FIRST DIVISION
May 28, 2013

No. 1-11-1342

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK TIMBERLAKE, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County No. 10 C6 60465-01 Honorable Brian Flaherty, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court did not err in denying defendant's proposed jury instruction specifically excluding antique firearms from the definition of a firearm because there was no evidence at trial that would support that proposed definition. In addition, the State's closing argument was not improper; it merely responded to the argument defendant raised in his closing argument. Finally, defendant's challenges to the aggravated unlawful use of a weapon conviction are rejected; this conviction is not properly before this court because no sentence was imposed on that conviction, and that conviction was merged into the conviction for unlawful use of a weapon by a felon. Accordingly, defendant's conviction and sentence are affirmed.

¶ 2 Following a jury trial, defendant Mark Timberlake was found guilty of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1) (West 2010)) and unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(A) (West 2010)). The trial court merged the AUUW conviction into the UUWF conviction, and sentenced defendant to three years' incarceration. On

appeal, defendant contends that: (i) the trial court erred in refusing his proposed jury instruction as to the definition of a firearm; (ii) the State's closing arguments improperly implied that it did not have to prove that the gun was a firearm and also appealed to the jury's fears; (iii) the evidence was insufficient to prove him guilty beyond a reasonable doubt of AUUW; (iv) in the alternative, the trial court's failure to instruct the jury as to the then-recently amended AUUW statute denied defendant a fair trial (and his trial counsel was ineffective in failing to challenge that error); and (v) the AUUW statute is unconstitutional. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant Mark Timberlake was charged by information with one count of unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.6(a) (West 2010)), and eight counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.1(a) (West 2010)). The UUWF count alleged that defendant knowingly possessed a handgun after having been previously convicted of the felony offense of the manufacture or delivery or cannabis. The AUUW counts alleged that defendant, despite the prior felony conviction and while not on his own land, abode, or fixed place of business, knowingly carried a firearm (either in a vehicle or "on or about his person"), and that at the time of the offense, either: (i) defendant did not have a firearm owner's identification (FOID) card; or (ii) the firearm was uncased, loaded, and immediately accessible.

¶ 5 At trial, Officer Anthony Prater of the Country Club Hills police department testified that, at around 11:30 p.m. on March 20, 2010, he was dispatched to 4064 Indian Hill Drive in response to a report of a suspicious vehicle. When he arrived, he saw a maroon-colored Buick parked in the driveway. Prater noted that the location was a residence and not a business. According to Prater,

an Officer Grgolevich arrived at around the same time and parked directly behind Prater. Prater and Grgolevich got out of their cars, and Prater walked up along the driver's side of the car while Grgolevich approached along the passenger's side.

¶ 6 As Prater approached, he saw defendant sitting alone in the driver's seat and also smelled the odor of burnt cannabis. When Prater asked defendant why defendant was at that location, Grgolevich indicated that there was a "blunt" (*i.e.*, a cannabis cigarette) in the ashtray. Prater had defendant exit the car; Prater then also saw the blunt. Defendant went to the rear of the car, and in response to Grgolevich's question, said that there was additional cannabis in his right pocket. Grgolevich recovered two small plastic bags of suspected cannabis, and defendant was taken into custody and transported to the police station.

¶ 7 At the station, Prater conducted a search of defendant's person and eventually located a gun inside a pair of shorts that defendant was wearing underneath thick jogging pants. Prater described the gun as small, stainless steel, and with a "colorful-type bottom." Prater added that two rounds of ammunition were inside the gun. Prater then submitted the gun to the evidence vault. Prater confirmed that defendant did not live at the location where he was arrested and that the gun was not cased, holstered, or otherwise in any type of compartment.

¶ 8 On cross-examination, Prater admitted that, when the homeowners arrived, they did not seem shocked to see defendant there, nor did it seem that they did not know defendant. Prater agreed that the gun had a pearl handle, but the trial court sustained the State's objection when defense counsel asked whether defendant said the firearm was an heirloom. Prater, however, conceded that he did

not test-fire the gun and that he did not submit the gun to the crime lab to determine its date of manufacture, its value, its functionality, or whether it was an antique.

