2013 IL App (1st) 112999-U

SIXTH DIVISION
September 27, 2013

Nos. 1-11-2999 and 1-12-0824, consolidated

**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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 08 CR 11453 (01) |
| | ) | |
| ALFONZO CALDWELL, | ) | Honorable |
| | ) | Diane Cannon, |
| Defendant-Appellant. | ) | Judge Presiding. |

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirmed defendant's convictions of armed violence predicated on aggravated fleeing, aggravated discharge of a firearm, and unlawful use of a weapon by a felon, where the State proved him guilty beyond a reasonable doubt, the trial court committed no instructional error, and his convictions and sentences did not violate the one-act, one-crime doctrine.

¶ 2 A jury convicted defendant, Alfonzo Caldwell, of armed violence predicated on aggravated fleeing or attempting to elude a police officer (hereinafter armed violence predicated on aggravated fleeing), aggravated discharge of a firearm, and unlawful use of a weapon by a felon. The trial court sentenced defendant to 15 years' imprisonment on the armed violence count, to run consecutively

to two concurrent 6-year terms of imprisonment for the aggravated discharge of a firearm and unlawful use of a weapon by a felon counts. The trial court also imposed a three-year term of mandatory supervised release (MSR). On appeal, defendant contends: (1) the State failed to prove him guilty beyond a reasonable doubt of armed violence predicated on aggravated fleeing; (2) the trial court erred by failing to properly instruct the jury on armed violence predicated on aggravated fleeing; (3) the trial court erred in giving an accountability instruction for the offenses of armed violence predicated on aggravated fleeing and aggravated discharge of a firearm; and (4) his convictions and sentences for aggravated discharge of a firearm and unlawful use of a weapon by a felon should be vacated where they are based on the same underlying act supporting his conviction for armed violence predicated on aggravated fleeing. We affirm.

¶ 3 The State charged defendant with one count of armed violence predicated on aggravated fleeing, one count of aggravated fleeing, one count of aggravated discharge of a firearm, and one count of unlawful use of a weapon by a felon. Before trial, the State *nolled* the aggravated fleeing count.

¶ 4 At trial, Officer Jeff Siwek testified that on the evening of May 7, 2008, he and his partners, Officers Frano and Laureto, were on patrol in an unmarked Ford Crown Victoria (the police car). The police car was equipped with oscillating headlights, strobe lights, and a siren. At approximately 11:15 p.m. they went to 454 South Lockwood in Chicago. Officer Siwek exited the car and conducted a field interview with an individual. While conducting the field interview, Officer Siwek heard multiple gunshots coming from the east towards Congress Avenue. In response, Officer Siwek and Officer Laureto went to the corner of Lockwood and Congress. Meanwhile, Officer Frano ran

back to the police car.

¶ 5 Officer Siwek testified that while he was standing at the corner of Lockwood Avenue and Congress Parkway, he saw a white car being followed by a black SUV on Congress Parkway. Officer Siwek saw that "[t]he passenger of the white car was leaning out firing with his left hand in the direction of the black car." Officer Siwek saw "flashes, gunshots, but a different sounding gunshot coming from the driver's side of the black car." Officer Siwek testified he did not actually see the driver of the black SUV shooting the gun, but he reiterated that he saw "flashes" coming from the driver's side of the black SUV.

¶ 6 Officer Siwek testified the white car turned south on Lockwood, followed by the black SUV. Both vehicles were speeding, going approximately 35 miles per hour (mph). The white car then turned westbound on Harrison, followed by the black SUV. Officer Siwek saw Officer Frano in the police car, about a "quarter block" behind the black SUV. Officer Frano had activated the siren and strobe light. Officer Frano turned onto Harrison, at which point Officer Siwek lost sight of all three vehicles. About five seconds later, Officer Siwek heard two to three more gunshots.

¶ 7 On cross-examination, Officer Siwek testified there were two people in the white vehicle and two people in the black SUV. Officer Siwek did not get a look at the person who shot from the white vehicle, because his back was to Officer Siwek. Officer Siwek did not see the driver of the black SUV and did not see a gun in the driver's hand, but saw a "muzzle flash" coming from the driver's side.

¶ 8 Officer Siwek testified the speed limit was 30 mph on Lockwood Avenue and 25 mph on the side streets. Officer Siwek further testified he found two cartridge cases "approximately three houses

in on Congress" but could not remember whether he found them on the north or south side of the street. Officer Siwek also viewed the black SUV after the police chase ended and saw that its back window was broken.

¶ 9 Officer John Frano testified he was working with Officer Laureto and Officer Siwek on the evening of May 7, 2008. When questioned as to what he was wearing that evening, Officer Frano testified:

> "A. I was wearing civilian clothes, I was wearing a pair of jeans, a pair of gym shoes, a T-shirt and a black bulletproof vest with markings. I have my star on the left side, like I have now and my name tag.
>
> Q. And you said like you have now, your star is actually located up on the left side of your chest near your shoulder; is that correct?
>
> A. Yes.
>
> Q. And that's where it was on May 7, 2008?
>
> A. Yes.
>
> Q. And this radio, where was that located?
>
> A. The radio, I use a radio with a mic that goes on the shoulder, so my radio is on my waist and the microphone wire comes up through my vest and it sits on my left shoulder."

¶ 10 Officer Frano testified that on May 7, 2008, he and his partners were traveling in an unmarked Ford Crown Victoria (police car) equipped with a siren, strobe lights, and oscillating headlights. At about 11:24 p.m. he and his partners were stopped at 454 South Lockwood Avenue

in Chicago, speaking to an individual. While they were speaking with him, Officer Frano heard gunshots coming from the east. In response, Officers Siwek and Laureto ran to the corner of Congress Parkway and Lockwood Avenue, while Officer Frano ran back to the police car.

