2014 IL App (1st) 120369-U

No. 1-12-0369

Fifth Division
AUGUST 8, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 11 CR 8441
	)	
WILLIAM HAMILTON,	)	The Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Justice McBride specially concurred.

ORDER

¶ 1 *Held:* Defendant's conviction is affirmed where: (1) the State proved defendant's prior felony convictions beyond a reasonable doubt and (2) any error in the application of the trial court's *Montgomery* balancing test did not rise to the level of plain error. However, two of defendant's armed habitual criminal convictions and one of his UUW convictions for the possession of a firearm are vacated due to the one-act, one-crime doctrine.

¶ 2 After a bench trial, defendant William Hamilton was convicted of three counts of possession of a controlled substance with intent to deliver, three counts as an armed habitual

criminal, and six counts of unlawful use or possession of a weapon by a felon (UUW). He was sentenced to nine years in the Illinois Department of Corrections for the first six counts, and to seven years for the remaining six counts, all sentences to run concurrently. On appeal, defendant argues: (1) that his convictions as an armed habitual criminal and UUW should be reversed outright because the State failed to prove beyond a reasonable doubt that he was convicted of the prior felonies alleged in the indictment; (2) that the trial court erred when it failed to conduct a *Montgomery* balancing test before admitting evidence of defendant's prior convictions as impeachment evidence; and (3) that two of defendant's convictions as an armed habitual criminal and four of his convictions for UUW should be vacated because they violate the one-act, one-crime doctrine. Defendant also asks that his mittimus be corrected to reflect the correct name of the drug-possession offenses for which he was convicted. For the reasons that follow, we affirm in part, vacate in part, and order the mittimus corrected.

¶ 3 BACKGROUND

¶ 4 On June 2, 2011, defendant was indicted on 12 counts based on his alleged possession or narcotics and firearms on April 29, 2011. Counts I, V, and VI charged defendant with possession of heroin and methadone with intent to deliver. Counts II, III, and IV charged defendant as an armed habitual criminal for the possession of three firearms "after having been convicted of armed robbery with a firearm under case number 03CR24873(01) and possession of a controlled substance with intent to deliver under case number 93CR3443(01)." Counts VII, VIII, and IX charged defendant with unlawful use or possession of a weapon by a felon (UUW) for the possession in his abode of three firearms "after having been previously convicted of the felony offense of armed robbery with a firearm, under case number 03CR-24873(01)." Counts X, XI, and XII charged defendant

with UUW for the possession in his abode of ammunition for the three firearms "after having been previously convicted of the felony offense of armed robbery with a firearm, under case number 03CR-24873(01)."

¶ 5 The parties came before the court for a bench trial on December 8, 2011. The State's first witness was Chicago police officer Jerald O'Malley, who testified that, at approximately 12:48 p.m. on April 29, 2011, he was in the vicinity of 6253 South Michigan, an apartment building, for the purpose of executing a search warrant; in executing the warrant, the police were specifically searching for defendant.[1] There were several officers in the building's parking lot, while O'Malley waited in a marked police vehicle further away. Upon receiving communication from the officers at the building, O'Malley drove approximately eight blocks, where he observed defendant in a white Cadillac. The Cadillac had pulled to the curb, so O'Malley stopped directly behind it, activated the police vehicle's emergency equipment, exited the vehicle, and approached the Cadillac.

¶ 6 O'Malley observed defendant in the driver's seat of the Cadillac alone in the vehicle. O'Malley asked defendant his name and whether he had a driver's license. Defendant responded that his name was Willie Hamilton and handed O'Malley an identification card; the address on the identification card did not match the address on the search warrant, but defendant informed O'Malley that he resided at the address listed on the search warrant. O'Malley asked defendant to exit the Cadillac, which defendant did, and O'Malley informed defendant that they had a search warrant for him and for the residence listed on the warrant. Defendant responded "that he actually had heroin inside of *** the waistband of his underwear." O'Malley then searched defendant and removed a clear plastic bag from the

[1] The search warrant named both defendant and 6253 South Michigan, apartment 2407, as the targets of the warrant.

front of defendant's waistband; the clear plastic bag contained 11 orange Ziploc bags containing white powder that O'Malley suspected was heroin, 2 pink Ziploc bags containing heroin in tan chunk form, and 22 clear knotted bags containing tan chunks that O'Malley suspected was heroin.

¶ 7 O'Malley placed defendant in custody and drove approximately six blocks, to a location where the City of Chicago operated gas pumps used to fuel police vehicles; O'Malley drove to that location "so the team could get back together" and have the appropriate number of officers to return to the apartment building. Defendant's vehicle was taken to the same location.

¶ 8 O'Malley testified that defendant informed him that the keys taken from the Cadillac's ignition included the keys to the residence that was the target of the search warrant. O'Malley gave the keys to his sergeant and remained outside with defendant in the police vehicle while the rest of the team used the keys to enter the lobby of the building and proceed to the twenty-fourth floor. O'Malley was informed that the keys did not work on the door to the apartment, so the officers were planning on using forced entry to gain entrance.

¶ 9 O'Malley testified that, at some point, another set of keys was recovered. Defendant informed O'Malley that he had mistakenly informed O'Malley that the keys were on the key ring, but they were actually in a jacket that was in the backseat of the vehicle. O'Malley checked the backseat of the vehicle and recovered the keys from inside the jacket. O'Malley inserted the keys on the doorknob to apartment 2407, and they opened the lock; at the time that O'Malley tried the keys, the door was broken due to the forced entry.

¶ 10 After the search of apartment 2407, the police returned to the police station and O'Malley inventoried the items recovered. In addition to the bags of suspected heroin that O'Malley

personally recovered from defendant's person, O'Malley inventoried four larger plastic bags of suspected heroin, three pill bottles, three guns, and $3,060 in currency from the apartment. O'Malley also inventoried an undated notification concerning the insurance on defendant's cell phone which was addressed to defendant at the South Michigan Avenue address, keys, and narcotics packaging material and scales also found in the apartment; the orange-tinted Ziploc bags in the narcotics packaging material matched the packaging of the narcotics that O'Malley had recovered from defendant's person.

¶ 11 On cross-examination, O'Malley testified that the Cadillac that defendant was driving was registered to Hattie Johnson, not to defendant. O'Malley further testified that the reason that the officers stopped at the gas station and did not go directly to the apartment to execute the search warrant was that "[w]e wanted Mr. Hamilton not to have a chance to destroy any evidence. We knew the vehicle which Mr. Hamilton had been observed driving several times. We preferred to just take him down that way."

¶ 12 O'Malley testified that when he entered the apartment, he observed a juvenile female sitting on the couch.

¶ 13 The State's next witness was police officer James Davis, who testified that at approximately 12:48 p.m. on April 29, 2011, he was performing surveillance on 6253 South Michigan in preparation for executing a search warrant on that premises. Davis testified that there were approximately 14 other officers working to execute the search warrant. Davis was approximately half a block away, waiting for defendant, and observed defendant leaving the apartment building and entering a cream-colored Cadillac. Davis used his radio to inform the other police officers that defendant was leaving.

¶ 14 Davis testified that the next time he observed defendant was at the police gas station, where several other officers were also present, including O'Malley. At that time, defendant "stated that he had three guns at home in his bedroom and some heroin and could he go get them out himself, because he didn't want his girl[friend] to get kicked out of the apartment."

¶ 15 Davis testified that he was one of the officers executing the search warrant for the apartment. Prior to opening the door, Davis heard loud music coming from inside the unit. The officers possessed a set of keys, provided by defendant, but they did not open the door, so the officers had to enter by knocking the door in. Since they were making a forced entry, and in light of the loud music coming from within despite defendant's statement that the apartment was unoccupied, the officers' guns were drawn. Once the door was opened, approximately 8 to 10 officers entered the apartment. Once they entered, they discovered a young woman, whom they detained while the apartment was searched.

