

No. 1-13-0691

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> ANTWAN J.H., A MINOR)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	Cook County.
)	
v.)	No. 12 JD 4768
)	
ANTWAN J.H., a Minor,)	Honorable
)	Richard F. Walsh,
Respondent-Appellant).)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices LAMPKIN and REYES concurred in the judgment.

O R D E R

¶ 1 **Held:** Credible witness testimony established the minor respondent's possession of a handgun beyond a reasonable doubt; one conviction under a subsection of the aggravated unlawful use of a weapon (AUUW) statute held to be unconstitutional was reversed; all remaining convictions on weapons charges but the most serious conviction were required to be vacated under the one-crime/one-act rule; respondent forfeited the issue of whether the trial court failed to fulfill statutory requirements for sentencing a minor to incarceration.

¶ 2 Following a delinquency hearing, minor respondent Antwan J.H. was found delinquent on all five counts charged in a petition for adjudication of wardship: three counts of aggravated

unlawful use of a weapon (AUUW), one count of unlawful possession of a firearm by a person under 18 years of age, and one count of possession of a firearm with defaced identification marks. At the dispositional hearing, the court committed respondent to the Department of Juvenile Justice (the DOJJ). On appeal, respondent contends: (1) he was not proven guilty beyond a reasonable doubt because the testimony of the lone State witness was not credible; (2) the entire AUUW statute is unconstitutional; (3) he was improperly convicted of four of the five weapons charges where all five were based on only one act; and (4) his sentencing hearing failed to comport with the statutory requirements for committing minors to the DOJJ. We reverse one of respondent's convictions for AUUW, vacate his convictions for defacing identification marks of a firearm and unlawful possession of a firearm, remand this cause to the trial court to vacate the less serious of the two remaining AUUW counts, and affirm the order of commitment to the DOJJ.

¶ 3 At respondent's trial, Cicero police officer Frank Savaglio testified to events occurring early in the evening of November 29, 2012. Savaglio was assigned to a gang crimes tactical unit. He was wearing a plain-clothes outfit consisting of jeans and a shirt or jacket covered by a vest with a police star on the upper left side of the vest. At about 5:40 p.m., he and his partner were in a vehicle that was flagged down by a woman who reported an ongoing disturbance involving a gray four-door vehicle at 19th Street and 58th Avenue in Cicero. The officers drove to that location where Savaglio saw a gray four-door vehicle turning right onto 19th Street. Three or four male individuals who had just been engaged with the gray vehicle were on the east side of 58th Avenue. Savaglio exited his vehicle, announced his office, and approached the group. He looked to his right and saw respondent, a black youth about 16 to 18 years old, with two tattoos on his face and wearing black pants and a black hooded sweatshirt under a black vest.

Respondent's back and right side were facing the officer. Respondent started to produce a silver handgun from the right side of his waistband. Savaglio yelled, "Stop, police." Respondent turned in Savaglio's direction, looked at him, and started to run, holding the gun in his hand. Savaglio followed as respondent ran east down 19th Street, north down an alley, and east into a yard on 57th Court where he threw the gun into a back yard. Savaglio stopped, secured the handgun, and radioed respondent's direction to other officers who apprehended respondent in another back yard. Savaglio went to that location and positively identified respondent. At that time, respondent did not have a FOID card, did not live in Cicero, and was not engaged in hunting or anything under the wildlife code. When Savaglio first saw respondent, he was not in his fixed place of business, and the gun he pulled from his waistband was not encased in any type of container and was small enough to be concealed on a person. At trial, Savaglio identified a State photographic exhibit depicting the handgun, a small Phoenix Arms .22 caliber silver handgun about seven inches long. When Savaglio retrieved the handgun, it was operable and loaded with six live rounds in a clip. Its serial number had been obliterated.

¶ 4 The court took judicial notice of information in the court file that on November 29, 2012, respondent was 16 years old and resided in Justice, Illinois. The defense rested without presenting evidence. The court found respondent guilty as charged in the delinquency petition.