¶ 11 Officer Frano testified that as he was standing by the police car, he heard a couple more gunshots and then saw "a white vehicle being followed by a black [SUV] driving at a high rate of speed coming off of Congress turning south on Lockwood." The black SUV was less than a car length behind the white vehicle. Officer Frano identified defendant as the driver of the black SUV.

¶ 12 Officer Frano testified he entered his police car and immediately turned on the siren and the oscillating lights and began chasing the two vehicles. The siren and oscillating lights remained on throughout the chase. As he was chasing the vehicles, Officer Frano called out over the police radio that shots had been fired and that two vehicles were fleeing the scene of Congress Parkway and Lockwood Avenue. Officer Frano saw the white vehicle turn right onto Harrison Street, followed "right behind" by the black SUV. Officer Frano did not see anybody from the white vehicle shoot at anybody in the black SUV.

¶ 13 Officer Frano testified he turned onto Harrison Street and saw the white vehicle pulled over at Lotus Avenue and Harrison Street. The black SUV slowed down and pulled up along side the white vehicle. Officer Frano testified:

> "Q. What happened as the black SUV slowed down?
>
> A. The black SUV, as it slowed down, coming to almost a complete stop alongside the white vehicle, fired approximately two to three rounds into the driver's side of the white vehicle.

Q. You said the black SUV was next to the white vehicle; is that correct?

A. Yes.

Q. So is it fair to say that the passenger side of the black SUV was next to the driver's side of the white car?

A. That's correct.

Q. So how close was the black SUV to that white car?

A. Five, seven feet.

* * *

Q. What exactly did you see when that black car slowed down next to the white car?

A. *** I saw two to three muzzle flashes from inside[] the car. When I'm looking, I'm looking through the [back] window of the SUV. I could see muzzle flashes and I could hear gunshots being fired.

Q. Where exactly did you see these muzzle flash[es]?

A. The muzzle flashes were in the center of the vehicle to the passenger side. Just across the center line if you were to cut the vehicle down the middle.

Q. So if you're looking from behind, could you see the heads of the people in the car?

A. No.

Q. If you're looking from behind, you have the driver's seat to your left; is that correct?

A. Yes.

Q. And the passenger seat to your right, correct?

A. That's correct.

Q. And this muzzle flash that you described, it was coming from right in between those two-where those two seats would be, correct?

A. That is correct.

Q. What is muzzle flash?

A. Muzzle flash is when you-after you fire a weapon, you get the sparks, it's like a light, it's like a light going on."

¶ 14 Officer Frano testified that after the shots rang out, the black SUV fled westbound on Harrison, with Officer Frano in pursuit. They traveled toward Central Avenue; Officer Frano testified he looked at his speedometer and noted he was going 50 mph in a 30 mph zone and that it was "fair to say" that the black SUV was traveling "over" 50 mph. Officer Frano followed the black SUV south on Central and onto Interstate 290. On Interstate 290, the black SUV swerved in and out of lanes. Officer Frano testified he was traveling "between 85, 90 miles per hour" in an effort to "keep up" with the black SUV. The speed limit on Interstate 290 is 55 mph.

¶ 15 Officer Frano testified that after about a one-mile chase on Interstate 290, defendant pulled the black SUV over. Officer Frano approached the black SUV. As he got to the driver's side door, Officer Frano saw that other squad cars had arrived on the scene to assist. Defendant exited the driver's side door. A passenger, Javaris Walker, exited the passenger side.

¶ 16 When asked why he had chased after the black SUV instead of staying with the white car,

Officer Frano testified:

> "From my observations, I believed that the black vehicle was chasing the white vehicle. I hadn't seen the white vehicle do anything wrong technically. The black vehicle, I observed gunshots coming from that vehicle at the white vehicle. I didn't see the people in the white vehicle doing anything."

¶ 17 On cross-examination, Officer Frano testified he was 75 to 100 feet behind the black SUV when he saw the muzzle flashes. Officer Frano testified he did not see who was shooting the weapon from inside the black SUV and did not see a gun in anybody's hand. Officer Frano was the only officer who pursued the black SUV onto Interstate 290, and after the black SUV pulled over, Officer Frano pulled up 75 to 100 feet behind it and radioed dispatch. Officer Frano noticed the back window on the SUV was shattered.

¶ 18 On redirect examination, Officer Frano further testified that when he saw the muzzle flash coming from the black SUV, he believed the driver was shooting the gun. Officer Frano testified that after the black SUV pulled over and defendant was detained, he looked inside the driver's side of that vehicle and saw a shell casing for a nine-millimeter round of ammunition on the floor.

¶ 19 Officer Thomas Pierce, an evidence technician, testified that at about 12:30 a.m. on May 8, 2008, he was assigned to process three crime scenes. Officer Pierce processed the black SUV parked on the shoulder at approximately 6500 West on Interstate 290, where he recovered a fired cartridge case on the floor of the driver's seat. Officer Pierce also processed the intersection of West Harrison Street and South Lotus Avenue, where he recovered a Smith and Wesson semiautomatic pistol, pistol grips, and a metal fragment of a bullet. The pistol was loaded with six live rounds and had a

cartridge case "jammed in the slide mechanism *** making the weapon inoperable." Finally, Officer Pierce processed the intersection of Lockwood Avenue and West Congress Parkway, where he recovered a fired cartridge case on the pavement at 5260 West Congress Parkway, as well as another cartridge case from underneath a red Nissan at 5258 West Congress Parkway.

¶ 20 The parties stipulated that if Tiffany Kimbel, an Illinois State Police fingerprint-comparison expert, was called to testify, she would state she received: (1) a pistol, a pair of pistol grips, six live cartridges, and one discharged cartridge case under inventory #11295816; (2) one discharged cartridge case under inventory #11295872; and (3) two discharged cartridge cases under inventory #11295854. Ms. Kimbel found no latent prints on any items suitable for comparison.

