SECOND DIVISION
February 24, 2015

No. 1-14-3012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re Quedell D., a Minor		
	)	
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
v.	)	No. 14 JD 3214
	)	
QUEDELL D.,	)	Honorable
	)	Stuart Katz,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *HELD*: Respondent's conviction of Class 2 aggravated unlawful use of a weapon based on lack of a FOID card did not violate double jeopardy principles because the trial court consistently found respondent guilty of that substantive offense, despite being mistaken as to the proper sentencing classification at one time.

¶ 2 Following a bench trial, minor-respondent Quedell D. was found guilty of two counts of aggravated unlawful use of a weapon (AUUW) and one count of unlawful possession of a

firearm (UPF). At sentencing, the juvenile court merged respondent's convictions into a single count of Class 2 AUUW, then adjudged respondent a ward of the court and committed him to the Department of Juvenile Justice (Department). On appeal, respondent contends that his Class 2 AUUW conviction violates double jeopardy. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The record shows that respondent was charged in a petition for adjudication of wardship with several firearm offenses. As pertinent here, Count I alleged that he committed AUUW in that he possessed a firearm without a valid firearm owner's identification (FOID) card. The State sought in its petition to enhance this offense to a Class 2 felony based on respondent's prior firearm conviction. The following evidence was presented at respondent's trial.

¶ 5 In the early morning hours of August 16, 2014, Chicago police officer Torres was driving a marked squad car in the vicinity of 7125 South Damen Avenue, when he saw a group of people and heard someone yell, "Run, run, go, go, cops, cops." He then saw respondent and two others break away from the group and run westbound where they jumped a fence. His partner, Officer Gentile, got out of the car and pursued the suspects on foot. Meanwhile, Officer Torres drove to the next block and discovered respondent emerging from a gangway. As Officer Torres turned his spotlight towards respondent, he saw respondent look towards the gangway and throw a silver object into it. Officer Torres told him to freeze, then placed him in custody and brought him back to the squad car. At that time, respondent said, "It's not mine. Is there anything I can do? This is going to be my third gun case." Officer Torres placed respondent in the back of his squad car and went to search the gangway. There, he recovered a silver .38 caliber revolver loaded with six live rounds. Respondent was subsequently brought to the police station where he was unable to furnish a valid FOID card.

¶ 6 The trial court found that Officer Torres testified "clearly and credibly" at trial and that "the State ha[d] proven the minor guilty." Notwithstanding, the court found that "under Count I [for Class 2 AUUW], the State ha[d] failed to prove up that the minor ha[d] a previous adjudicated offense for a firearm which has to be proven under *Apprendi* since it is an enhancement *** from a Class IV to a Class II offense." The court therefore only made "a finding of guilty of [AUUW] Class IV." The following colloquy was then had:

> "MR. LENZINI [assistant State's Attorney]: Can I just be heard on that?
>
> THE COURT: Sure. If I'm mistaken in the law, but since that's a sentencing enhancement, it would be my understanding that would have to be proven beyond a reasonable doubt under *Apprendi*.
>
> MR. LENZINI: Right. Your Honor, my argument would be that it is not an element. It's simply on a position [*sic*] to put the minor on notice that at sentencing it would be used—
>
> THE COURT: It doesn't have to be an element of defense. It's an enhancement which has to be proven beyond a reasonable doubt. That's true of all enhancements *** under *Apprendi*. You can argue at sentencing if you think I'm wrong, but there's a finding of guilty except for that last part. That has to be proven beyond a reasonable doubt, and you didn't prove it. Finding of guilty of all counts otherwise."

The court subsequently clarified that it was making a finding of guilty on the "lesser offense, Class IV, [AUUW] based on lack of FOID."

¶ 7 At a hearing on September 10, 2014, the court informed the parties that it needed "to correct something for the record." The court stated that it had "checked with a colleague who

deals with the *Apprendi* issues far more frequently than I do" and that it discovered it was "incorrect in [its] reading of *Apprendi* and [its] application to this case." The court explained:

> "The sentencing enhancement, since it was based on a prior conviction for a gun case *** does not need to be proven up to the trier of fact at trial.
>
> It was properly listed in the petition in order to put the defense on notice that they were going to be seeking the higher sentence.
>
> So my finding is—since I did find him guilty, so that has not actually changed. It doesn't change the finding, so it changes what will be the supplement sentence on this matter."

¶ 8 Thereafter, at sentencing, the court found that it being respondent's third gun case, it was in the best interest and welfare of the minor and the public that respondent be adjudged a ward of the court. The court also found that respondent's parents were "unfit or unable for reasons other than financial circumstances alone to care for, protect, train, or discipline the minor or are unwilling to do so" and that secure confinement was necessary after reviewing all of the relevant factors. The court merged respondent's convictions into one count of Class 2 AUUW and committed him to the Department. The court ordered that respondent be brought back in four months, at which time if he received a good report, he would be placed on one year of intensive probation. This appeal followed.