¶ 9 At the conclusion of Prater's testimony, the trial court granted the State's motion to admit into evidence a certified copy of defendant's prior felony conviction, after which the State rested. The trial court then denied defendant's motion for a directed verdict, and the defense rested without putting on any evidence.

¶ 10 During the jury instructions conference, the State proposed Illinois Pattern Jury Instruction, Criminal, No. 18.07A (4th ed. 2000) (hereinafter IPI Criminal 4th, No. 18.07A), providing in part:

> "The word 'firearm' means any device, ***, which is designed to expel a projectile *** by the action of an explosion, expansion of gas, or escape of gas. Whether a firearm is operable does not affect its status as a weapon."

Defendant objected to the State's proposed version, proposing that additional bracketed material be read to the jury indicating that the term firearm "does not include an antique firearm *** which, although designed as a weapon, the Department of State Police finds by reason of the date of the manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon." Alternatively, defendant proposed that the trial court read to the jury all of the guns and devices that were excluded from the definition of firearm. The trial court, however, overruled defendant's objection, and indicated it would instruct the jury with the State's version of IPI Criminal 4th, No. 18.07A. The parties then proceeded to closing arguments.

¶ 11 During defendant's closing argument, defense counsel made the following comments:

"The prosecution failed to prove to you the most basic element of the offense[,] *** that this is a firearm.

Yes, they called it one. They had the officer call it one. But they just can't call it one. They have got to prove it to you. It's a gun. No question it's a gun. But there's also a toy gun, there's also a glue gun. But what makes it an offense is that that gun has to be a firearm. They can't just tell you it is. They have got to prove it to you."

¶ 12 The State responded during its rebuttal closing argument in pertinent part as follows:

"You don't have to listen to me or my partner or Officer Prater to determine this is a firearm. Anyone want to glue rhinestones onto a sweater with this glue gun? Or shoot at your little kids with this water gun? No. Why? Because you know this is a firearm. And how do you know it's a firearm? Because you have the law to help guide you. You have the instructions that the Judge is going to give you, how the law defines 'firearm.'

***

Anyone who has any doubt, any reasonable person who has any doubt of this, could raise their hand and stand in front of this gun as it's test[-]fired to see if it works."

Defendant objected, but the trial court overruled the objection, and the State subsequently concluded its rebuttal closing argument.

¶ 13 The trial court then instructed the jury that neither opening statements nor closing arguments were evidence, and that any statement or argument not based on the evidence should be disregarded. The trial court also instructed the jury as to the State's offered version of IPI Criminal 4th, No. 18.07A. Specifically, the trial court instructed, "The word 'firearm' means any device by whatever name known which is designed to expel[] a projectile or projectiles by the action of an expansion – explosion, expansion of gas, or escape of gas. Whether a firearm is operable does not affect its status as a weapon." After jury instructions, the jury retired to deliberate.

¶ 14 The jury later found defendant guilty of both aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon (UUWF). Following a sentencing hearing, the trial court merged the AUUW count into the UUWF count and sentenced defendant to three years' imprisonment for the UUWF conviction. This timely appeal follows.

¶ 15 ANALYSIS

¶ 16 Jury Instructions

¶ 17 Defendant first contends that the trial court erred in refusing to instruct the jury as to the definition of a firearm. Specifically, defendant argues that the trial court improperly refused to include optional language in IPI Criminal 4th, No. 18.07A, that excludes antique firearms from the definition of firearm. Defendant concludes that the trial court's refusal not only denied him a fair trial by jury on "all the essential elements" of the charged offenses, it also "destroyed [his] defense by relieving the State from having to prove the only contested element at trial." In the alternative,

defendant contends that the antique firearm exception is an affirmative defense, and he provided sufficient evidence to warrant a jury instruction on this exception.