¶ 5 Respondent's dispositional hearing took place on January 31, 2013. The trial record contains an original social investigation report and a supplemental report filed on the date of the dispositional hearing. The report showed that respondent was born on December 11, 1995, and had had numerous previous contacts with the court system. Respondent had "a number of placements" in the Temporary Detention Center (TDC) and two previous commitments to the DOJJ, as well as multiple violations of parole in his commitments, resulting in his being returned

to DOJJ on violation of parole. An early contact with police showed respondent was charged in a petition with three counts of AUUW, resulting in confinement in the Juvenile Detention Center, violations of probation, and finally a commitment to DOJJ on June 11, 2010. A petition for adjudication of wardship was filed in 2011, charging respondent with robbery, theft from person, aggravated battery, battery, and attempted robbery. Respondent was committed to DOJJ on January 13, 2012, and was released on parole on October 19, 2012. He violated parole, a warrant issued, and he was returned to the Illinois Youth Center (IYC) in Chicago on November 3, 2012. He was discharged from IYC on November 18, 2012, and placed back on parole. He violated parole on November 25, 2012, by going AWOL on house arrest; and another warrant issued on November 27, 2012. He was arrested on November 30, 2012, in Cicero for the offenses in the instant case. The report observed that previous interventions afforded respondent, both punitive and therapeutic, had failed in deterring him from continued involvement in criminal activity.

¶ 6 Dave and June Anderson, respondent's grandparents, had been his primary caretakers; they adopted him and his sister as the result of his natural father's incarceration and his mother's reported difficulty with alcohol and drug abuse. The report stated that, despite the efforts of his grandparents, respondent "comes from a home environment in which little social controls are imposed, one lacking in structure, and one in which there are few consequences regarding his maladaptive behavior." June Anderson, respondent's grandmother, died in 2012.

¶ 7 Respondent has abused both alcohol and drugs, specifically, marijuana and cocaine which he claimed to use on a regular basis. There were past psychiatric diagnoses of bipolar disorder not otherwise specified, marijuana abuse, and Oppositional Defiant Disorder which evolved more into a conduct disorder diagnosis. Respondent had been the subject of "numerous

psychiatric interventions, residential placements, prescribed medications, individual and family counseling, and therapeutic day school." Attached documentation from a physician noted that "all previous interventions have not been effective in achieving a reasonable period of stability." There were multiple residential placements for respondent at each of four hospitals or residential care homes, all of which were the result of what his grandmother had described as "manic episodes."

¶ 8 The greatest area of concern was respondent's gang affiliation. The probation officer noted that respondent stated "that the Latin Kings and the gang culture is his life. It is all he knows." The report observed that respondent's "use of free time involved the culture of gang activity, disrespecting the rights of others, committing crimes against the community, and using alcohol and drugs on a regular basis." When questioned as to his future plans, respondent informed the probation officer "that he is looking forward to returning back to [the DOJJ] and finishing his education while incarcerated."

¶ 9 At the dispositional hearing, the probation officer recommended that it was in the best interest of respondent that he be returned to the DOJJ. The State argued that respondent was not a good candidate for probation and recommended commitment to the DOJJ based on respondent's gang involvement and continued criminal activity. Respondent's counsel stated, "I do recall that there was a clinical, and they were saying there was some services in the community to do on the last court date." Counsel did not identify any specific service. He requested "a finding to stand, case closed, give him credit for the 64 days he's been in custody." This exchange followed:

"THE COURT: Well, I don't think there's any alternatives realistically. I'm going to follow the recommendations of the

probation officer. I am going to commit the minor the Illinois Department of Juvenile Justice.

Mr. Halman, if you disagree with my decision finding you guilty --

MINOR RESPONDENT: I don't give a f***, man. Man, f*** contempt. F*** all that sh**. I could care less about this sh**. These mother*****ers ain't gon' [sic] stop me, man.

THE COURT: You're really somebody there. I was trying to advise you of your appellate rights.

