

No. 1-12-0329

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	11 CR 5360
	)	
MARCUS KEY,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

**ORDER**

*HELD:* The trial court erred in not providing the jury with separate verdict forms for each count of unlawful use or possession of a weapon by a felon. The trial court did not err in failing to instruct the jury on possession of cannabis as a lesser-included offense of possession of cannabis with intent to deliver. We affirm defendant's conviction for unlawful possession of

more than 10 grams, but not more than 30 grams of cannabis with intent to deliver, but we vacate the unauthorized portion of the sentence and reduce the sentence to the maximum nonextended term of three years' imprisonment.

¶ 1 Defendant Marcus Key was charged by information with two separate counts of unlawful use or possession of a weapon by a felon. The first count was based upon his alleged constructive possession of eight .38 caliber bullets and the second count was based upon his alleged constructive possession of a single .45 caliber bullet. The ammunition was recovered from a black plastic bag found underneath a mattress in defendant's bedroom during the execution of a search warrant. Defendant was also charged with one count of possession of a controlled substance – ecstasy – with intent to deliver, and one count of possession of cannabis with intent to deliver.

¶ 2 Following a jury trial, defendant was found guilty of unlawful use or possession of a weapon by a felon. He was also found guilty of possession of cannabis with intent to deliver. He was found not guilty of possession of a controlled substance with intent to deliver.

¶ 3 Defendant was sentenced to 4 years' imprisonment for unlawful use or possession of a weapon by a felon, with the two counts for this offense being merged; and 4 years' imprisonment for possession of cannabis with intent to deliver, with all sentences to be served concurrently. The trial court denied defendant's motion to reconsider his sentence. This appeal followed.

¶ 4 On appeal, defendant contends: (1) we should reverse his convictions for unlawful use or possession of a weapon by a felon and remand for a new trial on the ground he was denied his constitutional right to a unanimous jury verdict where the jury was not required to return a unanimous verdict with respect to either of his two convictions for unlawful use or possession of a weapon by a felon; (2) alternatively, we should reverse one of his convictions for unlawful use

or possession of a weapon by a felon and correct the mittimus to reflect one conviction for this offense; (3) the trial court erred in refusing to give his requested jury instruction on the lesser-included offense of simple possession; and (4) we should remand for resentencing on the ground the trial court imposed a void sentence one year higher than the maximum sentence allowable for possession of cannabis with intent to deliver. For the reasons that follow, we reverse in part, affirm in part, modify sentence, and remand with directions.

¶ 5 The issues raised on appeal are relatively discrete. Therefore, we discuss only those facts necessary for the disposition of each issue.

¶ 6 ANALYSIS

¶ 7 The State charged defendant with two separate counts of unlawful use or possession of a weapon by a felon. The first count alleged defendant possessed .38 caliber ammunition while the second count alleged he possessed .45 caliber ammunition. The jury unanimously found defendant guilty of these offenses using a general verdict form.

¶ 8 Defendant argues on appeal that the trial court erred in failing to provide the jury with separate verdict forms for each count of unlawful use or possession of a weapon by a felon. Defendant maintains he was denied his constitutional right to a unanimous jury verdict because the jury was not required to return a unanimous verdict regarding either of his two convictions for unlawful use or possession of a weapon by a felon.

¶ 9 The right to trial by jury protected by the Illinois Constitution includes the right to a unanimous jury verdict in criminal trials. See *People v. Lobb*, 17 Ill. 2d 287, 298 (1959); *People v. Strain*, 194 Ill. 2d 467, 475 (2000). Whether a defendant's constitutional right has been violated is reviewed *de novo*. *People v. Burns*, 209 Ill. 2d 551, 560 (2004). Therefore, we review *de novo* defendant's argument he was denied a unanimous jury verdict.

¶ 10 Defendant concedes he failed to preserve this issue for review, but maintains it should be addressed as plain error. The plain-error doctrine permits a reviewing court to consider forfeited claims of error if either: (1) the evidence is closely balanced and the jury's guilty verdict may have resulted from the error; or (2) the error was so fundamental and of such magnitude that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process. *People v. Hudson*, 228 Ill.2d 181, 191 (2008).