¶ 18 It is well established that a defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997) (citing *People v. Crane,* 145 Ill. 2d 520, 526 (1991)). "Very slight evidence upon a given theory of a case will justify the giving of an instruction." *Id.* (citing *People v. Bratcher,* 63 Ill. 2d 534, 540 (1976)). Nonetheless, as the supreme court cautioned in *People v. Everette*, 141 Ill. 2d 147, 157 (1990), "*** we must be wary so as not to permit a defendant to demand unlimited instructions based upon the merest factual reference or witness' comment." We review a trial court's denial of a jury instruction for an abuse of discretion. *People v. Davis*, 213 Ill. 2d 459, 475 (2004). "An abuse of discretion exists only where the trial court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010) (citing *People v. Donoho*, 204 Ill. 2d 159, 182 (2003)).

¶ 19 As a preliminary matter, we must address defendant's underlying contention that an essential element of UUWF is whether the firearm is an antique. When an exception appears as part of the body of a substantive offense, the State bears the burden of disproving the existence of the exception beyond a reasonable doubt to sustain a conviction for the offense. *People v. Laubscher*, 183 Ill. 2d 330, 335 (1998). "In other words, where the exception is descriptive of the offense, it must be negatived in order to charge the defendant with the offense." *People ex rel. Courtney v. Prystalski*, 358 Ill. 198, 204 (1934). By contrast, if the exception "merely withdraws certain acts or certain

persons from the operation of the statute, it need not be negatived, and its position in the act, whether in the same section or another part of the act, is of no consequence." *Prystalski*, 358 Ill. at 204.

¶ 20 In relevant part, the UUWF statute states that it is unlawful for a person "to knowingly possess on or about his person *** any firearm *** if the person has been convicted of a felony under the laws of this State." 720 ILCS 5/24-1.1(a) (West 2010). "Firearm" is defined with reference to section 1.1 of the Firearm Owners Identification Card Act (the FOID Act). 720 ILCS 5/2-7.5 (West 2010) (citing 430 ILCS 65/1.1 (West 2010)). Section 1.1 of the FOID Act defines firearm as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," but excludes from this definition:

> "(1) any pneumatic gun, spring gun, paint ball gun, or B-B gun which expels a single globular projectile not exceeding .18 inch in diameter or which has a maximum muzzle velocity of less than 700 feet per second;
>
> (1.1) any pneumatic gun, spring gun, paint ball gun, or B-B gun which expels breakable paint balls containing washable marking colors;
>
> (2) any device used exclusively for signalling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission;

> (3) any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition; and
>
> (4) an antique firearm (other than a machine-gun) which, although designed as a weapon, the Department of State Police finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon." 430 ILCS 65/1.1 (West 2010).

¶ 21 In resolving this issue, we find guidance in *Laubscher*, *Prystalski*, and *People v. Foster*, 394 Ill. App. 3d 163 (2009). In *Laubscher*, the defendant was found guilty of, *inter alia*, unlawful use of a weapon, but the appellate court reversed that conviction, concluding that the State failed to prove that, when the defendant possessed the weapon, he was neither "on his land" nor in his "fixed place of business" as provided in the exceptions to the unlawful use of weapons statute. *Laubscher*, 183 Ill. 2d at 332-33. The State appealed, but the supreme court affirmed the appellate court. *Id.* at 333. At that time, the statute in question prohibited an individual from knowingly possessing any firearm concealed on or about his person "*except when on his land or in his own abode or fixed place of business*." (Emphasis added.) 720 ILCS 5/24-1(a)(4) (West 1994). The court noted that the exceptions were within the statutory definition of the offense, and therefore the State had the burden of disproving the existence of the exception beyond a reasonable doubt in order to sustain a conviction for the offense. *Laubscher*, 183 Ill. 2d at 335.