¶ 21 Tracy Konior, an Illinois State Police firearms-identification expert, testified that the four recovered cartridge cases she received and analyzed, and the recovered bullet fragment, were fired from the recovered gun.

¶ 22 The trial court admitted into evidence a certified copy of defendant's conviction of possession of a controlled substance under case number 04 CR 24496, several photographs of the crime scenes, and a Power Point presentation detailing the route of the chase.

¶ 23 The State rested. Defendant made a motion for a directed verdict which was denied. The defense then rested and the parties proceeded to a jury instruction conference.

¶ 24 During the jury instruction conference, the State tendered Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 5.03), the instruction for accountability. The trial court allowed the instruction over defendant's objection. The State also tendered IPI Criminal 4th No. 11.51Y, the definition of armed violence predicated on aggravated

fleeing, which stated in pertinent part:

> "A person commits armed violence when he commits the offense of aggravated fleeing or attempting to elude a police officer while he carries on or about his person or is otherwise armed with a firearm."

¶ 25 During discussions on IPI Criminal 4th No. 11.51Y, defense counsel stated:

> " Not so much an objection but more of a question. And I had this conversation with the State this morning. They *nolled* Count IV which was, if I'm recalling, is the aggravated fleeing or attempting to elude a police officer. So that count is not in front of the jury. But that's the basis of their armed violence. So now we have a count that's not in front of the jury, and we are asking the jury to make a decision on that count when they, since the case was *nolled*, in my mind at least, it's not in front of them. So I'm just a little confused on this instruction as to how that's possible."

¶ 26 The State responded:

> "Judge, the actual aggravated fleeing and eluding is not before the jury. That is correct. However, it is the underlying basis for the armed violence and that the defendant is armed with a weapon at the time that he committed aggravated fleeing and eluding. Pursuant to the IPI instructions, in this type of situation, the definition of aggravated fleeing and eluding should be given in this instruction."

¶ 27 The trial court agreed with the State and gave IPI Criminal 4th No. 11.51Y (the definition of armed violence predicated on aggravated fleeing) as well as separate instructions collectively defining aggravated fleeing (IPI Criminal 4th Nos. 23.03 and 23.01).

¶ 28 IPI Criminal 4th No. 23.03, given by the trial court to the jury, stated:

"A person commits the offense of aggravated fleeing or attempting to elude a police officer when, in committing the offense of fleeing or attempting to elude a police officer, he willfully flees or attempts to elude a police officer and such flight or attempt to elude is at a rate of speed at least 21 miles per hour over the legal speed limit."

¶ 29 IPI Criminal 4th No. 23.01, given by the trial court to the jury, stated:

"A person commits the offense of fleeing or attempting to elude a police officer when, as a driver or operator of a motor vehicle, having been given a visual or audible signal by a peace officer directing him to bring his vehicle to a stop, he willfully fails or refuses to obey the signal, increases his speed, extinguishes his lights, or otherwise flees or attempts to elude the officer. The signal given by the peace officer may be by hand, voice, siren, or by red or blue light. However, the officer giving the signal must be in police uniform."

¶ 30 In addition to instructing the jury on armed violence and the predicate offense of aggravated fleeing, the trial court also instructed the jury on the charge of unlawful possession of a weapon by a felon[1]:

[1]Although the trial court gave the jury the instruction defining the offense of "unlawful *possession* of a weapon by a felon"(IPI Criminal 4th No. 18.07), the court gave the jury verdict forms for the offense of "unlawful *use* of a weapon by a felon." The jury returned a guilty verdict for unlawful use of a weapon by a felon. Defendant makes no argument on appeal that any prejudicial error resulted from the difference in wording between IPI Criminal 4th No. 18.07 and the verdict forms.

"A person commits the offense of unlawful possession of a weapon by a felon when he, having been previously convicted of the offense of possession of a controlled substance, knowingly possesses a firearm." IPI Criminal 4th No. 18.07.

¶ 31 The trial court also instructed the jury on the charge of aggravated discharge of a firearm:

"A person commits the offense of aggravated discharge of a firearm when he knowingly discharges a firearm in the direction of a vehicle he knows to be occupied." IPI Criminal 4th No. 18.11.

¶ 32 During jury deliberations, the jury sent two notes to the trial judge. The first note stated:

"We understand there are three charges- armed violence, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. However, what do we do with the jury instructions related to fleeing or attempting to elude a police officer? Is this another charge? How should we consider this information?"

¶ 33 With the parties' agreement, the trial judge responded that "fleeing or attempting to elude a police officer is to be considered only as an element of armed violence, there is no verdict form for fleeing or attempting to elude a police officer."

¶ 34 The jury subsequently sent a second note, which stated:

"We are concerned that there were no details offered with respect to the 'white car.' Should this be given weight insofar as the charges against the defendant are concerned?"

¶ 35 With the agreement of the parties, the trial judge responded, "You have heard the evidence, please continue your deliberations."

¶ 36 The jury convicted defendant of armed violence predicated on aggravated fleeing, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. The trial court sentenced defendant to 15 years' imprisonment on the armed violence count, to run consecutively to two concurrent 6-year terms of imprisonment for the aggravated discharge of a weapon and unlawful use of a weapon by a felon counts. The trial court also imposed a three-year MSR term. Defendant appeals.

¶ 37 First, defendant contends the State failed to prove him guilty beyond a reasonable doubt of armed violence predicated on aggravated fleeing. It is not the function of the reviewing court to retry defendant when presented with a challenge to the sufficiency of the evidence. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The relevant inquiry is whether, after viewing the evidence, and all reasonable inferences drawn from that evidence, in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Martin*, 2011 IL 109102, ¶ 15.

