2014 IL App (1st) 121649-U

FOURTH DIVISION
OCTOBER 9, 2014

No. 1-12-1649



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| Plaintiff-Appellee, | ) | Appeal from the Circuit Court of |
| v. | ) | Cook County. |
| JAMEICA BROWN, | ) | No. 12 CR 148 |
| Defendant-Appellant | ) | Honorable Clayton J. Crane, Judge Presiding. |

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JUSTICE TAYLOR delivered the judgment of the court.
Justice Gordon concurred in the judgment.
Presiding Justice Palmer dissented.

*HELD*: Charging instrument did not apprise defendant of State's intention to request enhanced sentence. Remanded for resentencing.

¶ 1 On the direct appeal. Defendant Jameica Brown raises claims that challenge only his sentence. Defendant claims that his retail theft conviction was improperly enhanced from a

Class A misdemeanor to a Class 4 felony offense where the State's charging instrument failed to provide the notice required by the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c) (West 2010)) and by the Criminal Code of 1961 (720 ILCS 5/16A-10(2) (West 2010))[1] that the State was seeking an enhanced classification of the offense.

¶ 2 BACKGROUND

¶ 3 Since there is no factual issue before us and no issue concerning defendant's conviction, we set forth only the facts that are pertinent to the charging instrument and those concerning his sentencing.

¶ 4 Defendant was charged by information with two counts of retail theft of property with a value less than $300 (720 ILCS 5/16A-3(a) (West 2010)). Counts I and II were both for retail theft in value less than $300 but were distinguished by inclusion of different prior convictions.

¶ 5 The charging provisions of the retail theft statute states in relevant part:

> "16A-3. Offense of Retail Theft. A person commits the offense of retail theft when he or she knowingly:
>
> (a) [t]akes possession of, carries away, transfers or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such

[1] On January 1, 2012, legislation went into effect which renumbered and amended the statutory provisions for retail theft. Section 16-25(f) of the Criminal Code of 2012 contains the current sentencing provisions for retail theft. 720 ILCS 5/16-25(f) (West 2012).

> merchandise without paying the full retail value of such merchandise[.]" 720 ILCS 5/16A-3(a) (West 2010).

¶ 6 Defendant was convicted on count II of his indictment, which stated:

> "Jameica Brown committed the offense of retail theft in that he, knowingly took possession of, carried away, transferred, or caused to be carried away or transferred any merchandise displayed, held, stored, or offered for sale, to wit: Energizer products, in a retail mercantile establishment, to wit: Walgreens, with intent to retaining such merchandise or depriving merchant permanently of the possession, use, or benefit of such merchandise without paying full retail value of such merchandise, and the full retail value of which did not exceed $300. And the defendant has previously been convicted of the offense [of] retail theft under case number 10C55011301."

The count did not state whether it was charging a Class A misdemeanor or a Class 4 felony, and it did not state that the prosecutor was seeking an enhanced sentence.

¶ 7 During the trial, the State's evidence established that defendant had stolen merchandise from a Walgreens on December 9, 2011, and no issues are raised on appeal concerning the sufficiency of the State's evidence.

¶ 8 Following a bench trial, defendant was found guilty on April 16, 2012, of count II, quoted above, and acquitted on the remaining count. The trial court sentenced defendant to a Class 4 felony sentence of 18 months in prison.

¶ 9 The sentencing provisions of the retail theft statute state in pertinent part:

> "(1) Retail theft of property, the full retail value of which does not exceed $300, is a Class A misdemeanor. ***

> (2) A person who has been convicted of retail theft of property, the full retail value of which does not exceed $300, and who had been previously convicted of any type of theft, robbery, armed robbery, burglary, residential burglary, possession of burglary tools or home invasion is guilty of a Class 4 felony. *** When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge of retail theft as a felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial." 720 ILCS 5/16A-10(1), (2) (West 2010).

¶ 10 Defendant did not file a postjudgment motion and instead filed this notice of appeal on May 11, 2012.

¶ 11 ANALYSIS

¶ 12 On this direct appeal defendant claims that his retail theft conviction was improperly enhanced from a misdemeanor to a felony because the State did not give notice of its intention to use his prior conviction to enhance this offense.

¶ 13 The State first contends that the defendant has waived review of this issue because of his failure to raise it at trial or in a posttrial motion. To preserve a sentencing issue for appellate review, a defendant must both object at sentencing and raise the issue in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); *People v. Easley*, 2012 IL App (1st) 110023, ¶ 16. In this appeal, defendant concedes that he failed to do either.