¶ 22 In *Prystalski*, the defendant was convicted of possession, for the purpose of administering a habit-forming drug, a hypodermic needle and syringe adapted for that use. *Prystalski*, 358 Ill. at

200-01. The statute defining the offense stated in relevant part that no person "except a manufacturer or a wholesale or retail dealer in surgical instruments, apothecary, physician, dentist, veterinarian, nurse or intern[] shall at any time *** possess a hypodermic syringe or needle *** adapted for the use of habit forming drugs *** and which is possessed for the purpose of administering habit forming drugs unless such possession be authorized by the certificate of a physician issued within the period of one year prior thereto." *Prystalski*, 358 Ill. at 203. The information charging the defendant, however, did not include the exceptions relating to the classes of exempt persons or the physician's certificate of authorization, and the defendant claimed that the State had to "negative" those exceptions. *Id.* The supreme court held that, although the exceptions relating to the classes of exempt persons were merely the "designation of persons" and not descriptive of the crime, the physician's certificate of authorization was descriptive of the offense and therefore "must be negatived in the information or indictment in order to render that instrument immune from attack on motion to quash or to sustain a judgment of conviction." *Id.* at 204-05.

¶ 23 By contrast, in *Foster*, the defendant was convicted of aggravated unlawful use of a weapon. *Foster*, 394 Ill. App. 3d at 164. On appeal, the defendant contended in part that the State failed to prove him guilty beyond a reasonable doubt because one of the essential elements of the offense was his knowing possession of a firearm "in a 'functioning state.' " *Id.* at 168. The *Foster* court noted that section 24-1.6(a) of the Criminal Code of 1961 (Code) defined the offense, including the exception regarding: (1) the place of possession (*i.e.*, on the offender's own land, abode or place of business) and (2) whether it was uncased, loaded, or immediately accessible. *Id.* (citing 720 ILCS 5/24-1.6(a) (West 2006)). The court, however, rejected the defendant's contention because the

exception as to the weapon's functionality was not in section 24-1.6(a) (which defined the offense); rather, it was in section 24-1.6(c). *Id.* (citing 720 ILCS 5/24-1.6(c) (West 2006)).

¶ 24 The common thread running through these cases is whether an exception to an offense is within the portion of the statute defining the offense. In this case, the UUWF statute prohibits felons from possessing a "firearm," but as in *Foster* (and unlike *Laubscher* and *Prystalski*), the definition of firearm–including the exception for antique firearms–is not provided within the main body of the statute. Instead, it refers to section 2-7.5 of the Code, which in turn refers to section 1.1 of the FOID Act. As such, the exception for antique firearms is not an essential element of the UUWF statute. Consequently, the State is not required to disprove that exception beyond a reasonable doubt. Therefore, we must reject defendant's contention on this point.

¶ 25 We also reject defendant's claim in the alternative that the antique firearm exception is an affirmative defense and that defendant provided sufficient evidence entitling him to an instruction comprising the antique firearm exception. IPI Criminal 4th, No. 18.07A, states:

> "The word 'firearm' means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas. [The term does not include _____.]"

¶ 26 The committee note to IPI Criminal 4th, No. 18.07A, directs trial courts to use the bracketed material in the first paragraph "when appropriate," inserting relevant excluded devices from this definition that are listed in section 1.1 of the FOID Act (430 ILCS 65/1.1 (West 2010)). See IPI

Criminal 4th, No. 18.07A, Committee Note. Antique firearms are included as an exception to the definition of firearm in section 1.1(4) of the FOID Act. 430 ILCS 65/1.1(4) (West 2010).

¶ 27 The cardinal rule of statutory construction is to give effect to the intent of the legislature, the best evidence of which is the language used in the statute. *People v. Hari*, 218 Ill. 2d 275, 292 (2006). We must give that language its plain and ordinary meaning, and we may never depart from the plain language by reading into the statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent. *Id.*

¶ 28 In this case, the exception for antique firearms was not an affirmative defense. As the State points out, when the legislature intends that an exception be construed as an affirmative defense, "it has labeled it as such." *People v. Smith*, 71 Ill. 2d 95, 106 (1978). Here, there is no statutory language indicating that these exceptions are affirmative defenses. If the legislature intended to include the antique firearm exception as an affirmative defense, it could have explicitly specified it as such, as it has in multiple instances, most notably in the chapter concerning criminal offenses. See, *e.g.*, 720 ILCS 5/24-1.1(c) (West 2010); 720 ILCS 5/10-5(c) (West 2010); 720 ILCS 5/10-5.1(f) (West 2010); 720 ILCS 5/11-1.70 (West 2010); 720 ILCS 5/11-20(f) (West 2010); 720 ILCS 5/11-20.1(b)(1) (West 2010); 720 ILCS 5/11-45(b) (West 2010); 720 ILCS 5/12-5.01(d) (West 2010); 720 ILCS 5/31A-1.1(e), (f) (West 2010); 720 ILCS 550/16.1 (West 2010). Since the legislature did not specify that the exceptions in section 1.1 of the FOID Act are affirmative defenses, we may not read the legislation to the contrary. *Hari*, 218 Ill. 2d at 292.