¶ 38 Section 33A-2(a) of the Criminal Code of 1961 provides that, with certain exceptions not applicable here, "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law." 720 ILCS 5/33A-2(a) (West 2008). In this case, the underlying felony is aggravated fleeing or attempting to elude a peace officer, which is defined in the Illinois Vehicle Code in pertinent part as follows:

> "The offense of aggravated fleeing or attempting to elude a peace officer is committed by any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer in the manner prescribed in subsection (a) of Section 11-204 of this Code, and such flight

> or attempt to elude *** is at a rate of speed at least 21 miles per hour over the legal speed limit." 625 ILCS 5/11-204.1(a) (West 2008).

¶ 39 Section 11-204(a) provides that the visual or audible signal must be one "directing [the] driver or operator to bring his vehicle to a stop." 625 ILCS 5/11-204(a) (West 2008). Section 11-204(a) further states:

> "The signal given by the peace officer may be by hand, voice, siren, red or blue light. Provided, the officer giving such signal shall be in police uniform, and, if driving a vehicle, such vehicle shall display illuminated oscillating, rotating or flashing red or blue lights which when used in conjunction with an audible horn or siren would indicate the vehicle to be an official police vehicle." 625 ILCS 5/11-204(a) (West 2008).

¶ 40 Defendant contends we should reverse his conviction of armed violence predicated on aggravated fleeing because the State failed to prove beyond a reasonable doubt two of the essential elements of aggravated fleeing as specified in sections 11-204.1(a) and 11-204(a), namely that: (1) Officer Frano was in "police uniform" when he signaled defendant to stop his vehicle; and (2) defendant's flight from Officer Frano was at a rate of speed at least 21 mph over the legal speed limit.

¶ 41 I. Whether the State Proved Beyond a Reasonable Doubt that Officer Frano was in Police Uniform When He Signaled Defendant to Stop His Vehicle

¶ 42 First, defendant contends we should reverse his conviction of armed violence predicated on aggravated fleeing because the State failed to prove beyond a reasonable doubt the following essential element of aggravated fleeing: that Officer Frano was in police uniform at the time he signaled defendant to stop, as required by section 11-204(a). Defendant specifically points to Officer

Frano's testimony that he was in "civilian clothes" at the time he signaled defendant to stop.

¶ 43 We begin our analysis by examining section 11-204(a)'s requirement (in conjunction with section 11-204.1(a)) that to prove defendant committed aggravated fleeing, the State must show that the officer who signaled him to stop was in police uniform. When interpreting a statute, "our primary role is to give effect to the intent of the legislature." *People v. Johnson*, 2013 IL App (1st) 120413, ¶ 17. "The best indication of legislative intent is the language of the statute itself, and if that language is clear on its face, it is unnecessary to resort to other aids of construction." *Id.* In determining legislative intent, we read the statute as a whole and consider all relevant parts. *United Airlines, Inc. v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 121136WC, ¶ 21.

¶ 44 As discussed, section 11-204.1(a) provides that to prove defendant committed the offense of aggravated fleeing, the State must show defendant was given a visual or audible signal by a peace officer as prescribed in section 11-204(a). Section 11-204(a) states that the signal must direct defendant to bring his vehicle to a stop, and that the police officer giving the signal to stop "shall be in police uniform." 625 ILCS 5/11-204(a) (West 2008). Section 11-204(a) does not define the term "police uniform," but it does specifically provide that any car in which the officer is driving at the time of defendant's flight must display "oscillating, rotating or flashing red or blue lights which when used in conjunction with an audible horn or siren would indicate the vehicle to be an official police vehicle." 625 ILCS 5/11-204(a) (West 2008).

¶ 45 The clear language of section 11-204(a) (adopted in section 11-204.1(a)) indicates a legislative intent to maintain order, protect the safety of others, and encourage respect of police authority by requiring drivers or operators of motor vehicles to comply with police officers' signals

to bring their vehicles to a stop, and by criminalizing behaviors by which drivers or operators of motor vehicles attempt to flee from said officers. Drivers or operators of motor vehicles who flee from police as set forth in section 11-204(a) commit the offense of simple fleeing, and if while fleeing, their rate of speed is at least 21 mph over the legal speed limit, they commit the offense of aggravated fleeing under section 11-204.1(a). Read as a whole, the language of section 11-204(a) (adopted in section 11-204.1(a)) requiring the pursuing police officer to be in "police uniform," and that his car display lighting and an audible horn or siren indicating that it is an "official police vehicle," evinces the legislative intent that in order to commit either simple fleeing or aggravated fleeing, a defendant fleeing from a police officer reasonably should have known that the person signaling him to stop was in fact a police officer. Accordingly, we glean that a police uniform, as that term is used in section 11-204(a) and adopted in section 11-204.1(a), is one that reasonably identifies the wearer as a police officer to the defendant. As section 11-204(a) provides no specific definition or examples of what constitutes a police uniform, the issue of whether Officer Frano's clothing constituted a police uniform is a fact-specific one in which we must determine whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that said clothing reasonably identified Officer Frano as a police officer to defendant.