¶ 16 Davis testified that he recovered a box from one of the apartment's three bedrooms that contained four clear plastic bags containing a tan chunky substance that he suspected was heroin, and also recovered a bag containing drug paraphernalia and packaging. The drug paraphernalia consisted of a coffee blender, cutting agents to be added to drugs, methadone, a number of Ziploc plastic bags, and a digital scale. In that same bedroom, Davis also observed men's clothing, including men's fur coats, dress shoes, and dress shirts, and also recovered mail from a dresser belonging to "Willie Hamilton." Davis testified that a different police officer, Officer Chmelar,[2] recovered $3,060 in currency from the same bedroom.

¶ 17 Davis testified that, approximately 30 minutes after the execution of the search warrant, defendant was brought to apartment 2407. Prior to leaving the apartment, defendant spoke to

[2] Davis did not testify as to Officer Chmelar's first name.

Davis and Chmelar. Davis testified that defendant "asked for us to pick up his coat and shoes, because they were very expensive and he didn't want to get them dirty."

¶ 18 Davis testified that defendant was transported to the police station for processing and, while at the police station, defendant told Davis "that he had a new Ruger 380 and a new 9 millimeter, but he had an old 32 handgun, and he kept the guns to protect the house."

¶ 19 On cross-examination, Davis testified that the Cadillac that defendant was driving was registered to Hattie Johnson.

¶ 20 The State's next witness was police officer Jerry Crisp, who testified that at approximately 12:48 p.m. on April 29, 2011, he was in the vicinity of 6253 South Michigan, conducting surveillance with approximately 14 other officers, including O'Malley and Davis; O'Malley was working in an enforcement capacity and not in a surveillance capacity. Crisp first observed defendant driving a white Cadillac that had been curbed, at which point Crisp broke the surveillance and returned to the apartment building.

¶ 21 Crisp testified that he personally searched one of the apartment's three bedrooms, where he discovered three loaded handguns in a closet, as well as narcotics packaging and a digital scale. The three handguns recovered were a Ruger .380 with a magazine; a revolver with six live .32-caliber rounds; and a 9-millimeter handgun with one magazine and nine live 9-millimeter rounds.

¶ 22 After its witnesses had testified, the State sought to admit several exhibits into evidence. With regard to the certified copies of conviction, the following colloquy occurred:

> "STATE: Your Honor, in addition, the State seeks to admit State's Exhibits 7 and 8, certified copies of conviction, which have been stipulated by and between the parties, pursuant to the charge of armed

habitual criminal and UUW by a felon. Specifically, in regard to Case No. 03-CR-24873(01), the defendant was convicted of the offense of armed robbery. That conviction was entered March 30th of 2005. The defendant was sentenced to seven years. So stipulated?

DEFENSE COUNSEL: Yes, the certified copies.

THE COURT: I will consider those only for element of proof on those three cases.

STATE: That is all we would be seeking it for, Judge. And in addition, in regard to Case No. 93-CR, to satisfy the armed habitual criminal element, the defendant was convicted of possession of controlled substance with intent to deliver, a Class 2 offense, and that conviction was entered in 1993, on August 6th. So stipulated?

DEFENSE COUNSEL: Yes.

THE COURT: Same limitation on myself, only for proof of those offenses."

The State also introduced a stipulation that, if called to testify, Paul Fritas, a forensic chemist employed by the Illinois State Police crime lab, would testify that: (1) he tested 9 of the 22 items recovered from defendant's person and they tested positive for heroin, with a weight of 5.6 grams; (2) the 4 items recovered from the apartment's bedroom tested positive for heroin, with a weight of 168.7 grams; and (3) 1.6 grams of a larger amount tested positive for methadone.

¶ 23 Since the State's exhibits are central to the issues on appeal, we describe them here. Exhibit 7 is a certified statement of conviction/disposition in a case captioned "People of the

State of Illinois vs. James Hamilton," with case number 03 CR 24873(01). Exhibit 7 further states that "the above named defendant" was charged with armed robbery with a firearm, a Class X offense, and attempted armed robbery with a firearm, a Class 1 offense, and was sentenced to seven years in the Illinois Department of Corrections for each count, to run concurrently. Exhibit 8 is a certified statement of conviction/disposition in a case captioned "People of the State of Illinois vs. Willie Hamilton," with case number 93 CR 10359(01). Exhibit 8 further states that defendant was charged with two counts of possession of a controlled substance with intent to deliver, one a Class X offense and one a Class 1 offense, and pleaded guilty to one of the offenses; the statement does not specify which offense. Exhibit 8 also states that defendant was sentenced to three years in the Illinois Department of Corrections, with the sentence to run consecutive to the sentences in cases 89 CR 11406 and 93 CR 3443.

¶ 24 After the State rested, the defense moved for a directed finding of acquittal on all charges other than the count based on the heroin recovered from defendant's person. Defense counsel's argument was based on a failure to prove that defendant resided in the apartment. The trial court denied the motion for a directed finding, finding that the State had satisfied its burden of proof.

¶ 25 The first witness on defendant's behalf was M.J., the 14-year-old female who was present at the time the apartment was searched. M.J. testified that she lived at 6253 South Michigan, apartment 2407, with her mother, her cousin, and her brother. The apartment contained three bedrooms; her mother stayed in one, M.J. stayed in another, and her cousin and brother shared the third.

¶ 26 M.J. testified that at approximately 12:45 p.m. to 1 p.m. on April 29, 2011, she was at home cleaning when "the police kicked the door down and [she] was face down on the ground with handcuffs on [her] with a gun to [her] head." After the police entered, they searched the apartment.

¶ 27 M.J. testified that defendant was not living at the apartment on April 29, 2011, and that he was in a relationship with her mother, Hattie Johnson.

¶ 28 On cross-examination, M.J. testified that defendant had only been at the apartment a few times and that he never had mail delivered there and never left clothing there. She further testified that she had spoken to defendant about her testimony.

¶ 29 The next witness on behalf of the defense was defendant. Prior to defendant taking the stand, the following colloquy occurred:

> "STATE: Before the defendant testifies, pursuant to *People v. Patrick*, we are making our *Montgomery* motion before he testifies so that he is apprised [of] any felony convictions that could be used against him.
>
> THE COURT: You have a right to testify or not testify, as you see fit, Mr. Hamilton. Your lawyer cannot make the decision for you, whether to testify or not. Only you can make the decision yourself. If you do testify, then any convictions that you have within the last ten years I could consider those, and conducting a balancing test, in terms of weighing the credibility versus -- or weighing the prejudicial effect versus the probative value, I would consider those to affect your credibility as a witness. On the other hand, if you choose not to testify, I don't factor that in at all, the fact that you did not testify. I give myself the same jury instruction that I

would give to any jury in the case. Knowing all of those things, do you want to testify?

DEFENDANT: Yes, sir."

¶ 30 Defendant testified on direct examination that he had six felony convictions, including four possession of a controlled substance convictions, an armed robbery conviction, and a UUW conviction. He further testified that on April 29, 2011, he lived at the address listed on his state identification card and denied informing police that he lived at a different address.

¶ 31 Defendant testified that on April 29, 2011, police stopped his vehicle in the vicinity of 200 East 69th Street; defendant pulled over and produced his identification card. The police ordered him to exit the vehicle, which he did. The police did not ask defendant whether he was holding any narcotics, and defendant did not inform them that he was. However, the police recovered heroin from his person and arrested defendant. After the police recovered the heroin, defendant did not inform them that he had more heroin at 6253 South Michigan.