¶ 11 A defendant has the burden of persuasion under both prongs of the plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant contends we should review this issue under the second prong. We agree.

¶ 12 Under the second prong of the plain error analysis, prejudice is presumed because of the importance of the right involved, regardless of the strength of the evidence against the defendant. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Our supreme court has equated the second prong of the plain error analysis with structural error. *Id.* at 613-14 (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)).

¶ 13 Structural errors are constitutional deprivations "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). "An error is typically designated as 'structural' and requiring automatic reversal only if it necessarily renders a criminal trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Averett*, 237 Ill. 2d 1, 12-13 (2010).

¶ 14 Structural errors are recognized in only a limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). The United States Supreme Court has identified a small number of errors deemed so serious that they defy harmless-error analysis and, thus, must be considered structural errors requiring automatic reversal. These errors include: complete denial of counsel;

biased trial judge; racial discrimination in the selection of the grand jury; denial of self-representation at trial; denial of a public trial; and an erroneous reasonable doubt instruction to the jury. See *Thompson*, 238 Ill. 2d at 609 (citing *Washington v. Recueno*, 548 U.S. 212, 218 n.2 (2006) (listing examples of structural errors)); see also *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (the right to a unanimous jury verdict beyond a reasonable doubt). The United States Supreme Court has determined that without "these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

¶ 15 In this case, the State charged defendant with two separate offenses of unlawful use or possession of a weapon by a felon, with each offense described in a different count in the indictment. The trial court read the charges to the jury, making them aware that defendant was accused of two separate offenses of unlawful use or possession of a weapon by a felon. The trial court, however, provided the jury with only one issues instruction and one set of general verdict forms. The jury unanimously found defendant guilty of these offenses using a general verdict form. However, the general verdict did not specify whether jurors found defendant guilty of possessing .38 caliber ammunition, .45 caliber ammunition, or both.

¶ 16 Under these circumstances, we find the trial court's failure to provide the jury with separate verdict forms for each count of unlawful use or possession of a weapon by a felon created the risk that, although all of the jurors found defendant guilty of at least one of the counts of unlawful use or possession of a weapon by a felon, they were not unanimous as to a particular count. We are unable to determine from the general verdict whether jurors unanimously found defendant guilty of possessing .38 caliber ammunition, .45 caliber ammunition, or both. A trial

court's refusal or failure "to submit separate verdict forms is harmless error only if the jury's findings may be ascertained from the general verdicts entered." *People v. Smith*, 233 Ill. 2d 1, 25 (2009).

¶ 17 The State maintains that the general verdict form was appropriate in this case because both counts of unlawful use or possession of a weapon by a felon originated or arose out of the same transaction, namely, defendant's possession of ammunition in a single black plastic bag found underneath his mattress. The State argues that although there were separate possessions alleged for the two different calibers of ammunition, the evidence established that the possession was part of one single incident, such that a general verdict form was appropriate. We must disagree.

¶ 18 Although the State could have chosen to charge defendant's possession of the two different calibers of ammunition as a single incident or act, "this is not the theory under which the State charged defendant, nor does it conform to the way the State presented and argued the case to the jury." *People v. Crespo*, 203 Ill. 2d 335, 342 (2001). In the instant case, the State charged defendant with two separate counts of unlawful use or possession of a weapon by a felon based on his constructive possession of two different calibers of ammunition. Therefore, the jury should have been instructed to find separate verdicts as to each count. Because the failure to do so prevents us from determining whether jurors unanimously found defendant guilty of possessing .38 caliber ammunition, .45 caliber ammunition, or both, we must reverse defendant's convictions for these offenses and remand for a new trial on those two charges. Since we are remanding this cause for a new trial, we need not address defendant's contentions regarding his *mittimus* concerning these convictions.

¶ 19 Next, defendant contends the trial court erred in failing to instruct the jury on possession of cannabis as a lesser-included offense of possession of cannabis with intent to deliver. We disagree.

¶ 20 Although a defendant generally may not be convicted of an offense for which he has not been charged, in some instances a defendant may be entitled to have the jury instructed on less serious offenses that are included in the charged offense. *People v. Ceja*, 204 Ill. 2d 332, 359 (2003). A lesser-included offense is "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2010). Whether an offense encompasses a lesser-included offense is a question of law, which we review *de novo*. *People v. Landwer*, 166 Ill. 2d 475, 486 (1995).