¶ 46 In the present case, Officer Frano testified that while on duty, he heard shots fired and saw a white vehicle being followed by a black SUV driven by defendant at a high rate of speed. Officer Frano entered his unmarked police car, activated its siren and oscillating lights, and chased after the white car and the black SUV being driven by defendant. Officer Frano saw the black SUV slow

down next to the white car at Lotus and Harrison and saw and heard gunshots being fired from the black SUV toward the white car. Officer Frano proceeded to chase after only the black SUV. At the time of the chase he was wearing "civilian clothes" consisting of jeans, gym shoes, and a T-shirt. Officer Frano further testified, though, that at the time of the chase he also was wearing his name tag, a police star on the left side of his chest near his shoulder, a black bulletproof vest with markings, and a police radio on his waist with a microphone wire coming up through his vest and "sit[ting] on [his] left shoulder." Viewing Officer Frano's testimony in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that Officer Frano was clearly identified as a police officer to the fleeing defendant by his clothing consisting of his name tag, police star, bullet proof vest with markings, and police radio and microphone and, thus, that said clothing constituted a "police uniform" for the purposes and intent of section 11-204(a). We also note that any rational trier of fact could have found beyond a reasonable doubt from Officer Frano's testimony that while chasing defendant, his police car displayed oscillating lighting and an audible siren indicating the vehicle to be an official police vehicle, as required by section 11-204(a).

¶ 47 Defendant argues that Officer Frano never specifically testified whether his bulletproof vest had been worn over or under his T-shirt. However, as discussed, in reviewing the sufficiency of the evidence, Officer Frano's testimony is viewed in the light most favorable to the prosecution and all reasonable inferences are drawn in its favor (*Martin*, 2011 IL 109102, ¶ 15), and, as such, we consider that the bulletproof vest was worn over the T-shirt and was visible to defendant. Even if we *were* to assume the bulletproof vest was worn underneath the T-shirt, any rational trier of fact still could have found that Officer Frano's clothing consisting of the name tag, police star, and police

radio and microphone remained visible and clearly identified him as a police officer to defendant and thus constituted a police uniform under section 11-204(a). Accordingly, we reject defendant's contention that we should reverse his conviction of armed violence predicated on aggravated fleeing because the State failed to prove that Officer Frano was in police uniform.

¶ 48 II. Whether the State Proved Beyond a Reasonable Doubt that Defendant's Flight from Officer Frano was at a Rate of Speed at Least 21 mph Over the Legal Speed Limit

¶ 49 Next, defendant contends we should reverse his conviction of armed violence predicated on aggravated fleeing because the State failed to prove beyond a reasonable doubt the following essential element of aggravated fleeing: that defendant's flight from Officer Frano was at a rate of speed at least 21 mph over the legal speed limit, as required by section 11-204.1(a).

¶ 50 We disagree. Officer Frano testified that while pursuing defendant onto Central Avenue, the officer looked at his speedometer and noted he was traveling 50 mph in a 30 mph zone and that defendant was traveling "over" 50 mph. Viewing Officer Frano's testimony in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant was fleeing from Officer Frano while traveling more than 50 mph in a 30 mph zone, *i.e.*, that he was traveling at least 21 mph over the legal speed limit.

¶ 51 Officer Frano further testified that after following defendant's black SUV onto Interstate 290, Officer Frano was traveling "between 85, 90 miles per hour" in an effort to "keep up" with defendant. The speed limit on Interstate 290 is 55 mph; thus, Officer Frano was driving between 30 to 35 mph over the speed limit in an effort just to "keep up" with defendant. Viewing Officer Frano's testimony in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that since Officer Frano was traveling between 30 to 35 mph over the speed limit

to keep up with defendant, then defendant, too, must have been traveling between 30 to 35 mph over the speed limit during his flight from the officer. Accordingly, we reject defendant's contention that we should reverse his conviction of armed violence predicated on aggravated fleeing because the State failed to prove that defendant was fleeing from Office Frano at a rate of speed at least 21 mph over the legal speed limit.

¶ 52 III. Whether the Trial Court Committed Instructional Error Regarding the Charge of Armed Violence Predicated on Aggravated Fleeing

¶ 53 Defendant contends the trial court improperly instructed the jury on armed violence predicated on aggravated fleeing when it failed to give the issues instruction (IPI Criminal 4th No. 23.04) specifically listing the elements or propositions for aggravated fleeing which the State must prove beyond a reasonable doubt.

¶ 54 Defendant waived review by failing to object or request the issues instruction for aggravated fleeing during the instructions conference. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Defendant argues that we may review the issue pursuant to Illinois Supreme Court Rule 451(c). Ill. S. Ct. R. 451(c) (eff. July 1, 2006). Our supreme court has held that "[t]he purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. The rule is coextensive with the plain-error clause of Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a))." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 55 In a plain error analysis, the first step the reviewing court must determine is whether any error occurred at all. *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009). "In reviewing the adequacy of instructions, this court must consider the jury instructions as a whole to determine whether they fully and fairly advised the jury of the applicable law." *People v. Valladares*, 2013 IL App (1st) 112010,

¶ 108. " 'The function of instructions is to convey to the jury the correct principles of law applicable to the evidence so the jury can apply the proper legal principles to the facts and arrive at a proper conclusion based on the law and the evidence.' " *Id*., (quoting *People v. Peebles*, 125 Ill. App. 3d 213, 217 (1984)).

¶ 56 In the present case, the trial court committed no error in the giving of the jury instructions on armed violence predicated on aggravated fleeing where, viewed as a whole, they fully and fairly advised the jury of the applicable law. In particular, the trial court gave IPI Criminal 4th No. 11.51Y, which stated in pertinent part:

> "A person commits armed violence when he commits the offense of aggravated fleeing or attempting to elude a police officer while he carries on or about his person or is otherwise armed with a firearm."

¶ 57 The committee note to IPI Criminal 4th No. 11.51Y directed the trial court to also give the instruction "defining" the predicate offense that is the subject of the armed violence. IPI Criminal 4th No. 11.51Y, Committee Note. In this case, aggravated fleeing was the predicate offense that was the subject of the armed violence. Accordingly, the trial court correctly gave IPI Criminal 4th Nos. 23.01 and 23.03, which taken together defined the predicate offense of aggravated fleeing. The committee note to IPI Criminal 4th No. 11.51Y did *not* direct the trial court to also give the issues instruction for the predicate offense that is the subject of the armed violence, and, accordingly, the trial court committed no error in failing to give the issues instruction for aggravated fleeing.