¶ 32 After his arrest, defendant was taken to 64th and State, where he remained for approximately 20 minutes; the Cadillac defendant had been driving was also taken to that location. Defendant was then placed in the back of a police vehicle and driven to 6253 South Michigan, where his girlfriend, Hattie Johnson, lived. When he arrived at apartment 2407, Johnson's apartment, the door was broken. Defendant was taken to the apartment's front room, where M.J. was sitting on the couch, handcuffed. He told the police officer that she was only 14 years old and to remove the handcuffs, and the officer did. Defendant denied asking anybody to pick up his coat and shoes and testified that he did not observe a man's coat or shoes on the floor.

¶ 33 Defendant testified that a document concerning his cell phone was mailed to the apartment because he was the victim of identity theft and was concerned about people having access to his phone records.

¶ 34 On cross-examination, defendant testified that he had only been to the apartment two or three times, one of which was immediately before he drove Johnson's Cadillac on April 29. He further testified that he was a user of narcotics and was high when he was arrested by the police, which affected how much he remembered of April 29. Defendant also testified that the first time he had encountered the guns that were recovered was in court.

¶ 35 After defendant's testimony, the defense rested. In rebuttal, the prosecutor stated:

> "STATE: Judge, we just seek to make a *Montgomery* motion at this time. We'd make a *Montgomery* motion because the defendant testified.
>
> THE COURT: I already ruled on that.
>
> STATE: All right.
>
> THE COURT: Anything within ten years. I already weighed the probative value versus prejudicial effect and warned the defendant that I would consider it.
>
> STATE: Judge, in rebuttal, we would seek to admit those two certified copies of convictions, State's 7, which is admitted for a different reason, Case No. 03-CR-24873(01), and then the new one, which would be 07-CR-10137(01), a PCS conviction, State's Exhibit No. 10.
>
> THE COURT: Those will be admitted for limited impeachment value."

¶ 36 During closing argument, defense counsel adopted the arguments made during the motion for a directed finding and added:

> "You have a man, and it's [a] strange position that I find myself in to have no objections to prior convictions coming in, especially the one past the ten-year period, but the fact of the matter is, you have someone who has been around the block many, many, many times. The police have this whole team, a dozen plus officers out there. They have the entire resources of the Chicago Police Department at their disposal. They want you to believe beyond a reasonable doubt that a man with his background hands a valid I.D. based upon what at that particular moment appeared to be a traffic stop and gives them that I.D. and simultaneously or almost simultaneous says but I live at a place where you have a search warrant to get drugs and guns perhaps. And that just doesn't ring."

¶ 37 The trial court found defendant guilty on all counts, and, on January 4, 2012, defendant filed a posttrial motion for a new trial, which was denied the same day. Defendant was sentenced to nine years in the Illinois Department of Corrections for counts I through V, and was sentenced to seven years for counts VI through XII; all of the sentences were to run concurrently. Defendant filed a motion to reconsider his sentence, which was denied, and this appeal follows.

¶ 38 ANALYSIS

¶ 39 On appeal, defendant argues: (1) that his convictions for armed habitual criminal and UUW should be reversed outright because the State failed to prove beyond a reasonable doubt that he was convicted of the prior felonies alleged in the indictment; (2) that the trial

court erred where it failed to conduct a balancing test as required by *People v. Montgomery*, 47 Ill. 2d 510 (1971), before admitting evidence of defendant's prior convictions as impeachment evidence; and (3) that two of defendant's convictions for armed habitual criminal and four of his convictions for UUW should be vacated because they violate the one-act, one-crime doctrine. We consider each argument in turn.

¶ 40 I. Sufficiency of the Evidence

¶ 41 Defendant first argues that the State failed to prove beyond a reasonable doubt that he was convicted of the prior felonies alleged in his indictment and, therefore, his convictions for armed habitual criminal and UUW should be reversed outright. When reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009); *People v. Ross*, 229 Ill. 2d 255, 272 (2008). Instead, "it is our duty to carefully examine the evidence while bearing in mind that the trier of fact is in the best position to judge the credibility of witnesses, and due consideration must be given to the fact that the fact finder saw and heard the witnesses." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011) (citing

People v. Cunningham, 212 Ill. 2d 274, 280 (2004), and *People v. Smith*, 185 Ill. 2d 532, 541 (1999)).

¶ 42 In the case at bar, defendant is challenging his convictions for armed habitual criminal and UUW. Under the Criminal Code of 1961 (the Criminal Code), "[a] person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination" of a list of offenses including "a forcible felony as defined in Section 2-8 of this Code" and "any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7(a) (West 2010). In the case at bar, the indictment charged defendant with being an armed habitual criminal for the possession of three firearms "after having been convicted of armed robbery with a firearm under case number 03CR24873(01) and possession of a controlled substance with intent to deliver under case number 93CR3443(01)."

¶ 43 Additionally, under the Criminal Code, "[i]t is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2010). In the case at bar, the indictment charged defendant with UUW for the possession in his abode of three firearms "after having been previously convicted of the felony offense of armed robbery with a firearm, under case number 03CR-24873(01)."

¶ 44 On appeal, defendant argues that the State failed to prove that defendant had been convicted in case number 03 CR 24873(01), which requires reversal of all of the armed

habitual criminal and UUW counts. Additionally, defendant argues that the State failed to prove that defendant had been convicted in case number 93 CR 3443(01), which requires reversal of the armed habitual criminal counts.

¶ 45 A. Case Number 03 CR 24873(01)

¶ 46 We first consider defendant's arguments concerning case number 03 CR 24873(01). The certified copy of conviction for that offense was admitted into evidence as State's Exhibit 7. Exhibit 7 is a certified statement of conviction/disposition in a case captioned "People of the State of Illinois vs. James Hamilton," with case number 03CR2487301. Exhibit 7 further states that "the above named defendant" was charged with armed robbery with a firearm, a Class X offense, and attempted armed robbery with a firearm, a Class 1 offense, and was sentenced to seven years in the Illinois Department of Corrections for each count, to run concurrently.

¶ 47 Defendant argues that the certified statement of conviction is insufficient to prove that he had been convicted of a felony, as required by both the armed habitual criminal and UUW statutes. "In Illinois, the traditional method of proving a prior conviction is by the certified record of the prior conviction or an authenticated copy of the conviction, and proof of identity between the name on the record and the defendant on trial." *People v. White*, 311 Ill. App. 3d 374, 380 (2000) (citing *People v. Davis*, 65 Ill. 2d 157, 164 (1976)). Generally, "identity of name gives rise to a rebuttable presumption of identity of person." *People v. Davis*, 95 Ill. 2d 1, 31 (1983). Thus, where the name on the certified copy of conviction is the same as the name of the defendant, the State may meet its burden of proof through the certified copy of conviction and is not required to produce additional evidence that the

defendant is the same person convicted in the prior case. See *People v. Smith*, 148 Ill. 2d 454, 465 (1992).

¶ 48 In the case at bar, however, the name on the certified copy of conviction was "James Hamilton," which is not the same as defendant's name, William Hamilton. Thus, the presumption that defendant is the same person named in the certified copy of conviction does not apply. "If the presumption does not apply or is rebutted, other evidence must be adduced to substantiate that the defendant is the person named in the record of conviction." *People v. West*, 298 Ill. App. 3d 58, 63 (1998). Defendant argues that since no additional evidence was presented, his prior conviction was not proven and, therefore, the armed habitual criminal and UUW convictions must be reversed.