¶ 14 However, defendant asks us to review the error under the plain error doctrine. The plain error doctrine permits review of clear and obvious errors that were waived below. *People v.*

*Piatkowski*, 225 Ill. 2d 551, 565 (2007). "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. "[S]entencing issues are excepted from the doctrine of waiver when they affect a defendant's substantial rights." *People v. Carmichael*, 343 Ill. App. 3d 855, 859 (2003). In *Carmichael*, we held: "We find that the defendant's contention that the offense of which he was convicted was improperly enhanced from a Class 3 felony to a Class 2 felony implicates substantial rights justifying review of the issue." 343 Ill. App. 3d at 859.

¶ 15 " 'The first step of plain-error review is to determine whether any error occurred.' " *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 20 (quoting *People v. Lewis*, 234 Ill. 2d 32, 43 (2009)). We will therefore first review defendant's claim to determine if there was any error.

¶ 16 Defendant claims that the State failed to provide him with notice of the State's intent to seek an enhanced sentence, as required by section 111-3 of the Code of Criminal Procedure of 1963. 725 ILCS 5/111-3 (West 2010); see also 720 ILCS 5/16A-10(2) (West 2010). Defendant argues that the State was required not only to identify the prior conviction in the information, but also to specifically state that it would seek to increase the classification of the offense from a Class A misdemeanor to a Class 4 felony. Defendant contends that the State's failure to comply with the notice requirements led to the improper elevation of the classification of the offense and prejudiced him by affecting his substantial right to be sentenced based on the correct sentencing range. The State maintains that the inclusion of the prior conviction in the charging instrument is sufficient notice of the State's intention to treat the current offense as a felony.

¶ 17 Whether the State's charging instrument failed to provide the notice required by the Code of Criminal Procedure (the Act) (725 ILCS 5/111-3(c) (West 2010)) and the Criminal Code (720 ILCS 5/16A-10(2) (West 2010)) is a question of statutory interpretation, which this court reviews *de novo. People v. Caballero,* 228 Ill. 2d 79, 82 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *People v. Colquitt,* 2013 IL App (1st) 121138, ¶ 29.

¶ 18 When we interpret a statute, our primary objective is to determine and give effect to the legislature's intent. *Crawford Supply Co. v. Schwartz,* 396 Ill. App. 3d 111, 117 (2009). The most reliable indication of the legislature's intent is the plain language of the statute itself. *Id*. When the language of the statute is clear, we must apply it as written. *Id.*

¶ 19 According to well-established rules of statutory interpretation, we must interpret a statute so that all the language used in the statute is given some effect and so that no word, clause or sentence is rendered meaningless or superfluous. *People v. Jones,* 397 Ill. App. 3d 651, 657 (2009). See also *People v. Jones,* 214 Ill. 2d 187, 193 (2005) (the statute must be "construed so that no part of it is rendered meaningless or superfluous"); *Crawford,* 396 Ill. App. 3d at 117.

¶ 20 If the language of a statute is ambiguous, we may look to tools of interpretation to ascertain the intended meaning of a provision. *People ex rel. Illinois Department of Corrections v. Hawkins*, 2011 IL 110792, ¶ 24; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). When interpreting an ambiguous statute, we consider the purpose of the law, the evils it was intended to remedy, and the legislative history of the statute. *Hawkins*, 2011 IL 110792, ¶ 24; *Stroger v. Regional Transportation Authority*, 201 Ill. 2d 508, 524 (2002). In so doing, we presume that several statutes relating to the same subject are governed by one spirit and a single policy, and

that the legislature intended the several statutes to be consistent and harmonious. *Hawkins*, 2011 IL 110792, ¶ 24; *DeLuna*, 223 Ill. 2d at 60.

¶ 21 Section 111-3 is entitled "Form of charge," and it prescribes what a charging instrument must state. 725 ILCS 5/111-3 (West 2010). Subsection (c) requires the charging document to specifically state when the prosecutor intends to seek an enhanced sentence, as follows:

> "When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial." 725 ILCS 5/111-3(c) (West 2010).

The existence of the prior conviction is used after a defendant's conviction to increase the classification of the crime at sentencing. *People v. Lucas*, 231 Ill. 2d 169, 181 (2008). Our supreme court has stated " '[t]he legislature enacted section 111-3(c) to ensure that a defendant received notice, before trial, of the offense with which he is charged.' " (Emphasis omitted.) *Nowells*, 2013 IL App (1st) 113209, ¶ 26 (quoting *People v. Jameson*, 162 Ill. 2d 282, 290 (1994)).