MINOR RESPONDENT: Man, f*** you, dude. I don't give no f***.

THE SHERIFF: Judge . . .

THE COURT: I'm trying to advise you of your appellate rights.

MINOR RESPONDENT: Man, I don't give a f*** about my appellate rights.

THE COURT: You don't want to hear it?

That's right. Take him out of here.

MINOR RESPONDENT: I don't give a f***. F*** all y'all.

(Whereupon Sheriff began escorting
Minor Respondent from courtroom.)

THE COURT: I attempted to advise him of his appellate rights --

MINOR RESPONDENT: Shut the f*** up, you bitch ass,
nigger. I'll kill your bitch ass, nigger."

¶ 10 The trial court executed a written Order of Commitment to the DOJJ for an indeterminate term with credit for 64 days in custody.

¶ 11 Respondent now appeals from the adjudicatory finding of delinquency and dispositional order. His first assignment of error is that the testimony of the State's sole witness was inherently incredible and uncorroborated and raised a reasonable doubt of his guilt.

¶ 12 The constitutional safeguard of proof beyond a reasonable doubt applies during the adjudicatory stage of a juvenile delinquency hearing. *In re Malcolm H.*, 373 Ill. App. 3d 891, 893 (2007). Thus, when a delinquency petition is filed, the State is charged with proving the elements of the substantive offense beyond a reasonable doubt. *In re Marquita M.*, 2012 IL App (4th) 110011, ¶ 28. The reasonable doubt standard asks whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *Malcolm H.*, 373 Ill. App. 3d at 893, citing *In re W.C.*, 167 Ill. 2d 307, 336 (1995). Since the trial court has the best opportunity to observe the demeanor and conduct of the parties and witnesses, it is in the best position to determine the credibility and weight of the witnesses' testimony. *In re E.S.*, 324 Ill. App. 3d 661, 667 (2001). It is not the function of the reviewing court to retry the defendant. *People v. Austin M.*, 2012 IL 111194, ¶ 107.

¶ 13 Officer Savaglio was the State's sole witness. Respondent labels as incredible Savaglio's testimony that respondent "first displayed a handgun to Savaglio immediately after Savaglio had identified himself as a police officer, and then discarded the gun while Savaglio was just steps behind him." Respondent contends that Savaglio's testimony was "nothing more than a fanciful

connivance to justify [respondent's] arrest and prosecution." We disagree. Respondent is mistaken in asserting Savaglio testified that respondent produced the handgun while aware of Savaglio's presence. The record reveals that Savaglio testified he initially announced his office as he approached a group of three or four youths. When Savaglio looked off to his right, he observed respondent, who was facing at an angle away from the officer with his back and right side toward the officer. At that time Savaglio saw respondent withdraw the handgun from his waistband. It was only when Savaglio announced his office again, in a louder voice, that respondent turned, saw the officer, and fled. No contradictory evidence or testimony was offered.

¶ 14 The testimony of even a single witness who had an opportunity to observe the accused under circumstances permitting a positive identification is sufficient to support a conviction. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). The factfinder, not a reviewing court, must assess the credibility of witnesses, resolve conflicts in the evidence, and decide what reasonable inferences to draw from the evidence. *In re Gino W.*, 354 Ill. App. 3d 775, 777 (2005). This court reverses a delinquency finding only when the proof is so improbable or unsatisfactory that reasonable doubt exists as to the respondent's guilt. *Keith C.*, 378 Ill. App. 3d at 257. There was nothing inherently incredible in the officer's testimony, and the trier of fact obviously believed his testimony. Despite respondent's attempt to discredit Savaglio's testimony, he has not met his burden to show that no rational trier of fact could have found that the essential elements of the offenses were proven beyond a reasonable doubt. We find no basis for reversing the trial court's judgment and its inherent credibility determination.