¶ 58 The appellate court came to a similar conclusion in *People v. Walls*, 224 Ill. App. 3d 885 (1992). In *Walls*, the defendant there was charged with armed violence predicated on aggravated

battery. *Id*. at 887. The trial court instructed the jury on the definition of aggravated battery but did not give the issues instruction for aggravated battery. *Id*. at 891-92. On appeal from his conviction, defendant contended the trial court committed plain error in failing to give the issues instruction. *Id*. The appellate court disagreed, noting that the committee note to the definitional instruction for armed violence only directed the trial court to give the instruction "defining" the predicate offense underlying the armed violence charge and did not direct the trial court to give the issues instruction. *Id*. at 892. The appellate court further noted:

> "[I]f the jury was given the issues instruction for aggravated battery, it may have been confused rather than enlightened by it since it refers to sustaining 'the charge' of aggravated battery and that the defendant should be found either 'guilty' or 'not guilty' based on its consideration of whether each or any of the propositions has been proved beyond a reasonable doubt. There was no 'charge' of aggravated battery here, nor were there verdict forms on which to record the jury's judgment of guilty or not guilty." *Id*. at 892-93.

¶ 59 The appellate court concluded that the trial court did not err in the instructions given to the jury. *Id*. at 893.

¶ 60 Similarly, if the jury here was given the issues instruction for aggravated fleeing, it may have been confused since the issues instruction refers to sustaining the "charge" of aggravated fleeing and that defendant should be found either "guilty" or "not guilty" thereof. See IPI Criminal 4th No. 23.04. However, there was no "charge" of aggravated fleeing in this case, nor were there any verdict forms on which to record the jury's judgment of guilty or not guilty of aggravated fleeing. Rather,

the pertinent charge here was armed violence predicated on aggravated fleeing, and the trial court gave the jury the issues instruction and verdict forms for that charge. See IPI Criminal 4th No. 11.52Y. Accordingly, as in *Walls*, the trial court here did not err in the instructions given.

¶ 61 Further, even if we were to hold that the trial court erred in failing to give the issues instruction for aggravated fleeing, any such error was harmless. Defendant contends the alleged error in failing to give the issues instruction for aggravated fleeing prejudiced him because without it the jury was unaware of the elements thereof that the State must prove to convict defendant of armed violence predicated on aggravated fleeing. We disagree, as IPI Criminal 4th Nos. 23.01 and 23.03 (set forth above), given by the trial court, together set out all the elements of aggravated fleeing that the State must prove to convict defendant of armed violence predicated on aggravated fleeing.

¶ 62 Defendant also argues he was prejudiced by the failure to give the issues instruction for aggravated fleeing, because without it the jury was not specifically instructed to hold the State to its burden of proof on each element thereof. Defendant argues that a note sent out by the jury during deliberations demonstrated the jury's confusion with regard to the State's burden of proof. The jury note stated:

> "We understand there are three charges-armed violence, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. However, what do we do with the jury instructions related to fleeing or attempting to elude a police officer? Is this another charge? How should we consider this information?"

¶ 63 Contrary to defendant's argument, the jury note demonstrated no confusion by the jury as to the State's burden of proof, but rather demonstrated some confusion as to whether the instructions

that collectively defined the predicate offense of aggravated fleeing also required the jury to render a separate verdict thereon. With the consent of both the State and the defense, the trial court correctly responded to the jury that "fleeing or attempting to elude a police officer is to be considered only as an element of armed violence, there is no verdict form for fleeing or attempting to elude a police officer."

¶ 64 Further, we note that the trial court correctly instructed the jury regarding the State's burden of proof on the charged offense of armed violence predicated on aggravated fleeing. IPI Criminal 4th No. 11.52Y, given by the trial court, informed the jury that to convict defendant of armed violence, the State must prove beyond a reasonable doubt that while committing the predicate offense of aggravated fleeing, defendant was carrying a firearm.

¶ 65 Accordingly, defendant was not prejudiced by the failure to give the issues instruction on aggravated fleeing, and any error in the failure to give that instruction was harmless.

¶ 66 Defendant also argues that the trial court erred by failing to give the issues instruction for the offense of simple fleeing (IPI Criminal 4th No. 23.02). Defendant's argument fails for the same reasons that the trial court committed no error in failing to give the issues instruction for the offense of aggravated fleeing. Specifically, defendant's argument fails because: (1) defendant waived review by failing to object or tender an issues instruction for the offense of simple fleeing; (2) the committee note to IPI Criminal 4th No. 11.51Y (defining the charged offense of armed violence predicated on aggravated fleeing) did not require that such an issues instruction for the offense of simple fleeing be given; (3) the giving of an issues instruction for the offense of simple fleeing would have confused the jury, where the instruction refers to a "charge" of fleeing and that defendant should be

found "guilty" or "not guilty" thereof (see IPI Criminal 4th No. 23.02); and (4) any error was harmless where the trial court properly instructed the jury on all the elements of the charged offense of armed violence predicated on aggravated fleeing and the State's burden of proof.

¶ 67 IV. Whether the Trial Court Erred by Giving an Accountability Instruction

¶ 68 Next, defendant contends the trial court erred by instructing the jury on the theory of accountability for the offenses of armed violence predicated on aggravated fleeing and unlawful use of a weapon by a felon. Defendant preserved the issue for review by objecting on the basis that the person for whom he would be held accountable, Mr. Walker (the passenger in the black SUV), had committed no conduct that would give rise to the accountability instruction.