¶ 49 Defendant's argument, however, overlooks the fact that there was a stipulation in the case at bar. When the State sought to admit into evidence the certified copies of conviction, the following colloquy occurred:

> "STATE: Your Honor, in addition, the State seeks to admit State's Exhibits 7 and 8, certified copies of conviction, which have been stipulated by and between the parties, pursuant to the charge of armed habitual criminal and UUW by a felon. Specifically, in regard to Case No. 03-CR-24873(01), the defendant was convicted of the offense of armed robbery. That conviction was entered March 30th of 2005. The defendant was sentenced to seven years. So stipulated?
>
> DEFENSE COUNSEL: Yes, the certified copies."

¶ 50 "The law is well established that an accused may, by stipulation, waive the necessity of proof of all or part of the case which the People have alleged against him." *People v. Polk*, 19

Ill. 2d 310, 315 (1960). " 'A stipulation is conclusive as to all matters necessarily included in it' " (*People v. Woods*, 214 Ill. 2d 455, 469 (2005) (quoting 34 Ill. L. & Prac. *Stipulations* § 8 (2001))), and " '[n]o proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence' " (*Woods*, 214 Ill. 2d at 469 (quoting 34 Ill. L. & Prac. *Stipulations* § 9 (2001))). "Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated." *Woods*, 214 Ill. 2d at 469. Stipulations are binding and conclusive on the parties, and parties will not be relieved from a stipulation absent " ' "a clear showing that the matter stipulated is untrue, and then only when the application is seasonably made." ' " *People v. Calvert*, 326 Ill. App. 3d 414, 420 (2001) (quoting *People v. Coleman*, 301 Ill. App. 3d 37, 48 (1998), quoting *Brink v. Industrial Comm'n*, 368 Ill. 607, 609 (1938)). Here, defendant does not argue that the matter stipulated to --- his prior conviction in case number 03 CR 24873(01) --- was untrue. Accordingly, the stipulation is binding and the State was not required to provide additional evidence that defendant was the same individual named in the certified copy of conviction prior to using it to satisfy the State's burden of proof. See *Woods*, 214 Ill. 2d at 473 (finding that the testimony of an officer coupled with a stipulation from a forensic chemist was sufficient to prove chain of custody); *Polk*, 19 Ill. 2d at 315 (in rejecting the defendant's argument that there was no evidence of continuity of possession of drug evidence, court noted that, while such proof may be necessary under certain circumstances, the stipulation between the parties "had the effect of eliminating proof which otherwise might have been required"); *Calvert*, 326 Ill. App. 3d at 420 ("emphatically reject[ing]" the defendant's argument that the trial court was required to conduct a *Montgomery* balancing test prior to

admitting the defendant's prior conviction for impeachment purposes, since the conviction was admitted pursuant to stipulation).

¶ 51 Moreover, even if the State was required to produce more evidence in order to meet its burden of proof, the stipulation entered into between the parties included the statement that "*the defendant* was convicted of the offense of armed robbery" (emphasis added) in case number 03 CR 24873(01). Thus, the stipulation not only encompassed the admission of the certified copy of conviction but also removed any issue of whether the conviction was defendant's. This is similar to the situation present in *People v. Bell*, 327 Ill. App. 3d 238, 241 (2002), where the appellate court found that the State had proven beyond a reasonable doubt that the defendant was a felon despite a name variance where defense counsel had conceded that the State could " 'prove [the certified copy of conviction] up.' " Accordingly, we cannot find that the State failed to prove defendant's conviction in case number 03 CR 24873(01) beyond a reasonable doubt.

¶ 52 We find defendant's analogy to *People v. Moton*, 277 Ill. App. 3d 1010 (1996), to be unpersuasive. There, the appellate court reversed the defendant's conviction for UUW because it found that the State failed to prove that the defendant had a prior felony conviction. *Moton*, 277 Ill. App. 3d at 1011. The certified copy of conviction in that case named " 'William B. Morton,' " while the defendant's name was "William Moton." *Moton*, 277 Ill. App. 3d at 1011. The court noted that there was no presumption of identity present, despite the fact that the name on the certified copy of conviction was listed as an alias on the indictment, since there was no proof that the defendant had ever used an alias. *Moton*, 277 Ill. App. 3d at 1012-13. Since there was no presumption of identity, the State was required to present additional evidence that the defendant was the person named in the certified copy of

conviction and in the absence of such evidence, the State failed to prove the conviction beyond a reasonable doubt. *Moton*, 277 Ill. App. 3d at 1013.

¶ 53 Defendant argues that the same result should apply here, since "[i]n *Moton*, *all* of the State's evidence was stipulated to by defense counsel, not just the certified statement of conviction" (emphasis in original), and the appellate court there "rejected any notion that the stipulation barred the claim." However, despite defendant's contention otherwise, defense counsel in *Moton* did *not* stipulate to the admission of the certified copy of conviction: "The parties stipulated that the testimony and physical evidence at trial would be the same as that adduced at the suppression hearing. The only additional evidence introduced by the State at trial was a certified copy of a felony conviction entered in Shelby County, Tennessee, against 'William B. Morton.' " *Moton*, 277 Ill. App. 3d at 1011. Thus, the certified copy of conviction was the only piece of evidence that was not stipulated. Additionally, the language pointed to by defendant concerns a failure to object to the admission of the certified copy of conviction, not a stipulation as is present in the case at bar. See *Moton*, 277 Ill. App. 3d at 1013 ("defendant's failure to object to the aliases on the indictment or to admission of the Tennessee conviction documents did not absolve the State of its duty to prove the case beyond a reasonable doubt"). Accordingly, we find defendant's reliance on *Moton* unpersuasive and find that a rational trier of fact could have found that the State proved defendant's conviction in case number 03 CR 24873(01) beyond a reasonable doubt.

¶ 54 Finally, we are not persuaded by defendant's attempt to draw a distinction between stipulating to the admission of the certified copy of conviction and stipulating that it was sufficient to establish the prior-conviction elements of armed habitual criminal and UUW. Defendant is correct that the parties could not stipulate to a matter of law. See *People v.*

Baynes, 88 Ill. 2d 225, 240 (1981) ("A stipulation can admit facts but cannot change the law."); *People v. Byrnes*, 405 Ill. 103, 107 (1950) ("The defendant could not stipulate as to a matter of law."). However, the parties could, and did, stipulate to the admission of the certified copy of conviction in case number 03 CR 24873(01) as proof of defendant's conviction in that case.[3] That certified copy of conviction, in turn, satisfied the State's burden of proof in establishing that defendant had a prior felony conviction, as we have explained. See *White*, 311 Ill. App. 3d at 380 ("In Illinois, the traditional method of proving a prior conviction is by the certified record of the prior conviction or an authenticated copy of the conviction, and proof of identity between the name on the record and the defendant on trial." (citing *Davis*, 65 Ill. 2d at 164)). In short, defendant stipulated to the admission of evidence that served to prove an element of the State's case. Accordingly, we find no basis for reversal of either the armed habitual criminal or UUW convictions.

¶ 55 B. Case Number 93 CR 3443(01)

¶ 56 Defendant also argues that the State failed to prove that he had been convicted in case number 93 CR 3443(01), the second felony conviction required for an armed habitual criminal conviction. As noted, the indictment charged defendant with being an armed habitual criminal for the possession of three firearms "after having been convicted of armed robbery with a firearm under case number 03CR24873(01) and possession of a controlled substance with intent to deliver under case number 93CR3443(01)." However, when it

[3] Any argument that the parties stipulated to the admission of the certified copies of conviction but not to the information contained within them is meritless, as it would make little sense to stipulate to the admission of irrelevant documents. See *Woods*, 214 Ill. 2d at 474 (In rejecting the defendant's claim that the parties stipulated that a tested substance was heroin but not that it was the same substance seized from the defendant, the court noted that "it makes little sense for defense counsel to stipulate to expert testimony which is completely irrelevant to the case. However, this would be precisely the result were we to accept defendant's current argument that his trial counsel stipulated to the fact that the chemist tested a substance determined to be heroin, but that the heroin had no relationship whatsoever to the case.").

sought to admit the certified copies of conviction as evidence of defendant's prior convictions, the following colloquy occurred:

> "STATE: Your Honor, in addition, the State seeks to admit State's Exhibits 7 and 8, certified copies of conviction, which have been stipulated by and between the parties, pursuant to the charge of armed habitual criminal and UUW by a felon.
>
> * * *
>
> And in addition, in regard to Case No. 93-CR, to satisfy the armed habitual criminal element, the defendant was convicted of possession of controlled substance with intent to deliver, a Class 2 offense, and that conviction was entered in 1993, on August 6th. So stipulated?
>
> DEFENSE COUNSEL: Yes."