¶ 15 Respondent contends that all three of his convictions for AUUW must be reversed because the AUUW statute is unconstitutional as an impermissible limitation on the right to bear

arms. We agree only with respect to one of respondent's three counts of AUUW. In *People v. 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), categorically prohibiting the possession and use of an operable firearm for self-defense outside the home, facially violated the right to keep and bear arms as guaranteed by the second amendment to the United States Constitution. The State acknowledges our supreme court's holding in *Aguilar* that section 24-1.6(a)(1), (a)(3)(A), (d) is unconstitutional. Consequently, respondent's conviction on that count must be reversed.

¶ 16 Respondent also challenges the two remaining AUUW subsections under which he was adjudicated delinquent: possessing a handgun while under 21 years of age pursuant to subsection 24-1.6(a)(2), (3)(I) of the Criminal Code of 1961 (the Code) (720 ILCS 5/24-1.6(a)(2), (3)(I) (West 2012)), and possessing a firearm without a valid firearm owner's identification (FOID) card under subsection 24-1.6(a)(2), (3)(C) of the Code (720 ILCS 5/24-1.6(a)(2), (3)(C) (West 2012)). Respondent contends that the first of these two charges is unconstitutional under the second amendment to the federal constitution because persons under the age of 21 have a second amendment right to armed self-defense. Respondent's challenge to the second charge (possessing a firearm without a valid FOID card) is also based on the age factor and his second amendment right; he contends that applicants under the age of 21 cannot obtain a FOID card without the permission of a parent or legal guardian not prohibited from having a FOID card. 430 ILCS 65/4(a)(2)(i) (West 2012).

¶ 17 A statute is presumed to be constitutional, and the party challenging the statute bears the burden of establishing its invalidity. *In re K.C.*, 186 Ill. 2d 542, 550 (1999). Courts have an obligation to construe a statute in such a manner as to uphold its constitutionality if it is reasonable to do so. *In re S.M.*, 347 Ill. App. 3d 620, 623 (2004). The supreme court's opinion

in *Aguilar* declined to address the constitutionality of the AUUW statute other than subsection 24-1.6(a)(1), (a)(3)(A), (d). *Aguilar*, 2013 IL 112116, ¶ 22, n.3. However, the court did address, and uphold, the constitutionality of section 24-3.1(a)(1) of the Code (720 ILCS 5/24-3.1(a)(1) (West 2012)), prohibiting possession by a person under 18 years of age of any firearm of a size which may be concealed upon the person. (This was one of the five offenses of which respondent was convicted.) In doing so, the court noted other courts that have undertaken a thorough historical examination of laws prohibiting the possession of firearms by minors and have concluded "that the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection." *Aguilar*, 2013 IL 112116, ¶ 27. The supreme court concluded: "[W]e need only express our agreement with the obvious and undeniable conclusion that the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection." *Id.* Respondent has cited no persuasive authority to the contrary. We conclude that both of the two remaining subsections of the AUUW statute at issue are constitutional.

¶ 18 Respondent contends, and the State agrees, that all but one of his four remaining convictions on weapons charges must be vacated as violating the one-act, one-crime rule. Respondent acknowledges that he failed to raise this issue before the trial court but asserts that it should be reviewed under plain error. Under Supreme Court Rule 615(a), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." This rule also applies under the Juvenile Court Act. See *In re Ricardo A.*, 356 Ill. App. 3d 980, 994 (2005). We apply the plain error doctrine when (1) "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the

error," or (2) "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We may consider this claim of a violation of the one-act, one-crime doctrine under the plain-error rule, as the error affects the integrity of the judicial process. *In re Javaun I.*, 2014 IL App (4th) 130189, ¶ 45.