¶ 9 ANALYSIS

¶ 10 Respondent contends that he was convicted of Class 2 AUUW in violation of the bar against double jeopardy. He initially acknowledges that he has forfeited this issue, but requests that we review his claim for plain error.

¶ 11 The plain error doctrine is a narrow and limited exception to the general rule of procedural default. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). "To obtain relief under this rule, a [respondent] must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). He must then show either (1) that the evidence was closely balanced, or (2) that the error was " 'so serious that it affected the fairness of the [respondent's] trial and challenged the integrity of the judicial process.' " *Naylor*, 229 Ill. 2d at 593 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). "A conviction that violates double jeopardy is a substantial injustice and may be reviewed as plain error." *People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 21.

¶ 12 Respondent contends that a double jeopardy violation occurred because he was "acquitted" of Class 2 AUUW based on lack of a FOID card, found guilty of the "lesser offense" of Class 4 AUUW based on lack of a FOID card, then later found guilty of the former offense when the court realized that it had made a mistake. The State responds that respondent was never "acquitted" of AUUW based on lack of a FOID card, but rather, found guilty of that substantive offense. According to the State, the trial court merely corrected the sentencing classification for respondent's offense from a Class 4 to a Class 2 conviction. The State argues that this did not constitute a double jeopardy violation.

¶ 13 The double jeopardy clause of the United States Constitution provides that no person shall " 'be subject for the same offense to be twice put in jeopardy of life or limb.' " *People v. Bellmyer*, 199 Ill. 2d 529, 536 (2002) (quoting U.S. Const., amend. V). This bar is applicable to the states through the fourteenth amendment. *People v. Milka*, 211 Ill. 2d 150, 169 (2004) (citing *Benton v. Maryland*, 395 U.S. 784, 787 (1969)). Additionally, the Illinois Constitution provides the same protection. *Id.* (citing Ill. Const. 1970, art. I, § 10).

¶ 14 The bar against double jeopardy protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Id.* at 170 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). At issue in this case is the first of these protections: whether defendant was prosecuted for the same offense after an acquittal.

¶ 15 In *Evans v. Michigan*, the Supreme Court defined an "acquittal" as "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. __, __, 133 S. Ct. 1069, 1074-75 (2013). "[A]n 'acquittal' includes a ruling by the court that the evidence is insufficient to convict, a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability, and any other rulin[g] which relate[s] to the ultimate question of guilt or innocence." (Internal quotation marks omitted.) *Id.* at 1075 (quoting *United States v. Scott*, 437 U.S. 82, 91, 98 & n.11 (1978)).

¶ 16 Contrary to respondent's claim, we find that he was never acquitted of AUUW based on a lack of a FOID card. The trial court, at all times in this case, found that there was sufficient evidence to convict respondent of that offense. Initially, the court believed that Class 2 AUUW and Class 4 AUUW were different offenses, with the former containing an element that respondent had a prior AUUW conviction. This was incorrect. A prior AUUW conviction was, in fact, a sentencing enhancement factor, not an element of the offense. 720 ILCS 5/24-1.6(d)(1) (West 2012); see also *People v. Zimmerman*, 239 Ill. 2d 491, 500-01 (2010) (treating subsection (d) of the AUUW statute as containing sentencing enhancements, as opposed to elements of an offense); *People v. Gayfield*, 2014 IL App (4th) 120216-B, ¶¶ 27-29, *appeal pending* (noting that the State was not required to prove defendant was a felon in order to convict him of AUUW). The court subsequently realized its mistake and informed respondent that he was still guilty, but

that his sentence would be different. Its mistake as to which class of sentence applied to defendant's AUUW conviction did not affect, one way or the other, whether respondent was guilty or innocent of AUUW. Respondent has consistently been found guilty of AUUW. Thus, there has been no violation of double jeopardy in this case. See *Evans*, 568 U.S. at __, 133 S. Ct. at 1074-75.

¶ 17 We find the Supreme Court's decision in *Monge v. California*, 524 U.S. 721 (1998), to be controlling in this case. In *Monge*, the State of California had informed the petitioner that it sought "to prove two sentence enhancement allegations: that petitioner had previously been convicted of assault and that he had served a prison term for that offense." *Id.* at 724. California law provided that petitioner's sentence would be doubled where his conviction had been preceded by one "serious felony offense." *Id.* The State was required to prove the petitioner's prior conviction beyond a reasonable doubt. *Id.* at 725. At the petitioner's sentencing, the court found that the State had proven its sentence enhancement allegations; however, on appeal, the State conceded that it had not proved them beyond a reasonable doubt. *Id.* The State asked the appeals court for a remand to prove the allegations, but the appeals court determined "that a remand for retrial on the allegation would violate double jeopardy principles." *Id.* at 725-26. The California Supreme Court later reached the opposite conclusion and reversed the ruling of the appeals court. *Id.* at 726.