Exhibit 8 is a certified statement of conviction/disposition in a case captioned "People of the State of Illinois vs. Willie Hamilton," with case number 93 CR 10359(01). Exhibit 8 further states that defendant was charged with two counts of possession of a controlled substance with intent to deliver, one a Class X offense and one a Class 1 offense, and pleaded guilty on August 6, 1993; the statement does not specify the offense to which defendant pleaded guilty. Exhibit 8 also states that defendant was sentenced to three years in the Illinois Department of Corrections, with the sentence to run consecutive to the sentences in cases 89 CR 11406 and 93 CR 3443. Defendant argues that, since the conviction entered into evidence was not the same conviction listed in the indictment, the prior conviction element of armed habitual criminal was not satisfied.

¶ 57 Initially, we must address several arguments that the State makes in its appellate brief on this issue that we do not find persuasive. The State, as it must, recognizes that the certified copy of conviction entered into evidence is not for the same case as that listed in the indictment, but characterizes the error as a "mis-labeling of an exhibit" that "is of no consequence." However, this is not a case where the exhibit numbers were switched, so that the certified copy of conviction in case number 93 CR 3443(01) was entered into evidence under a different exhibit number. Instead, the certified copy of conviction in case number 93 CR 3443(01) was never entered into evidence and, consequently, appears nowhere in the record on appeal.

¶ 58 Additionally, as noted above, the parties stipulated that in "Case No. 93-CR, [used] to satisfy the armed habitual criminal element, the defendant was convicted of possession of controlled substance with intent to deliver, a Class 2 offense, and that conviction was entered in 1993, on August 6th." The State represents in its brief that "the parties stipulated that 93 CR-3443[] was 'a Class 2 offense' " and that "[t]his record affirmatively shows a stipulation that this conviction was a Class 2 felony." This representation is unpersuasive for two reasons. The first is most succinctly explained by defendant in his brief: "The parties never stipulated to *anything* regarding the conviction in case number 93CR344301. Neither attorney ever even mentioned that case number on the record at trial, and the parties stipulated to the admission of a certified statement of conviction from a completely different case." (Emphasis in original.) Second, the State is simply factually incorrect. The stipulation clearly concerned case number 93 CR 10359(01). The stipulation occurred in the context of the admission of State's Exhibit 8, which was the certified copy of conviction in case number 93 CR 10359(01), and an examination of the exhibit reveals that the conviction in that case

was entered on August 6, 1993, consistent with the stipulation. The stipulation that the conviction was a Class 2 felony also explains why the certified copy of conviction does not list the charge to which defendant pleaded guilty --- he pled down from the Class X and Class 1 charges to a Class 2 charge. By contrast, there is absolutely no support for the State's representation that the stipulation refers to case number 93 CR 3443(01). "The primary rule in the construction of stipulations is that the court must ascertain and give effect to the intent of the parties." *Woods*, 214 Ill. 2d at 468-69. In the case at bar, the record affirmatively shows that the parties intended to stipulate to the conviction in case number 93 CR 10359(01), and, therefore, that is how we must interpret the stipulation.

¶ 59 The fact remains, however, that we may affirm the trial court on any basis supported by the record on appeal. *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005) ("we may affirm the circuit court on any basis supported by the record"). Here, according to the stipulation between the parties, State's Exhibit 8, the certified copy of conviction in case number 93 CR 10359(01), was admitted into evidence for the purpose of serving as the second conviction required under the armed habitual criminal statute. Thus, the question we must consider is whether proof of a different conviction than that listed in the indictment is grounds for reversal. We find, under the facts in the instant case, that it is not.

¶ 60 "To vitiate a trial, a variance between the allegations in a criminal complaint and the proof at trial must be material and be of such character as may mislead the defendant in making his or her defense, or expose the defendant to double jeopardy." *People v. Maggette*, 195 Ill. 2d 336, 351 (2001). In examining the variance, courts look to "whether the defendant was prejudiced in the preparation of his defense" by the variance. *People v. Santiago*, 279 Ill. App. 3d 749, 753 (1996) (incorrect victim named in indictment, but no prejudice); *People v.*

Jones, 245 Ill. App. 3d 674, 677 (1993) (indictment stated the defendant improperly exchanged goods for money instead of a store credit, but no prejudice); *People v. Montgomery*, 96 Ill. App. 3d 994, 998 (1981) (incorrect victim named in indictment, but no prejudice).

¶ 61 In the case at bar, we cannot find that defendant was prejudiced by the use of case number 93 CR 10359(01) to prove a prior conviction instead of case number 93 CR 3443(01). The defense focus during trial was in challenging the connection between defendant and the apartment in which the guns and the majority of the heroin was discovered. Defendant's convictions were simply not an issue at trial; in fact, the defense used defendant's convictions to argue that the police officers' testimony was incredible in light of defendant's experience with the criminal justice system. Moreover, defense counsel stipulated to the use of case number 93 CR 10359(01) "to satisfy the armed habitual criminal element," a stipulation that occurred prior to the defense presenting its case. Thus, we cannot find that defendant's theory of the defense would have changed at all had there been no variance between the conviction listed in the indictment and the conviction entered as evidence at trial. See *People v. Davis*, 82 Ill. 2d 534, 539 (1980) ("[T]he defendant's defense was that he did not threaten Mrs. Robinson at all, but merely conversed with her. Thus, the defendant's argument that he was charged with threatening the wrong person is not material to his defense because it does not operate to exculpate him at all. The fact still remains that the defendant made a general threat."); *Montgomery*, 96 Ill. App. 3d at 998 ("Montgomery's defense was not that he did not assault Officer Romano. Instead he denied assaulting any officer with a gun. Had the complaint charged that he assaulted Officer Crescenti rather than Officer Romano, his defense would have remained unchanged. Since the only issue he

contested was whether he had a gun in his hand, the distinction between Officer Romano and Officer Crescenti could not have misled him in preparing his defense.").

¶ 62 Additionally, the variance between the indictment and the proof did not subject defendant to the danger of double jeopardy. The indictment quotes the statutory offense charged, the date of the offense, and the type of weapons recovered. See *Davis*, 82 Ill. 2d at 539; *Santiago*, 279 Ill. App. 3d at 753-54; *Jones*, 245 Ill. App. 3d at 677; *Montgomery*, 96 Ill. App. 3d at 998. Accordingly, we find that, under the circumstances present in the case at bar, the variance between the conviction listed in the indictment and the certified copy of conviction entered into evidence was not fatal and reversal is not warranted.

¶ 63 Defendant also argues that the use of case number 93 CR 10359(01) is improper because the certified copy of conviction does not prove that defendant was convicted of "any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher" (720 ILCS 5/24-1.7(a) (West 2010)) as required by the armed habitual criminal statute. We do not find this argument persuasive.