¶ 29 Moreover, even assuming, *arguendo*, that the exceptions were affirmative defenses, defendant would not have been entitled to an instruction incorporating the antique firearm exception.

Defendant presented no evidence whatsoever that the loaded gun found in his shorts was an antique. Defendant's cross-examination of Prater merely elicited the fact that Prater had not submitted the gun for analysis of its manufacturing date, its value, or whether it was an antique. This testimony did not provide "very slight" evidence on the question of whether the gun was an antique; instead, it provided no evidence. To hold as defendant contends would squarely contradict the supreme court's warning in *Everette* not to allow a defendant "unlimited instructions based upon the merest factual reference or witness' comment." *Everette*, 141 Ill. 2d at 157.

¶ 30 Finally, defendant's citation to *Laubscher* is unhelpful to his contention. As noted above, the statutory exception at issue in *Laubscher* was in the body of the statutory subsection defining the offense. *Laubscher*, 183 Ill. 2d at 335. By contrast, the statutory exception here is referred to in a separate statute. Therefore, the excepted types of weapons are not descriptive of the offense; rather, they merely withdraw certain acts (namely, the possession of an antique firearm as defined in section 1.1(4)) of the FOID Act. Accord *Foster*, 394 Ill. App. 3d at 169. Since the trial court's denial of defendant's proposed jury instruction was not "arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court" (*Ramsey*, 239 Ill. 2d at 429), the trial court did not abuse its discretion, and defendant's contention is therefore without merit.

¶ 31 The State's Closing Arguments

¶ 32 Defendant next claims that the State's closing arguments improperly implied that the State did not have to prove that the gun was a firearm and that those arguments also appealed to the jury's fears. Defendant asserts that these comments denied him a fair trial.

¶ 33 The State is given considerable latitude in making closing arguments, and it may respond to comments that clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000). Furthermore, we must review the arguments of both the State and the defense in their entirety, with the challenged portions placed in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). The State may respond to comments by the defense that clearly invite a response. *People v. Armstrong*, 183 Ill. 2d 130, 146 (1998). In addition, we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Finally, even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Defendant, citing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), argues that we should review this issue *de novo*. The State, citing *People v. Hudson*, 157 Ill. 2d 401, 441 (1993), argues in favor of an abuse of discretion standard. While the issue of which standard of review should apply is unsettled (see *People v. Maldonado*, 402 Ill. App. 3d 411, 421 (2010)), we need not resolve this apparent conflict because under either standard, defendant's claim fails.

¶ 34 During defendant's closing argument, defense counsel repeatedly argued that the State did not prove that the firearm found on defendant was dangerous, explaining that there are many types of guns that are harmless, including glue guns and toy guns. Defendant's comments clearly invited a response, and the State's response was primarily to challenge the credibility of the defense theory through ridicule, which is proper. See *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009) (the State may refer to the defense theory as "ridiculous"). In addition, the specific content of the