¶ 19 Multiple prosecutions are improper if based on the same physical act. *Id.* Here, respondent's one act of possessing a handgun was the basis for both of the remaining convictions of AUUW, as well as his convictions for possession of a firearm with a defaced serial number and unlawful possession of a firearm. All were carved from the same act of possessing a firearm. Under the one-act, one-crime rule, only the most serious offense may be upheld and the less serious offenses must be vacated. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). The parties agree that the two remaining AUUW offenses are more serious than the other two remaining offenses. We vacate the two less serious charges: unlawful possession of a firearm by a person under 18 years of age pursuant to section 24-3.1(a)(1) of the Code, and possession of a firearm with defaced identification marks pursuant to section 24-5(b) of the Code (720 ILCS 5/24-5(b) (West 2012)). We remand this cause to the trial court for the determination of which of the two remaining AUUW charges is the more serious offense, with directions that the court vacate the conviction entered on the less serious offense.

¶ 20 Respondent's final assignment of error is that his sentence of commitment to the DOJJ must be vacated because the dispositional findings of the trial court violated the commitment requirements of section 5-750 of the Juvenile Court Act of 1987 (the Act) (705 ILCS 405/5-750 (West 2012)). Respondent acknowledges that his failure to raise this issue before the trial court

has resulted in its forfeiture on appeal unless he can demonstrate plain error. See *In re M.W.*, 232 Ill. 2d 408, 430 (2009).

¶ 21 Respondent asserts that this court must reverse the trial court's dispositional finding and remand for a new dispositional hearing because, in committing respondent to the DOJJ, the trial court failed to make statutory findings required by section 5-750 of the Act. A trial court's decision to commit a minor to the DOJJ is reviewed for an abuse of discretion. *In re Ashley C.*, 2014 IL App (4th) 131014, ¶ 22. However, the question of whether the trial court complied with statutory requirements is a question of law that we review *de novo*. *In re Raheem M.*, 2013 IL App (4th) 130585, ¶ 45. When a trial court has failed to follow the dictates of section 5-750 before sentencing a minor to the DOJJ, we may excuse any forfeiture under the second prong of the plain-error analysis. *Raheem M.*, 2013 IL App (4th) 130585, ¶ 55.

¶ 22 The pertinent portion of section 5-750 states:

"(1) Except as provided in subsection (2) of this Section, when any delinquent has been adjudged a ward of the court under this Act, the court may commit him or her to the Department of Juvenile Justice, if it finds that (a) his or her parents, guardian or legal custodian are unfit or are unable, for some reason other than financial circumstances alone, to care for, protect, train or discipline the minor, or are unwilling to do so, and the best interests of the minor and the public will not be served by placement under Section 5-740, or it is necessary to ensure the protection of the public from the consequences of criminal activity of the delinquent; and (b) commitment to the Department of

Juvenile Justice is the least restrictive alternative based on evidence that efforts were made to locate less restrictive alternatives to secure confinement and the reasons why efforts were unsuccessful in locating a less restrictive alternative to secure confinement. Before the court commits a minor to the Department of Juvenile Justice, it shall make a finding that secure confinement is necessary, following a review of the following individualized factors:

(A) Age of the minor.

(B) Criminal background of the minor.

(C) Review of results of any assessments of the minor, including child centered assessments such as the CANS.

(D) Educational background of the minor, indicating whether the minor has ever been assessed for a learning disability, and if so what services were provided as well as any disciplinary incidents at school.

(E) Physical, mental and emotional health of the minor, indicating whether the minor has ever been diagnosed with a health issue and if so what services were provided and whether the minor was compliant with services.

(F) Community based services that have been provided to the minor, and whether the minor was compliant with the services, and the reason the services were unsuccessful.

(G) Services within the Department of Juvenile Justice that will meet the needs of the minor."

¶ 23 Respondent complains that the required findings were not made where the court stated merely: "Well, I don't think there's any alternatives realistically. I'm going to follow the recommendations of the probation officer. I am going to commit the minor to the Illinois Department of Juvenile Justice."