¶ 69 Section 5-2(c) of the Criminal Code of 1961 provides that a person is legally accountable for the conduct of another when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2008). Defendant argues on appeal that the State failed to present evidence of conduct on the part of Mr. Walker that would give rise to an accountability instruction for the offenses of armed violence predicated on aggravated fleeing and unlawful use of a weapon by a felon; he does not contend the trial court erred in giving the accountability instruction for the offense of aggravated discharge of a firearm.

¶ 70 We need not address defendant's argument regarding the giving of the accountability instruction if there was sufficient evidence to find defendant guilty as a principal for the offenses of armed violence predicated on aggravated fleeing and unlawful use of a weapon by a felon. See

*People v. Zirko*, 2012 IL App (1st) 092158, ¶ 39 (any error in giving an accountability instruction is harmless where there was sufficient evidence to find defendant guilty as the principal). We proceed to examine whether the evidence was sufficient to find defendant guilty as a principal of the offense of armed violence predicated on aggravated fleeing and the offense of unlawful use of a weapon by a felon. As discussed earlier in this order, when reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Martin*, 2011 IL 109102, ¶ 15.

¶ 71 A. Armed Violence Predicated on Aggravated Fleeing

¶ 72 A person commits the offense of armed violence predicated on aggravated fleeing when he commits the offense of aggravated fleeing while he carries on or about his person or is otherwise armed with a handgun. 720 ILCS 5/33A-2(a) (West 2008). A person commits the predicate offense of aggravated fleeing when, as a driver of a motor vehicle, having been given a visual or audible signal by a police officer to bring his vehicle to a stop, he flees or attempts to elude the police officer at a rate of speed at least 21 mph over the legal speed limit. The signal given by the officer may be by hand, voice, siren, or by red or blue light. However, the officer giving the signal must be in police uniform and the vehicle in which he is driving must display illuminated oscillating, rotating or flashing red or blue lights which, when used in conjunction with an audible horn or siren, indicates that the vehicle is an official police vehicle. 625 ILCS 5/11-204.1(a), 11-204(a) (West 2008).

¶ 73 We have already discussed earlier in this order that the evidence at trial, when viewed in the light most favorable to the prosecution, was sufficient for any rational trier of fact to find beyond a

reasonable doubt that while dressed in a police uniform, and with his oscillating lights and siren activated, Officer Frano chased after defendant's black SUV, which was traveling at least 21 mph over the legal speed limit. Said evidence was sufficient for any rational trier of fact to find beyond a reasonable doubt that defendant committed the offense of aggravated fleeing, which was the predicate offense underlying the armed violence charge.

¶ 74 The evidence at trial, when viewed in the light most favorable to the prosecution, was also sufficient for any rational trier of fact to find beyond a reasonable doubt the second component of the armed violence charge, that defendant was armed with a handgun at the time he committed the offense of aggravated fleeing. Specifically, Officer Siwek testified he saw a white car being followed by a black SUV on Congress Parkway, that a passenger in the white car leaned out and fired a gun in the direction of the black SUV, and that he also heard gunshots and saw flashes coming from the driver's side of the black SUV. Officer Frano testified he chased after the black SUV and white car and that during the course of the chase, he saw defendant drive the black SUV and pull up next to the white car on Lotus Avenue and Harrison Street. Officer Frano saw muzzle flashes and heard gunshots being fired from the black SUV, and he testified that he believed defendant was shooting the gun. Officer Frano testified that after the police chase ended, he looked inside the driver's side of defendant's black SUV and saw a shell casing for a nine-millimeter round of ammunition on the floor. Officer Pierce testified he processed the black SUV and recovered a fired cartridge case on the floor of the driver's seat. Any rational trier of fact could determine from Officer Siwek's, Officer Frano's, and Officer Pierce's testimony that defendant was armed with a handgun at the time he committed the offense of aggravated fleeing and, thus, that the State had

proved beyond a reasonable doubt that he was guilty as the principal for the offense of armed violence predicated on aggravated fleeing.

¶ 75 B. Unlawful Use of a Weapon by a Felon

¶ 76 A person commits the offense of unlawful use of a weapon by a felon if he knowingly possesses a firearm and has previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008).

¶ 77 Viewed in the light most favorable to the prosecution, Officer Siwek's, Officer Frano's, and Officer Pierce's testimony regarding defendant's participation in the shooting and the officers' recovery of the cartridge case from the driver's side of the black SUV (recounted earlier in this order) was sufficient for any rational trier of fact to find beyond a reasonable doubt that defendant knowingly possessed, on or about his person, a firearm. The admission into evidence of the certified copy of defendant's conviction of possession of a controlled substance was sufficient for any rational trier of fact to find beyond a reasonable doubt that defendant previously had been convicted of a felony. Accordingly, the State proved defendant guilty beyond a reasonable doubt as a principal for the offense of unlawful use of a weapon by a felon.

¶ 78 In conclusion, as there was sufficient evidence to find defendant guilty as a principal for the offenses of armed violence predicated on aggravated fleeing and unlawful use of a weapon by a felon, any error in the giving of the accountability instruction was harmless. *Zirko*, 2012 IL App (1st) 092158, ¶ 39.

¶ 79 V. Whether Defendant's Convictions of Aggravated Discharge of a Firearm and Unlawful Use of a Weapon by a Felon Violate the One-Act, One-Crime Doctrine

¶ 80 Defendant contends we should vacate his convictions of aggravated discharge of a firearm

and unlawful use of a weapon by a felon because they are based on the same physical act underlying his conviction of armed violence predicated on aggravated fleeing and, thus, violate the "one-act, one-crime doctrine."

¶ 81 Although defendant forfeited review by failing to raise this issue in the trial court, our supreme court has held "forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Accordingly, we address the argument.