¶ 21 Courts use a two-tiered process referred to as the "charging instrument" approach to determine whether an offense is a lesser-included offense and whether defendant is entitled to an instruction on that offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). First, courts look at the allegations in the charging instrument to determine whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense. *Kolton*, 219 Ill. 2d at 361. Once a lesser-included offense is identified, a court must examine the evidence presented at trial and determine whether it would permit a jury to rationally find the defendant guilty of the lesser-included offense and acquit him of the greater offense. *Ceja*, 204 Ill. 2d at 360.

¶ 22 Defendant was charged with unlawful possession of more than 10 grams, but not more than 30 grams of cannabis with intent to deliver. The parties agree that possession of cannabis is a lesser-included offense of possession of cannabis with intent to deliver. Therefore, the question before us is whether the evidence presented at trial would have permitted the jury to

find defendant guilty of possession, but acquit him of the greater offense of possession of cannabis with intent to deliver. In other words, the issue is whether the jury could have found defendant guilty of only the lesser-included offense of possession of cannabis.

¶ 23 Given the evidence presented at trial, we find there is no basis upon which the jury could have rationally found defendant guilty of simple possession and at the same time acquitted him of unlawful possession of cannabis with intent to deliver. Evidence was presented that on March 9, 2011, at approximately 7:19 p.m., Chicago police officers executed a search warrant of defendant's residence. Police recovered a clear knotted plastic bag containing 17 smaller clear plastic zip-lock baggies containing cannabis. They also recovered 10 small clear plastic zip-lock baggies containing cannabis hidden in the cushion of a pillow in the living room. All of the small zip-lock baggies were marked with a "bulldog" emblem and were consistent with street-level packaging for distribution, which would have been accomplished by the use of recovered drug paraphernalia, including a digital scale and multiple empty small zip-lock baggies.

¶ 24 Police also recovered loose cannabis on a counter in the kitchen. Moreover, defendant admitted to police that all of the recovered cannabis belonged to him and there was no evidence suggesting he possessed the cannabis for personal use. Accordingly, the trial court did not err in refusing to instruct the jury on the lesser-included offense of possession of cannabis.

¶ 25 Finally, defendant argues that his four year sentence for possession of cannabis with intent to deliver is void to the extent it exceeds three years. We agree.

¶ 26 Possession of cannabis with intent to deliver is a Class 4 felony. 720 ILCS 550/5(c) (West 2008). The maximum term of imprisonment for a Class 4 felony, unless extended, is three years. 730 ILCS 5/5-4.5-45(a) (West 2010). In the instant case, there was never a finding that defendant was extendible on this charge. The portion of a sentence exceeding the maximum

term authorized by statute is void. *People v. Thompson*, 209 Ill. 2d 19, 27-29 (2004). The State concedes that defendant's sentence is void to the extent it exceeds the maximum term of imprisonment for a Class 4 felony. Therefore, since defendant's sentence for possession of cannabis with intent to deliver exceeds the maximum term authorized by statute, we reduce the unauthorized sentence to the maximum term permitted by statute, in this case, three years. See *People v. Brown*, 225 Ill. 2d 188, 205 (2007) ("a sentence, or portion thereof, not authorized by statute is void \* \* \* [but] only to the extent that it exceeds what the law permits. The legally authorized portion of the sentence remains valid").

¶ 27 For the foregoing reasons, we reverse defendant's convictions for unlawful use or possession of a weapon by a felon and remand for a new trial where the jury may be properly instructed. We affirm defendant's conviction for unlawful possession of more than 10 grams, but not more than 30 grams of cannabis with intent to deliver, but we vacate the unauthorized portion of the sentence and reduce the sentence to the maximum nonextended term of three years' imprisonment. See 134 Ill. 2d R. 615(b)(4) ("On appeal the reviewing court may \* \* \* reduce the punishment imposed by the trial court").

¶ 28 Reversed in part, affirmed in part, sentence modified, cause remanded with directions.