¶ 22 In the case at bar, there is no dispute that the prosecutor, at sentencing, sought "an enhanced sentence because of a prior conviction." 725 ILCS 5/111-3(c) (West 2010). In addition, count II, which is quoted above, did not "state the [prosecutor's] intention to seek an enhanced sentence." 725 ILCS 5/111-3(c) (West 2010). Thus, the State violated the plain language of section 111–3.

¶ 23 In addition to stating "the intention to seek an enhanced sentence," subsection (c) also requires the charging instrument to state the prior conviction which is serving as the basis of the enhancement. 725 ILCS 5/111-3(c) (West 2010). Subsection (c) provides that the charge shall "state the intention to seek an enhanced sentence *and* shall state such prior conviction." (Emphasis added.) 725 ILCS 5/111-3(c) (West 2010). The "and" in this sentence indicates that both are required—both a statement of the State's intent to seek an enhanced sentence and a statement of what the prior conviction is. If a statement of only the prior conviction satisfied the requirements of the sentence, then the words about "intention" would become meaningless. *Jones,* 397 Ill. App. 3d at 657. Since we must construe a statute such that no word or clause is rendered meaningless or superfluous, we cannot read "intention" and "conviction" as synonymous. *Id*. In looking at the language of this statute, it is clear to us that the section 111-3(c) notice provision with which defendant is concerned only applies when the prior conviction that would enhance the sentence is not already an element of the offense. The plain language of 111-3(c) requires the State to not only identify a prior conviction, but also specifically state that it intends to use that prior conviction to seek an enhanced sentence. In the case at bar, the inclusion of the prior theft conviction is not an element of the offense. Thus, subsection (c) is applicable and therefore, the fact that the case number of defendant's prior conviction was mentioned somewhere in the charging instrument is not enough to satisfy the requirements of subsection (c). See *Nowells*, 2013 IL App (1st) 113209, ¶ 26; *People v. Pryor,* 2013 IL App (1st) 121792, ¶ 36.

¶ 24 Subsection (c) defines an enhanced sentence as follows: "For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one

classification of offense to another higher level classification of offense ***." 725 ILCS 5/111-3 (West 2010). The General Assembly, in enacting section 111-3(c), clearly intended to impose a more severe penalty for an offender previously convicted along with the proviso that this intent to seek a harsher penalty must be specifically stated in the charging instrument. See 725 ILCS 5/111-3(c) (West 2010) ("When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence.").

¶ 25 The State relies on *People v. Brooks*, 2012 IL App (4th) 100929, for the proposition that stating "the defendant has been previously convicted of the offense of retail theft" in the charging instrument satisfies the section 111-3(c) notice requirement. In *Brooks*, the defendant was charged with violating an order of protection. *Id.* ¶ 3. A violation of an order of protection is ordinarily a misdemeanor, but it may be enhanced to a felony if the defendant has a prior conviction for unlawful restraint. *Id.* In order to obtain felony sentencing, the State was required to notify the defendant of its intent to seek such an enhanced sentence according to section 111-3(c). *Id.* ¶ 21. The State included in the charging instrument the following: " 'violation of order of protection–subsequent offense felony.' " *Id.* ¶ 3. The trial court gave defendant an extended–term sentence. *Id*. ¶ 3. On appeal, the appellate court affirmed, finding that the enhanced sentence did not violate section 111-3(c). *Id*. ¶ 21.

¶ 26 Defendant argues that *Brooks* is distinguishable because the indictment in *Brooks* contained language of the State's intention to increase the classification of the offense. Defendant further contends that the indictment specifically identified the charged offense as a felony by saying "violation of order of protection–subsequent offense felony." Defendant maintains that while this language complied with the requirement that the charging instrument state the

intention to seek an enhanced sentence, the present case is different, since there was no such specific language in the charging instrument expressing the State's intention to enhance the charged offense to a felony. We agree and find *Brooks* distinguishable from the case at bar.