¶ 64 Defendant's argument might have some merit if the certified copy of conviction was viewed in a vacuum --- it does not specify the offense to which he pleaded guilty and, accordingly, does not state that the offense is a Class 3 felony or higher. However, the parties stipulated that in "Case No. 93-CR, [used] to satisfy the armed habitual criminal element, the defendant was convicted of possession of controlled substance with intent to deliver, a Class 2 offense, and that conviction was entered in 1993, on August 6th." Thus, the parties stipulated that the conviction in State's Exhibit 8, case number 93 CR 10359(01), was a conviction of a Class 2 offense. As noted, the stipulation that the conviction was a Class 2 felony also explains why the certified copy of conviction does not list the charge to which

defendant pleaded guilty --- he pled down from the Class X and Class 1 charges to a Class 2 charge. Accordingly, we do not find defendant's argument persuasive and affirm his armed habitual criminal convictions.

¶ 65 C. Ineffective Assistance of Counsel

¶ 66 Since we have determined that the certified copies of conviction, in conjunction with the stipulations between the parties, were sufficient to prove defendant's convictions beyond a reasonable doubt, we have no need to consider whether defendant's testimony concerning his convictions also proved defendant's prior convictions beyond a reasonable doubt. Thus, there is no need for us to address defendant's alternative argument concerning trial counsel's ineffectiveness in eliciting that testimony.

¶ 67 II. Impeachment of Defendant with Prior Convictions

¶ 68 Defendant next argues that the trial court erred in permitting the State to introduce two prior felony convictions as impeachment evidence against him without first conducting a balancing test of their probative value and prejudicial effect, as required under *People v. Montgomery*, 47 Ill. 2d 510 (1971).

¶ 69 As an initial matter, we note that defendant failed to preserve this issue for review. Illinois law is clear that both an objection and a written posttrial motion raising an issue are necessary to preserve an error for appellate review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defense counsel neither objected to the admission of either of defendant's prior convictions, nor were they included in defendant's posttrial motion. Accordingly, we review their propriety under plain-error review.

¶ 70 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error 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). In a plain-error analysis, "it is the defendant who bears the burden of persuasion." *People v. Woods*, 214 Ill. 2d 455, 471 (2005). However, in order to find plain error, we must first find that the trial court committed some error. *Piatkowski*, 225 Ill. 2d at 565 ("the first step is to determine whether error occurred").

¶ 71 Our supreme court's opinion in *Montgomery*, 47 Ill. 2d 510, generally governs the use of prior convictions to impeach a witness' credibility. "Under the *Montgomery* rule, evidence of a witness' prior conviction is admissible to attack the witness' credibility where: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment, (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later, and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice." *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999) (citing *Montgomery*, 47 Ill. 2d at 516). The last *Montgomery* factor requires the trial court to conduct a balancing test in which the prior conviction's probative value is weighed against its potential prejudice. *Atkinson*, 186 Ill. 2d at 456.

¶ 72 "In conducting this balancing test, the trial judge should consider, *inter alia*, the nature of the prior conviction, its recency and similarity to the present charge, other circumstances surrounding the prior conviction, and the length of the witness' criminal record. [Citations.] If the trial judge determines that the prejudice substantially outweighs the probative value of

admitting the evidence, then the evidence of the prior conviction must be excluded." *Atkinson*, 186 Ill. 2d at 456 (citing *Montgomery*, 47 Ill. 2d at 518). The determination of whether a witness' prior conviction is admissible for purposes of impeachment is within the discretion of the trial court. *People v. Mullins*, 242 Ill. 2d 1, 15 (2011). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 73 In the case at bar, prior to defendant taking the stand, the following colloquy occurred:

> "STATE: Before the defendant testifies, pursuant to *People v. Patrick*, we are making our *Montgomery* motion before he testifies so that he is apprised [of] any felony convictions that could be used against him.
>
> THE COURT: You have a right to testify or not testify, as you see fit, Mr. Hamilton. Your lawyer cannot make the decision for you, whether to testify or not. Only you can make the decision yourself. If you do testify, then any convictions that you have within the last ten years I could consider those, and conducting a balancing test, in terms of weighing the credibility versus -- or weighing the prejudicial effect versus the probative value, I would consider those to affect your credibility as a witness. On the other hand, if you choose not to testify, I don't factor that in at all, the fact that you did not testify. I give myself the same jury instruction that I would give to any jury in the case. Knowing all of those things, do you want to testify?
>
> DEFENDANT: Yes, sir."

Later, in rebuttal, the prosecutor stated:

> "STATE: Judge, we just seek to make a *Montgomery* motion at this time. We'd make a *Montgomery* motion because the defendant testified.
>
> THE COURT: I already ruled on that.
>
> STATE: All right.
>
> THE COURT: Anything within ten years. I already weighed the probative value versus prejudicial effect and warned the defendant that I would consider it.
>
> STATE: Judge, in rebuttal, we would seek to admit those two certified copies of convictions, State's 7, which is admitted for a different reason, Case No. 03-CR-24873(01), and then the new one, which would be 07-CR-10137(01), a PCS conviction, State's Exhibit No. 10.
>
> THE COURT: Those will be admitted for limited impeachment value."

Defendant argues that the trial court failed to properly balance the probative value and the prejudicial effect of the two convictions prior to admitting them and that this error rises to the level of plain error. We do not agree.

¶ 74 First, we note that one of the two convictions defendant argues was improperly admitted was the conviction in case number 03 CR 24873(01), which had been earlier admitted as proof of a prior conviction for purposes of the armed habitual criminal and UUW statutes. As our prior analysis of this issue demonstrates, the admission of the conviction for that purpose was proper. However, "*Montgomery* provides a threshold test of admissibility that governs the admission of a defendant's prior conviction for impeachment purposes when that

conviction is not otherwise relevant---and therefore not otherwise admissible. Conversely, when a defendant's prior conviction is relevant other than for impeachment---as in the present case in which the prior conviction constitutes an element of the offense---the *Montgomery* test does not apply." *People v. Hester*, 271 Ill. App. 3d 954, 959 (1995). In other words, "[i]f evidence of the prior conviction is admissible independently of impeachment purposes---and therefore independent of *Montgomery*---then the *Montgomery* test becomes inapposite. This independent basis trumps any *Montgomery* inquiry." *Hester*, 271 Ill. App. 3d at 959. Since the conviction in case number 03 CR 24873(01) was previously admitted by stipulation as substantive evidence to prove an element of the State's case, the *Montgomery* balancing test does not apply and the trial court did not abuse its discretion in permitting the conviction to be used for impeachment purposes.

¶ 75 Additionally, we cannot find reversible error in the trial court's decision to permit defendant's conviction in case number 07 CR 10137(01) to be admitted for impeachment purposes. We note that defendant does not argue that this conviction should not have been admitted, but only argues that the trial court did not conduct a proper *Montgomery* balancing test. However, an examination of the record reveals that the trial court did conduct the balancing test when it informed defendant: "If you do testify, then any convictions that you have within the last ten years I could consider those, and conducting a balancing test, in terms of weighing the credibility versus -- or weighing the prejudicial effect versus the probative value, I would consider those to affect your credibility as a witness." The trial court also later reiterated that it had "ruled on" the State's *Montgomery* motion and had concluded: "Anything within ten years. I already weighed the probative value versus prejudicial effect and warned the defendant that I would consider it." There is no error where the record

demonstrates that the trial court is applying the balancing test, even though it is not expressly articulated. *Mullins*, 242 Ill. 2d at 18; *Atkinson*, 186 Ill. 2d at 463; *People v. Williams*, 173 Ill. 2d 48, 83 (1996).