challenged remarks are within the bounds of argument based upon well-established precedent. See, *e.g.*, *Armstrong*, 183 Ill. 2d 130, 146 (1998) (prosecutor's rebuttal comment that the defendant "was treating [the murder victim] like she was a baby seal and [the defendant] was competing for poacher of the year" was not improper; in context, "it is clear that the prosecution's remarks were not improper" but were instead "designed to rebut the defense claim that the defendant lacked an intent to kill."); *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994) (holding that, where defense counsel repeatedly insinuated during his closing argument that the defendant's statement to the police had been obtained illegally, there was no reversible error in the prosecutor's comment that the trial judge had previously ruled that the statement was admissible and erroneously suggesting that the judge had found the statement to be factually reliable). Finally, the jury was instructed that closing arguments are not evidence and to disregard any comment not based upon the evidence, and defendant has provided nothing to counter the presumption that the jury followed the trial judge's instructions in reaching a verdict. *Simms*, 192 Ill. 2d at 373. Since we cannot hold that the comments resulted in such substantial prejudice to defendant that the verdict would have been different absent those remarks, the State did not commit reversible error. *Hudson*, 157 Ill. 2d at 441. Defendant's contention must therefore be rejected.

¶ 35 Finally, *People v. Wicks*, 115 Ill. App. 2d 19 (1969), which defendant cites in support of his contention, is wholly distinguishable from this case. In *Wicks*, during the State's closing argument, the prosecutor pointed a shotgun at the jury for three minutes, the duration of the robbery at issue. *Id.* at 24. This court found this to be prejudicial in part because "the jury could have been unduly

prejudiced by having to face a shotgun for three minutes." *Id.* Here, the State's comments do not remotely resemble the severity of the misconduct in *Wicks*. *Wicks* is therefore unavailing.

¶ 36 The Aggravated Unlawful Use of Weapons Charge

¶ 37 Finally, defendant challenges his AUUW conviction on multiple grounds. Specifically, he contends that the evidence was insufficient to prove him guilty of the crime beyond a reasonable doubt, or in the alternative, that he was denied a fair trial (and his trial counsel was ineffective in failing to point this out at trial) because of the trial court's failure to instruct the jury as to the then-recently amended AUUW statute. Defendant also claims that the AUUW statute is unconstitutional.[1] We agree with the State, however, that this conviction is not properly before this court.

¶ 38 The supreme court has long held that "it is axiomatic that is there is no final judgment in a criminal case until the imposition of sentence, and, in the absence of a final judgment, an appeal cannot be entertained." *People v. Flores*, 128 Ill. 2d 66, 95 (1989), *cert. denied*, 497 U.S. 1031 (1990). Nonetheless, the supreme court has also held that this court should entertain jurisdiction where a greater conviction is vacated so that a nonfinal, unsentenced conviction can be reinstated. *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982). This holding, however, is applicable in somewhat limited factual circumstances. See *People v. Ramos*, 339 Ill. App. 3d 891, 906 (2003) ("we believe that *Dixon* must be narrowly construed as not sanctioning the *** review of unappealed and

[1] This division has held otherwise with respect to the UUWF statute. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 31, *appeal pending*, No. 113995 (May Term 2012). As to the AUUW statute, a similar ruling by another division is currently being reviewed by the supreme court. *People v. Aguilar*, 408 Ill. App. 3d 136 (2011), *under advisement*, No. 112116 (oral arguments heard on September 11, 2012).

unsentenced convictions when the greater offense has not been reversed and vacated"), *appeal denied*, 205 Ill. 2d 627 (2003) (table).

¶ 39 Here, no sentence was imposed on defendant's AUUW conviction; instead, the trial court merged that conviction into, and then imposed sentence upon, the UUWF conviction. In addition, defendant's UUWF conviction has not been reversed (unlike in *Dixon*). As a result, no challenge to his unsentenced conviction for AUUW is properly before us. Therefore, we may not consider defendant's challenges to his unsentenced AUUW conviction.

¶ 40 CONCLUSION

¶ 41 The trial court did not err in denying defendant's proposed jury instruction specifically excluding antique firearms from the definition of a firearm because there was no evidence at trial that would support that proposed definition. In addition, the State's closing argument was not improper; it merely responded to the argument defendant raised in his closing argument. Finally, defendant's challenges to the aggravated unlawful use of a weapon conviction are rejected; this conviction is not properly before this court because no sentence was imposed on that conviction, and that conviction was merged into the conviction for unlawful use of a weapon by a felon. Accordingly, for the foregoing reasons, we affirm the judgment of the trial court

¶ 42 Affirmed.