¶ 27 Further, our supreme court, in a recent decision, *People v. Easley*, 2014 IL 115581, found that section 111-3(c) notice provision does not apply when the State seeks to enhance a defendant's sentence with a prior conviction that is already an element of the offense. In *Easley*, the defendant was convicted of unlawful use of a weapon by a felon and sentenced to nine years in prison. *Id.* ¶ 1. The appellate court affirmed defendant's conviction but vacated his Class 2 sentence and remanded with directions to impose a sentence within the Class 3 felony range. *Id.* The appellate court reasoned that the State failed to state its intention to seek and enhanced sentence prior to trial under section 111-3(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/11-3(c) (West 2008)). *Id.* The court allowed the State's petition for leave to appeal. *Id*. Our supreme court held that in construing the language of 111-3(c), it is clear that the notice provision applies only when the prior conviction that would enhance the sentence is not already an element of the offense. *Easley*, 2014 IL 115581, ¶ 19. The language of section 111-3(c) states that "the fact of such prior conviction and the State's intention to seek an enhanced sentence *are not elements of the offense* and may not br disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial." (Emphasis added.) 725 ILCS 111-3(c) (West 2008). *Id*. This language necessarily implies that section 111-3 applies only when the prior conviction is not an element of the offense. *Id*. The court then found that notice under section 111-3 is not necessary when the prior conviction is a required element of the offense. *Id.*

¶ 28 The supreme court also found *Nowells*, 2013 IL App (1st) 113209, persuasive on this issue. *Easley*, 2014 IL 115581, ¶ 25. *Nowells* similarly held that the notice provision of section 111-3(c) is inapplicable when the prior conviction is a required element of the offense. 2013 IL App (1st) 115581, ¶ 26. In *Nowells*, defendant was convicted of unlawful use of a weapon by a felon. 2013 IL App (1st) 113209, ¶ 1. On appeal, the defendant argued that he was not provided notice pursuant to section 111-3(c) that he was being charged with a Class 2 offense of unlawful use of a weapon by a felon. *Id.* ¶ 17. The appellate court rejected the defendant's argument, holding that "[Section 111-3(c)] notice is not necessary when the prior conviction is a required element of the offense such that only one class of felony conviction is possible for that offense as alleged in the charging instrument." *Id.* ¶ 26. The court reasoned the "[i]n looking at the language of this statute, it is clear to us that the section 111-3(c) notice provision with which defendant is concerned only applies when the prior conviction that would enhance the sentence is not already an element of the offense." *Id.*; see also *People v. Polk*, 2014 IL App (1st) 122017, ¶ 29; *People v. Soto*, 2014 IL App (1st) 121937, ¶ 24.

¶ 29 *Easley* and *Nowells* are distinguishable because here defendant's sentence was increased by a prior conviction from one classification of offense, namely, Class A misdemeanor, to another higher level classification of offense, namely, Class 4 felony. Additionally, the prior conviction at issue is not an element of the act of retail theft with which the defendant was charged. Thus, according to the plain words of the statute, defendant received an “enhanced sentence” and, as discussed above, did not receive the notice required in the charging instrument. As a result, there was error and, as we just explained, the error was clear and obvious from a plain reading of the statute. We find that due to the State's violation of the notice requirements in

section 111-3(c), defendant's sentence must be reversed. See *Pryor*, 2013 IL App (1st) 121792, ¶ 37.

¶ 30 As additional grounds for reversal, defendant argues that the notice the State included in the charging instrument did not satisfy section 16A-10(2), which requires that a charge for retail theft "state such prior conviction so as to give notice of the State's intention to treat the charge of retail theft as a felony." 720 ILCS 5/16A-10(2) (West 2010). Defendant argues that the requirement of specifically stating that it intends to use the prior conviction to seek an enhanced sentence can be found in section 16A-10(2).

¶ 31 The sentencing provisions of section 16A-10 state in pertinent part:

> "(1) Retail theft of property, the full retail value of which does not exceed $300, is a Class A misdemeanor. ***
>
> (2) A person who has been convicted of retail theft of property, the full retail value of which does not exceed $300, and who had been previously convicted of any type of theft, robbery, armed robbery, burglary, residential burglary, possession of burglary tools or home invasion is guilty of a Class 4 felony. *** When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge of retail theft as a felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial." 720 ILCS 5/16A-10 (West 2010).

¶ 32 We note that the plain language of this statute does not appear to contain a requirement that the State specifically state that it intends to use a prior conviction to obtain an enhanced

sentence. It merely provides that the indictment "shall state such prior conviction." However, in any event, we need not resolve the issue whether the indictment in the instant case failed to meet the notice requirements of section 16A-10, because, for the reasons already discussed, we find that it failed to meet the notice requirements of section 111-3(c) and defendant's sentence must therefore be reversed.