¶ 76 Moreover, even if the trial court failed to properly balance the probative value and prejudicial effect of defendant's prior convictions, such an error does not rise to the level of plain error under either prong of the plain-error doctrine. Under the first prong, the evidence was not "so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *Piatkowski*, 225 Ill. 2d at 565. While defendant argues that the error was prejudicial because the outcome rested on a credibility determination, we fail to see how the admission of defendant's prior conviction affected that outcome. Although neither party mentions it, defense counsel during his opening statement stated that defendant "has been convicted some 11 times. He has been to the penitentiary numerous times." Thus, from the very beginning of the trial, the fact that defendant had prior convictions was known to the trial court. We cannot find that the admission of one of those convictions threatened to tip the scales of justice against defendant such that it rises to the level of plain error under the first prong.

¶ 77 Additionally, we cannot find that this error is the type that "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process" such that it rises to the level of plain error under the second prong of the plain-error doctrine. *Piatkowski*, 225 Ill. 2d at 565. Our supreme court has equated the second prong of plain error with structural error, which is "systemic, serving to ' "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." ' " *People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010) (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), quoting

People v. Herron, 215 Ill. 2d 167, 186 (2005)). In *People v. Washington*, 2012 IL 110283, ¶ 59, our supreme court cited examples of the limited class of structural errors as including "the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and defective reasonable doubt instructions." *Washington*, 2012 IL 110283, ¶ 59 (citing *Neder v. United States*, 527 U.S. 1, 8-9 (1999)). The claimed error here did not rise to the level of plain error under the second prong of the plain-error doctrine illustrated in *Washington*. Accordingly, even if there was error in the trial court's admission of defendant's prior conviction, that error does not rise to the level of plain error under either prong of the plain-error doctrine.

¶ 78 III. One-Act, One-Crime Doctrine

¶ 79 Defendant next argues that two of his armed habitual criminal convictions and four of his UUW convictions should be vacated because the trial court violated the one-act, one-crime doctrine by entering convictions on all nine gun-possession counts and not merging any of them. Defendant was charged with one count of armed habitual criminal and one count of UUW for each of the three guns recovered from the apartment, and was also charged with one count of UUW for the ammunition recovered from inside each of the three guns, resulting in a total of three counts of armed habitual criminal and six counts of UUW. Defendant was convicted of all nine counts and separately sentenced for each conviction.[4] We find that two of the armed habitual criminal convictions and one of the UUW convictions must be vacated.

[4] Defendant was also convicted of three drug-possession counts, but those convictions are not at issue on appeal.

¶ 80 Defendant did not raise this issue before the trial court, so he asks us to review it for plain error. As noted, "the plain-error doctrine allows a reviewing court to consider unpreserved error 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." *Piatkowski*, 225 Ill. 2d at 565. Our supreme court has instructed that "an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule." *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). See also *People v. Carter*, 213 Ill. 2d 295, 299 (2004). Consequently, if we find error, it necessarily rises to the level of plain error under the second prong.

¶ 81 The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). "Where but one person has been murdered, there can be but one conviction of murder ***." *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). Similarly, when the State presents evidence of a defendant's possession of only one firearm at one time, there can be only one conviction based on it. *People v. Quinones*, 362 Ill. App. 3d 385, 397 (2005) (multiple convictions "based on the same act, specifically, defendant's possession of the firearm" "cannot stand under the one-act, one-crime doctrine"). When a court or jury returns multiple convictions for the same physical act, the mittimus should reflect only the conviction for the most serious charge, and the court must vacate the convictions on the less serious charges.

¶ 82 In the case at bar, defendant was charged with, and convicted of, one count of armed habitual criminal and one count of UUW for his possession of each of the three guns discovered at the apartment. Thus, for each of the three guns, defendant was convicted twice. The State does not dispute that one conviction for each gun must be vacated. However, the State argues that the three armed habitual criminal convictions should remain, while defendant argues that one armed habitual criminal conviction and two UUW convictions should remain. We agree with defendant.

¶ 83 Under the Criminal Code, "[a] person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination" of a list of qualifying offenses. 720 ILCS 5/21-1.7(a) (West 2010). In *People v. Davis*, 408 Ill. App. 3d 747, 752 (2011), three of the defendant's four convictions for armed habitual criminal were vacated on one-act, one-crime grounds, because the defendant argued, and the State agreed, that the armed habitual criminal statute did not permit multiple convictions for the simultaneous possession of multiple firearms, citing the supreme court's decision in *Carter*. We agree with the *Davis* court that the supreme court's analysis in *Carter* is equally applicable here.

¶ 84 In *Carter*, the supreme court considered an earlier version of the UUW statute, which stated that " 'It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or *any firearm or any firearm ammunition* if this person has been convicted of a felony under the laws of this State or any other jurisdiction.' " (Emphasis in original.) *Carter*, 213 Ill. 2d at 301 (quoting 720 ILCS 5/24-1.1(a) (West 1996)). The *Carter* court found the statute ambiguous, pointing to the term "any," which could be either singular or plural, and

determined that "[t]he use of the term 'any' in the statute does not adequately define the 'allowable unit of prosecution.' " *Carter*, 213 Ill. 2d at 301-02. The court noted that, in the face of ambiguity in a criminal statute, it was required to adopt a construction that favored the defendant and further noted that "[t]his court has consistently held, where a statute is ambiguous, in the absence of a statutory provision to the contrary, simultaneous possession could not support multiple convictions." *Carter*, 213 Ill. 2d at 302. Accordingly, the *Carter* court held that "in the absence of a specific statutory provision to the contrary, the simultaneous possession of two firearms and firearm ammunition constituted a single offense, and that only one conviction for unlawful possession of weapons by a felon could be entered." *Carter*, 213 Ill. 2d at 304.

¶ 85 While *Carter* concerned a prior version of the UUW statute, we find its reasoning applicable to the armed habitual criminal statute as well. Like the UUW statute at issue in *Cater*, the armed habitual criminal statute uses the term "any" in prohibiting a defendant from "receiv[ing], sell[ing], possess[ing], or transfer[ing] *any firearm* after having been convicted of a total of 2 or more times of any combination" of a list of qualifying offenses. (Emphasis added.) 720 ILCS 5/24-1.7(a) (West 2010). Thus, as in *Carter*, we must find that the use of the term "any" in the armed habitual criminal statute renders the statute ambiguous and that "where a statute is ambiguous, in the absence of a statutory provision to the contrary, simultaneous possession could not support multiple convictions." *Carter*, 213 Ill. 2d at 302. Consequently, since the three armed habitual criminal convictions were based on the simultaneous possession of the three guns, only one conviction can stand and the other two must be vacated. Thus, the three convictions based on the possession of the guns must be one

armed habitual criminal conviction and two UUW convictions --- three convictions for three guns.

¶ 86 In addition to the convictions based on the guns, defendant was also convicted of three counts of UUW for the ammunition loaded inside each gun. Defendant argues that these convictions violate the one-act, one-crime doctrine, while the State claims that simultaneous possession of a firearm and the ammunition loaded inside that firearm can support separate convictions without running afoul of the one-act, one-crime doctrine. We do not find defendant's argument persuasive.

¶ 87 The question of whether the UUW statute permits separate convictions for simultaneous possession of a firearm and the ammunition loaded inside that firearm requires the interpretation of the UUW statute. "The interpretation of a statute is a question of law that we review *de novo*." *Carter*, 213 Ill. 2d at 301. *De novo* consideration means we perform the same analysis that a trial judge would perform. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 107.

¶ 88 The UUW statute provides that "[i]t is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2010). The statute further provides that "[t]he possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation." 720 ILCS 5/24-1.1(e) (West 2010). The latter sentence was added to the statute in 2005, as a result of the supreme court's decision in *Carter*.

