook County includes the following citation to the AUUW statute: "720 [ILCS] 5/24-1.6(A)(2)." However, the 2013 sentencing judgment *also* references "count I" of the charging instrument. A review of count I reflects that defendant was charged with violating section "24-1.6(a)(2)/(3)(A)" of the AUUW statute. Count I states defendant "knowingly carrie[d] or possess[ed] on or about his person a firearm, upon any public street" while the firearm was "uncased, loaded and immediately accessible ***[.]" This section of the AUUW statute—section 24-1.6(a)(2), (a)(3)(A)—was found facially unconstitutional in *Mosley*, 2015 IL 115872, ¶ 61.

¶ 123 Accordingly, we agree with defendant and find his prior AUUW conviction is void *ab initio*. *Mosley*, 2015 IL 115872, ¶ 61; *N.G.*, 2018 IL 121939, ¶ 36, ("To hold that a statute is facially unconstitutional means that the conduct it proscribed was beyond the power of the state to punish. *** That being the case, the conviction must be treated by the courts as if it did not exist, and it cannot be used for any purpose under any circumstances.").

¶ 124 Defendant also asserts in his petition for rehearing that the trial court erred in considering the void AUUW conviction in sentencing him in the instant case, and he requests the matter be remanded for resentencing. In response, the State argues "[t]he record shows the trial court did not even consider the [AUUW] conviction at issue, and therefore, no error occurred." We find the record reflects the court did consider defendant's 2013 Cook County AUUW

conviction when it sentenced him in this case. The court noted defendant's prior criminal history and specifically stated that defendant's "last conviction out of Cook County was aggravated unlawful use of a weapon" where he "received a three and a half year sentence out of Cook County on May of 2013." Consequently, it is apparent the court relied, in part, on defendant's unconstitutionally void 2013 AUUW conviction in sentencing him in this case. From the record, we cannot say the court's reliance on defendant's void conviction was so insignificant that it did not result in a greater sentence, and thus this case must be remanded for resentencing. See *People v. Bourke,* 96 Ill. 2d 327, 332, 449 N.E.2d 1338 (1983) ("Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing.").

¶ 125 III. CONCLUSION

¶ 126 For the reasons stated, we vacate defendant's sentence and remand the matter to the trial court for resentencing without consideration of his void AUUW conviction. We otherwise affirm the trial court's judgment.

¶ 127 Affirmed in part, vacated in part, and remanded with directions.