¶ 18 The United States Supreme Court noted in its review of the case that it had "[h]istorically *** found double jeopardy protections inapplicable to sentencing proceedings, [citation], because the determinations at issue do not place a defendant in jeopardy for an 'offense.' *Id.* at 728. It further noted that "[s]entencing decisions favorable to the defendant *** cannot generally be analogized to an acquittal." *Id.* at 729. This is because "[t]he pronouncement of sentence

simply does not 'have the qualities of constitutional finality that attend an acquittal.' " *Id.* (quoting *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980)); see also *Bullington v. Missouri*, 451 U.S. 430, 438 (1981) (noting that "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed"). Ultimately, the Court reaffirmed these principles and concluded that "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." *Monge*, 524 U.S. at 734. Accordingly, the Court affirmed the California Supreme Court. *Id.*

¶ 19 Neither of the parties have cited to *Monge* in their briefs. However, we find it to be dispositive. *Monge* stands for the proposition that a double jeopardy violation does not occur when the court simply corrects a noncapital sentencing determination. See *id.* That is all that happened here. Therefore, we find no merit to respondent's claim.

¶ 20 Respondent, in arguing that a double jeopardy violation has occurred, focuses on the court's statement at trial that it was finding respondent guilty of the "lesser offense, Class IV, [AUUW] based on lack of FOID." Noting that a finding of guilty on a lesser-included offense operates as an acquittal of the offense charged (720 ILCS 5/3-4(a) (West 2012)), respondent argues that, based on the court's language, he was acquitted of Class 2 AUUW.

¶ 21 Respondent's argument elevates form over substance. Respondent does not even argue in this case that Class 4 AUUW is a lesser-included offense of Class 2 AUUW. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Here, he gives the court's "lesser offense" remark conclusive effect and declares that any mistaken belief that his "prior conviction was an element of the offense is irrelevant." Meanwhile, he completely ignores the fact that the court *found him guilty of AUUW based on a lack of a FOID card*. As noted above, the critical inquiry in a double jeopardy case is

whether the court's "rulin[g] *** relate[s] to the ultimate question of guilt or innocence." *Evans*, 568 U.S. at __, 133 S. Ct. at 1075. The court's mistake as to the class of sentence to be imposed for respondent's offense had no bearing on whether he was guilty or innocent of that offense. We therefore find no merit to respondent's argument.

¶ 22 We also find *People v. Howard*, 2014 IL App (1st) 122958, distinguishable from the case at bar. In *Howard*, the defendant was charged with four counts of unlawful use of a weapon by a felon (UUW), two based upon his possession of a firearm (Counts 4 and 6) and two based upon his possession of ammunition inside that firearm (Counts 5 and 7). *Howard*, 2014 IL App (1st) 122958, ¶ 2. With respect to Counts 4 and 5, the State provided notice that it was seeking to have the defendant sentenced as a Class 2 offender on the ground that he was on parole or mandatory supervised release at the time of the offenses. *Id.* At trial, the court found defendant guilty of Counts 6 and 7, but entered findings of not guilty on Counts 4 and 5 because "there was 'no evidence that the defendant was on parole or mandatory supervised release' at the time of the offense." *Id.* ¶ 5. Thereafter, at defendant's sentencing hearing, the State argued that defendant's parole status was a sentence enhancement and did not need to proven at trial. *Id.* ¶ 6. The court, ostensibly agreeing with the State, revised its findings to guilty on all four counts of UUW. *Id.* ¶ 6.

¶ 23 On appeal, the State conceded that defendant's convictions of Counts 4 and 5 violated double jeopardy. *Id.* ¶ 7. We vacated those counts and remanded the cause for resentencing on defendant's remaining UUW convictions. *Id.* We then considered whether, on remand, double jeopardy barred "the State from seeking to use the defendant's parole status to enhance his sentences for the remaining two UUW convictions." *Id.* ¶ 8. We noted that the trial court,

mistakenly or not, had "ruled that the State failed to prove the offense of Class 2 UUW beyond a reasonable doubt." *Id.* ¶ 15. We held:

> "The State is *** precluded under *Evans* from using the defendant's parole status on remand to reestablish Class 2 UUW, as this would amount to a second prosecution for the same offense of which he was already acquitted. We point out that, in rendering this decision, we make no judgment as to whether or not parole status constitutes [an] 'element' of UUW or whether it must be proven at trial beyond a reasonable doubt ***."

¶ 24 Here, unlike in *Howard*, respondent has not been acquitted of any offense. To the contrary, he has consistently been found guilty of AUUW based on lack of a FOID card, despite some initial confusion as to the proper class of that offense. Under the circumstances, we find that no double jeopardy violation occurred in this case. Absent reversible error, we find no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 25 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.