¶ 89 We note that in *People v. Anthony*, 2011 IL App (1st) 091528-B, a divided panel of this court found that separate convictions were permitted in such circumstances. There, the court determined that "the plain and unambiguous language of the statute allows for multiple convictions based upon simultaneous possession of a firearm and firearm ammunition" (*Anthony*, 2011 IL App (1st) 091528-B, ¶ 9) and further found that "[t]he statute contains no exception for situations in which the ammunition is loaded inside of the handgun" (*Anthony*, 2011 IL App (1st) 091528-B, ¶ 16). Accordingly, the court found no error in the defendant's multiple convictions based on simultaneous possession of a firearm and firearm ammunition. *Anthony*, 2011 IL App (1st) 091528-B, ¶ 17. The *Anthony* court's decision was recently followed by *People v. Howard*, 2014 IL App (1st) 122958, ¶¶ 17-18. These two cases are the only two published decisions on this issue.

¶ 90 We note that the defendant in *Anthony* never filed a petition for leave to appeal the issue to the supreme court, so the supreme court has not weighed in on this issue. Thus, although the authoring justice in the instant case feels otherwise and in fact authored the dissent in *Anthony* on which defendant relies, *Anthony* represents the prevailing law as it currently exists, and we follow it until such time as the supreme court instructs otherwise.

¶ 91 IV. Mittimus

¶ 92 As a final matter, defendant asks us to correct the mittimus. Counts I and V of the indictment charged defendant with possession of a controlled substance with intent to deliver. However, the mittimus reflects the convictions for these two counts as being for the manufacture or delivery of a controlled substance. While the State noted that the offenses are statutorily identical, we order the clerk of the circuit court to correct the mittimus to reflect the proper names of the offenses for which defendant was convicted. See *People v. Flores*,

381 Ill. App. 3d 782, 789 (2008) (under Illinois Supreme Court Rule 615(b)(1), the appellate court has the authority to order the clerk to amend the mittimus).

¶ 93 CONCLUSION

¶ 94 For the reasons set forth above, we find: (1) the State proved defendant's prior felony convictions beyond a reasonable doubt and (2) any error in the application of the trial court's *Montgomery* balancing test did not rise to the level of plain error. We also vacate two of defendant's armed habitual criminal convictions and one of his UUW convictions for the possession of a firearm. Finally, we order the clerk of the circuit court to correct the mittimus to reflect the correct names of defendant's convictions.

¶ 95 Affirmed in part and vacated in part; mittimus corrected.

¶ 96 JUSTICE McBRIDE, specially concurring.

¶ 97 Although I agree with the majority decision to affirm, I write to specially concur regarding the stipulation entered into by defendant and the State with respect to defendant's conviction for possession of a controlled substance with intent to deliver. Although the majority honors the first stipulation regarding defendant's conviction for armed robbery, it then suggests that there was no stipulation to defendant's conviction for possession of a controlled substance. However, the record clearly indicates that the parties agreed to remove the issue of defendant's conviction for possession of a controlled substance from the finder of fact.

¶ 98 It is well established that:

> "A defendant *** may waive the necessity of proof *** by entering into a stipulation with respect to [ ] evidence. [Citations.] A stipulation is an agreement between parties or their attorneys

> with respect to an issue before the court [citations], and courts look with favor upon stipulations because ' "they tend to promote disposition of cases, simplification of issues[,] and the saving of expense to litigants." ' [Citation.] The primary rule in the construction of stipulations is that the court must ascertain and give effect to the intent of the parties. [Citation.] 'A stipulation is conclusive as to all matters necessarily included in it,' [citation] and '[n]o proof of stipulated facts is necessary since the stipulation is substituted for proof and dispenses with the need for evidence' [citation]. Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated. [Citation.]" *People v. Woods*, 214 Ill. 2d 455, 468-69 (2005).

With these principles in mind, I believe there is no question that the parties in this case stipulated to defendant's prior conviction for possession of a controlled substance with intent to deliver and no exhibit (i.e., the certified copy of conviction) was needed to support that stipulation.

¶ 99 Under the Armed Habitual Offender Act, the State was required to establish that, among other things, defendant had at least two prior convictions; those being a forcible felony, the armed robbery, and any violation of the Illinois Controlled Substances Act for an offense that was punishable as a Class 3 felony or higher. At the time of the stipulation, although not specifically referencing the four numbers for indictment number "93-CR," both sides clearly agreed that defendant in that case, on August 6, 1993, was convicted of the charge of

possession of a controlled substance with intent to deliver, and that the offense was a Class 2. The colloquy detailed below indicates exactly that:

> "ASSISTANT STATE'S ATTORNEY: And in addition, in regard to Case No. 93-CR, to satisfy the armed habitual criminal element, the defendant was convicted of possession of controlled substance with intent to deliver, a Class 2 offense, and that conviction was entered in 1993, on August 6th. So stipulated?
>
> DEFENSE COUNSEL: Yes."

¶ 100 The problem with the majority's analysis is that it ignores the intent of the parties regarding the stipulation. As the language above shows, what the parties were stipulating to, was defendant's conviction, possession of a controlled substance with intent to deliver, that would establish one of the convictions for the armed habitual offender offense. There was only one conviction for possession alleged in the charging instrument and it was a 1993 indictment. This "93-CR" indictment is the only possible conviction the parties were stipulating to. The fact that People's Exhibit No. 8 was referred to earlier had no impact on the stipulation the parties entered into moments later.

¶ 101 In Illinois, a certified copy of a conviction is generally a self-authenticating document. See *People v. Gober*, 146 Ill. App. 3d 499, 502 (1986) (a prior conviction can be proved by either the record or an authenticated copy); *People v. Davis*, 95 Ill. 2d 1, 31 (1983) (a certified copy of conviction may be offered as proof of a defendant's prior conviction, and the identity of name creates a rebuttable presumption of the identity of the person); *People v. Smith*, 148 Ill. 2d 454, 464-65 (1992) (where the State introduced a certified copy of a prior felony conviction committed by someone with the same name as the defendant, the State

proved beyond a reasonable doubt that the defendant had previously been convicted of a felony and the defendant was not prejudiced where he did not argue he was not the person named on the certified copy); 735 ILCS 5/8-1202 (West 2012) (providing that the "papers, entries and records of courts may be proved by a copy thereof certified under the signature of the clerk having the custody thereof, and the seal of the court"); Fed. R. Evid. 902(4) (adopted by the Illinois Supreme Court Sept. 27, 2010, eff. Jan. 1, 2011) (providing that the "following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted" including "certified copies of public records").

¶ 102 As already pointed out above, there was no need for a certified copy of defendant's conviction to be admitted into evidence in order for the stipulation to be valid. If the State had a certified copy of that conviction in court, there would have been no need for a stipulation between the parties in the first place. Moreover, when the parties stipulated that defendant had a previous conviction that qualified as an offense that would subject him to the Armed Habitual Offender Act, they were agreeing, for purposes of trial, that was indeed the case.

¶ 103 On appeal, defendant has not suggested that he was not convicted of possession of a controlled substance under an indictment in 1993 or that it was not a qualifying felony. Defendant agreed in open court that on August 6, 1993, he was convicted of the possession offense and that it was a class 2 felony. I would honor the stipulation.

¶ 104 Thus, there is no need for the majority to consider whether one of defendant's four other felony convictions would also qualify as a conviction necessary for his armed habitual offender conviction. As a result, I do not join in the portion of the decision in which the majority analyzes this other conviction.

¶ 105 Finally, it should be pointed out that when a defendant agrees to an irregularity, that irregularity cannot later be the basis for an appeal. See *People v. Caffey,* 205 Ill. 2d 52, 114 (noting that when a party "procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, that party cannot contest the admission on appeal).