¶ 82 The one-act, one-crime doctrine prohibits the imposition of multiple convictions based on a single act and provides that only a conviction for the most serious offense may be sustained. See *People v. King*, 66 Ill. 2d 551, 566 (1977); *In re Samantha V.*, 234 Ill. 2d 359, 379 (2010). The one-act, one-crime doctrine involves a two-step analysis:

> "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 83 Defendant argues his convictions for aggravated discharge of a firearm and unlawful use of a weapon by a felon violate the one-act, one-crime doctrine because they were carved out of the same physical act supporting his conviction for armed violence, *i.e.*, his possession of a handgun. In support, defendant relies on *People v. Williams*, 302 Ill. App. 3d 975 (1999), a case decided by the

Second District Appellate Court (hereinafter the Second District). In *Williams*, a car defendant was riding in was stopped by police because the rear license place was not properly illuminated. *Id*. at 976-77. The officer subsequently determined a warrant was outstanding for defendant, and so he arrested defendant and took him into custody. *Id*. at 977. In doing so, the officer found a gun and a clear plastic baggie containing nine rocks of cocaine in the car seat. *Id*. Defendant was convicted of and sentenced to concurrent terms of 18 years' imprisonment for armed violence based on possession of a controlled substance and 10 years' imprisonment for unlawful possession of a weapon by a felon. *Id*. at 976. On appeal, defendant argued the trial court erred when it imposed a sentence for the conviction of unlawful possession of a weapon by a felon, contending that such a sentence violates the one-act, one-crime rule. *Id*. The Second District agreed with defendant:

> "[T]he common act is a felon possessing a gun and drugs simultaneously. There is no separate act. In one instance the gun is combined with possession of a controlled substance to constitute armed violence, and in the other it is combined with the act of a convicted felon status to create a separate offense. We hold that the one-act, one-crime rule does apply to these convictions." *Id*. at 978.

¶ 84 Accordingly, the Second District reversed defendant's conviction of unlawful possession of a weapon by a felon and vacated the sentence imposed thereon. *Id*.

¶ 85 In the present case, defendant argues that, similar to *Williams*, the common act for all his convictions is the act of possessing a handgun. Defendant contends that, pursuant to *Williams*, we should vacate his convictions and sentences for aggravated discharge of a firearm and unlawful use of a weapon by a felon because they violate the one-act, one-crime doctrine, leaving only his

conviction and sentence for the most serious offense, armed violence predicated on aggravated fleeing.

¶ 86 The State argues that *Williams* was wrongly decided and asks us to follow *People v. White*, 311 Ill. App. 3d 374 (2000), a case decided by the Fourth District Appellate Court (hereinafter Fourth District). In *White*, officers learned there was an outstanding warrant for defendant's arrest and eventually began pursuing the van he was driving. *Id*. at 376-77. Defendant significantly increased his speed and then came to an abrupt stop and ran away from the van with a gun in his hand. *Id*. at 377. Defendant exchanged gunfire with the officers and eventually was arrested. *Id*. at 378-79. He was taken to the hospital where several bags of cocaine were found in his left sock. *Id*. at 379. A jury convicted defendant in pertinent part of unlawful possession of a weapon by a felon and armed violence based on illegal possession of a controlled substance. *Id*. at 384. On appeal, defendant argued that his convictions were carved out of one act, specifically, his simultaneous possession of the controlled substance and of the weapon. *Id*. at 386. Pursuant to *Williams*, defendant argued his conviction for unlawful possession of a weapon by a felon should be vacated. *Id*. at 384.

¶ 87 The Fourth District disagreed, finding that *Williams* had wrongly determined that a defendant's simultaneous possession of the gun and the drugs rendered it one common act. *Id*. at 385. The Fourth District cited case law holding that two separate acts do not become one solely by virtue of being proximate in time. *Id*. (citing *People v. Myers*, 85 Ill. 2d 281 (1981), *People v. Dixon*, 91 Ill. 2d 346 (1982), *People v. Segara*, 126 Ill. 2d 70 (1988)). The Fourth District also found that *Williams* had wrongly determined that the possession of the gun and the drugs could not support

convictions for the two separate crimes of unlawful possession of a weapon by a felon and armed violence based on possession of a controlled substance because they shared a common act, the possession of the gun. *White*, 311 Ill. App. 3d at 385. The Fourth District cited case law holding that a defendant can be found guilty of two offenses even when they share a common act. *Id*. at 385-86 (citing *People v. Rodriguez*, 169 Ill. 2d 183 (1996)). The Fourth District held that in the case before it:

> "Though defendant may have possessed the weapon and the drugs close in time, or even simultaneously, we conclude nevertheless that each possession was a separate act. Although both offenses shared the common act of possession of a weapon, armed violence required the additional act of possession of the drugs, and unlawful possession of a weapon by a felon required the additional element of status as a felon. Accordingly, the two offenses did not result from precisely the same physical act." *White*, 311 Ill. App. 3d at 386.

¶ 88 We find the reasoning in *White* persuasive. Although all defendant's offenses here shared the common act of possession of a firearm, his armed violence conviction required the additional act of aggravated fleeing, his conviction of unlawful use of a weapon by a felon required the additional element of status as a felon, and his conviction of aggravated discharge of a firearm required the additional act of defendant actually firing the firearm. We conclude that as in *White*, each possession was a separate act and, accordingly, the offenses did not result from precisely the same physical act. See also *Rodriguez*, 169 Ill. 2d at 188-89.

¶ 89 Where, as here, separate acts are undertaken, the next question is whether any of the offenses

are lesser-included offenses. "Convictions for included offenses are improper." *Id*. at 384. Defendant does not argue that any one offense is a lesser-included offense of the other.

¶ 90 For all the foregoing reasons, we affirm defendant's convictions.

¶ 91 Affirmed.