¶ 33 It is well settled that remand for resentencing is necessary when a reviewing court is unable to determine the effect of the trial court's consideration of an improper sentencing factor. *People v. Carmichael*, 343 Ill. App. 3d 855, 862 (2003) (citing *People v. Smith*, 295 Ill. App. 3d 405, 411 (1998)). " '[E]ven if a sentence imposed under a wrong sentencing range fits within a correct sentencing range, the sentence must be vacated due to the trial court's reliance on the wrong sentencing range in imposing the sentence.' " *People v. Owens*, 377 Ill. App. 3d 302, 305-06 (2007) (quoting *People v. Brooks*, 202 Ill. App. 3d 164, 172 (1990)). "Just as a trial judge has discretion in sentencing, he should be permitted [the discretion] to determine the effect, if any, of any errors" in sentencing. *People v. Nunez*, 263 Ill. App. 3d 740, 758 (1994).

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we vacate defendant's sentence and remand for resentencing.

¶ 36 Sentence vacated; cause remanded for resentencing with instructions.

¶ 37 PRESIDING JUSTICE PALMER, dissenting.

¶ 38 As I would affirm the defendant's conviction and sentence, I must respectfully dissent. I find that because defendant's prior conviction was included in the charging instrument, defendant was given sufficient notice that the State intended to prosecute the matter as a felony as opposed to a misdemeanor.

¶ 39 As noted by our supreme court in *Easley*, 2014 IL 115581, ¶ 18, the case of *People v. Jameson*, 162 Ill. 2d 282 (1994), discussed at length the legislative history of section 111-3(c) (725 ILCS 5/111-3(c) (West 2010)). The *Jameson* court observed that "[d]uring the debates over the bill in the House of Representatives, Representative Homer stated that the bill applied to 'cases where the State's Attorney has *charged someone with an upgraded offense* as a result of a prior conviction for the same offense.' " (Emphasis in original.) *Jameson*, 162 Ill. 2d at 288-89 (quoting 86th Ill. Gen. Assem., House Proceedings, April 17, 1989, at 7). As an example, Representative Homer referred to the retail theft statute, "in which a second conviction elevates the offense from a misdemeanor to a felony." *Id.* at 289.

¶ 40 The *Jameson* court also placed emphasis on Representative Homer's suggestion that "the purpose of section 111-3(c) was to clarify the confusion that existed in the Criminal Code concerning the procedures the State must follow when drafting a charging instrument." *Jameson*, 162 Ill. 2d at 289. Lastly, the *Jameson* court noted that only 9 of 26 statutes which permit the State to elevate an offense to a higher classification of offense based upon a prior conviction included a notice provision, including the retail theft statute. *Id.* at 289. The remaining statutes did not have a notice provision. *Id.* at 289-90. The court therefore concluded that "[t]he legislature enacted section 111-3(c) as a catch-all provision, thereby requiring the State to notify a defendant in *all* cases where it intends to charge the defendant with a higher classification of offenses based on the defendant's prior convictions for that same offense." *Id.* at 290.

¶ 41 Notably, although Representative Homer discussed the existence of the notice provision in the retail theft statute, that provision was not amended or repealed upon the passage of section

111-3(c). In fact, the specific notice provision of the retail theft statute found in section 16A-10(2) (720 ILCS 5/16A-10(2) (West 2010)) remained in effect for over 20 years thereafter, until it was removed from the statute when it was amended and renumbered in 2012.[1]

¶ 42 In construing section 111-3(c) and section 16A-10(2) with this legislative history in mind, I rely on three well-established rules of statutory construction. First, "[a] court presumes the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative. [Citation.] 'Even when an apparent conflict between statutes exists, they must be construed in harmony with one another if reasonably possible.' " *Faville v. Burns*, 2011 IL App (1st) 110335, ¶ 18 (quoting *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 458–59 (2002)). Second, "[w]here a general statutory provision and a more specific statutory provision relate to the same subject, we will presume that the legislature intended the more specific provision to govern." *Moore v. Green*, 219 Ill. 2d 470, 480 (citing *Knolls Condominium Ass'n*, 202 Ill. 2d at 459). And third, "[a]n amendment to a statute is presumed to be intended to effect a change in the law as it formerly existed." *People v. Craig*, 403 Ill. App. 3d 762, 768 (2010) (citing *In re C.M.J.*, 278 Ill. App. 3d 885, 889 (1996)).