¶ 24 The trial record contains a written Order of Commitment to the Department of Juvenile Justice, signed by the trial court and dated on the day of the dispositional hearing. On the preprinted order form, on which the trial court entered respondent's judgment and sentence, the court checked numerous boxes indicating its findings as to why commitment to the DOJJ was necessary. See *In re J.R.*, 2011 IL App (3d) 100094, ¶ 7. One checked box indicated: "The parents, guardian, legal custodian are unfit or unable, for some reason other than financial circumstances alone, to care for, protect, train, or discipline the minor, or are unwilling to do so and the best interests of the minor and the public will not be served by placement." Another checked box stated: "It is necessary to ensure the protection of the public from the consequences of the criminal activity of the minor." Another checked box indicated: "Secure confinement is necessary after a review of the following individualized factors: *** Criminal background." Yet another checked box stated: "Removal from the home is in the best interest of the minor, the minor[']s family and the public." It is apparent that the court met the findings requirements of subsection 5-750(1)(a).

¶ 25 Respondent argues that the trial court failed to consider efforts to locate a less restrictive alternative to confinement under subsection 5-750(1)(b). The requirements of subsection (b) were added by amendment in January 2012 by Public Act 97-362 (Pub. Act 97-362, § 5 (eff. Jan.

12, 2012)) and are applicable here where respondent's dispositional hearing was held on January 31, 2013. The pertinent box on the preprinted order form, stating that "reasonable efforts were made to locate less restrictive alternatives to secure confinement and were unsuccessful," was left unchecked. Section 5-750 mandates that no minor shall be sentenced to the DOJJ unless the court has considered evidence concerning less restrictive alternatives. *Raheem M.*, 2013 IL App (4th) 130585, ¶ 53.

¶ 26 Here, the court had before it instances of less restrictive alternatives to incarceration, specifically, alternatives noted in the social investigation report which were afforded respondent in the past but proved unsuccessful. Respondent's probation officer observed in the social investigation supplemental report that previous interventions, both punitive and therapeutic, had failed to deter him from criminal activity. The report called attention to respondent's abuse of alcohol and drugs, as well as his psychiatric diagnoses, including bipolar disorder, and noted that respondent "becomes easily agitated to the extent that he becomes verbally and physically aggressive towards others." This was demonstrated when, at the dispositional hearing, respondent threatened to kill the trial judge. On a number of prior occasions, after respondent exhibited what his grandmother had described as "manic episodes" and inability to calm down, respondent was placed on at least two separate occasions at each of four hospitals or residential care homes. However, the report noted that the "numerous psychiatric interventions, residential placements, prescribed medications, individual and family counseling, and therapeutic day school *** have not been effective in achieving a reasonable period of stability."

¶ 27 The report also considered the alternative of placement with respondent's grandparents. However, the probation officer described that alternative as lacking in structure and social controls, "and one in which there are few consequences regarding his maladaptive behavior."

Moreover, respondent's grandmother had died before his dispositional hearing in this case.

¶ 28 The social investigation report presented the trial court with alternatives to incarceration that respondent had received in the past, but indicated those alternatives were unsuccessful or not recommended. We may assume the court considered those less restrictive alternatives. See *Javaun I.*, 2014 IL App (4th) 130189, ¶ 43). In light of respondent's criminal history, including two prior commitments to DOJJ and multiple returns to DOJJ for parole violations, as well as respondent's failure to respond positively to the alternatives once available to him, "realistically" resulted in no viable alternative at all other than secure confinement. We conclude that the trial court complied with the statutory requirements of the Act in committing respondent to the DOJJ. As we have found no error here, there can be no plain error. *Piatkowski*, 225 Ill. 2d at 565; *Javaun I.*, 2014 IL App (4th) 130189, ¶ 39. Consequently, we must honor respondent's forfeiture of this issue.

¶ 29 For the reasons set forth above, we affirm the trial court's order committing respondent to the DOJJ, reverse respondent's conviction under the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d), vacate his convictions for defacing identification marks of a firearm and unlawful possession of a firearm by a person under 18 years of age, and remand this cause to the trial court with directions to vacate the less serious of the two remaining AUUW counts under section 24-1.6(a)(1) as a violation of the one-act, one-crime rule.

¶ 30 Affirmed in part, reversed in part, vacated in part, and remanded with directions.