¶ 43 Thus, to reiterate, similar statutes should be read harmoniously, more specific statutory provisions govern over more general provisions, and amendments to statutes are presumed to effect a change in the law. Taking into consideration the fact that the legislature never deemed it necessary until 2012 to remove the language found in section 16A-10(2), and also taking into

[1] As noted by the majority, section 16A-10(2) was repealed effective January 1, 2012, and renumbered and amended to the current sentencing provision for retail theft set forth in section 16-25(f) (720 ILCS 5/16-25(f) (West 2012)), which omits the language regarding notice that was included in section 16A-10(2).

account these three well recognized rules of statutory construction, as well as other practical considerations, I find that the notice given to this defendant satisfied both section 111-3(c) and section 16A-10(2).

¶ 44 Turning to the specific statutory language at issue, section 111-3(c) requires that in cases involving enhancement by a prior conviction, "the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant." 725 ILCS 5/111-3(c) (West 2010). Section 16A-10(2), which set forth when a misdemeanor retail theft charge was enhanced to a felony by certain prior convictions, provided at the relevant time that, "(w)hen a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge of retail theft as a felony." 720 ILCS 5/16A-10(2) (West 2010)).

¶ 45 As was pointed out during oral argument in this case, these provisions are similar, but not identical. The more general provision, the catch-all, provides for stating the intent to enhance as well as stating the prior conviction *so as to provide notice*. On the other hand, the provision specifically directed to retail theft cases only required stating the prior conviction *so as to give notice of the State's intention to treat the charge of retail theft as a felony*. Reading these provisions harmoniously, and without rendering the retail theft sentencing provision inoperable, I believe a reasonable interpretation of these statutes to be that setting forth the prior felony conviction in the charging document in a retail theft prosecution gives notice of the intent to prosecute the matter as a felony. This then satisfies both the specific requirement of section 16A-10(2), as well as section 111-3(c). As was pointed out in oral argument, there would be no

other reason to list the prior felony in a retail theft indictment other than to notify the defendant that he was being prosecuted for a felony.

¶ 46 Alternatively, if these two provisions cannot be harmonized, we must then recognize that section 16A-10(2) was a specific provision affecting only retail theft prosecutions, while section 111-3(c) is a general catch-all provision. As section 16A-10(2) was not repealed upon the passage of section 111-3(c), and applying the rule of statutory construction which directs that the specific governs the more general (*Moore*, 219 Ill. 2d at 480), the conclusion follows that in retail theft prosecutions, the requirements of section 16A-10(2) prevail. Thus, merely stating the prior conviction in the charging document was sufficient *so as to give notice of the State's intention to treat the charge as a felony.*

¶ 47 Further, as I pointed out, *supra*, the language in section 16A-10(2) was not repealed until 2012, over 20 years after the enactment of section 111-3(c). If the state of the law intended by the legislature for these last 20 years, and specifically when the defendant stole those battery operated lights from Walgreens in 2011, was that section 111-3(c) abrogated section 16A-10(2), then there would have been no reason to delete this provision in 2012. However, "[a]n amendment to a statute is presumed to be intended to effect a change in the law as it formerly existed." *Craig*, 403 Ill. App. 3d at 768. The 2012 legislation deleted the language found in section 16A-10(2) that is the subject of the case *sub judice*, leaving the requirements of section 111-3(c) to stand alone. This, I would contend, should be considered a change in the law.

¶ 48 Lastly, I contend that practical considerations weigh against the majority's decision here. It is abundantly clear that defendant was put on notice that he was being prosecuted for a felony offense. At all times defendant was represented by counsel. The prosecution was initiated by

the filing of a Complaint for Preliminary Examination on December 10, 2011. In the upper right-hand corner of the document, it states, "FELONY," in capital letters. The case was sent to Branch 50 in Chicago, a felony preliminary hearing court. Defendant was afforded a preliminary hearing, a hearing only conducted in felony prosecutions. Following a finding of probable cause, an information was filed. While it is true that a misdemeanor prosecution may be commenced by information, that is rarely the case. The case was sent to the Criminal Division of Cook County as opposed to the First Municipal District, where Chicago misdemeanors are litigated. The matter was assigned to a felony judge and tried in a felony courtroom. Upon conviction, a pre-sentence report was completed, something that is not required in misdemeanor prosecutions. At no time did defendant or his counsel indicate that while all these felony procedures were being followed, they were not aware that this was a felony prosecution. To say that defendant was not on notice that this was a felony prosecution is to ignore the realities of the situation.

¶ 49 I respectfully would affirm the judgment of the trial court in all respects.