2017 IL App (1st) 143657-U

FIRST DIVISION
March 27, 2017

No. 1-14-3657

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 12 CR 8828 (01)
	)	
SHURRON CLARK,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for UUWF based on possession of a firearm and his conviction for mob action are affirmed; defendant's conviction for UUWF based on possession of firearm ammunition is reversed. Defendant's UUWF conviction based on possession of a firearm is reduced from a Class 2 felony to a Class 3 felony, the sentence imposed on that conviction is vacated, and this matter is remanded for resentencing on that conviction.

¶ 2 Following a bench trial, defendant Shurron Clark was convicted of two counts of unlawful use or possession of a weapon by a felon (UUWF) and one count of mob action, for which he was sentenced to two seven-year and one two-year concurrent terms of imprisonment.

On appeal, Mr. Clark challenges the sufficiency of the evidence put forth by the State for all three counts. Mr. Clark alternatively argues that his UUWF convictions should be reduced from Class 2 felonies to Class 3 felonies because his prior felony conviction, the basis for the enhancements, was not a requisite "forcible felony." Mr. Clark further argues, and the State agrees, that his mittimus should be corrected to accurately reflect his convictions. For the reasons that follow, we affirm in part, reverse in part, and remand for resentencing.

¶ 3 BACKGOUND

¶ 4 After a shooting that occurred on April 8, 2012, the State filed a 30-count indictment against Shurron Clark, Arthur Graise, Savaan Wilson, and Brandon Williams. Mr. Clark was charged with one count of attempt first degree murder, one count of aggravated battery, two counts of unlawful use or possession of a weapon by a felon (UUWF) for the possession of a firearm and firearm ammunition, four counts of aggravated unlawful use of a weapon, and one count of mob action. Mr. Williams pled guilty to one count of UUWF and the State proceeded to a joint bench trial against Mr. Clark, Mr. Graise, and Mr. Wilson (collectively, the three defendants), each of whom waived his right to a jury trial. The four-day trial was conducted between September 5, 2013, and July 2, 2014. Although the three defendants were tried together, only Mr. Clark's convictions are before us on this appeal. Because Mr. Clark challenges the sufficiency of the evidence to support his convictions, we discuss the trial testimony in some detail.

¶ 5 The evening of April 8, 2012, an outdoor memorial was held near 12th Avenue and Fillmore Street in Maywood, Illinois, for Timothy Steele, who had recently been killed in that area. Approximately 15 to 30 people were gathered near the memorial. Around 5:30 p.m., Brandon Williams drove his silver SUV on 12th Avenue with Jasmine Jordan sitting in the front

passenger's seat. Mr. Williams backed the SUV into Ms. Jordan's driveway at 2030 South 12th Avenue, which was directly across from where the memorial was taking place, and both of them remained in the parked vehicle. A group of individuals then approached the SUV, including the three defendants and Terrence Steele, Timothy Steele's brother. Mr. Clark approached the driver's side of the SUV, and Mr. Wilson and Mr. Graise went to the passenger's side.

¶ 6 The primary focus of the trial was the exchange that took place between those individuals who approached the SUV and its occupants. That exchange resulted in several gunshots being fired and the driver's side window of the SUV shattering. Ms. Jordan exited the vehicle and ran up the driveway towards her house while Mr. Williams pulled out of the driveway and drove away. One of the bullets that were fired struck Devonte Cole, who was playing basketball in the driveway of 2101 South 12th Avenue, several houses away from where the incident took place.

¶ 7 The State's case-in-chief consisted of the testimony of several witnesses who were at or near the scene at the time of the incident, several police officers who either appeared at the scene shortly thereafter or subsequently investigated the case, and stipulations regarding the collection and testing of evidence and defendants' prior convictions.

¶ 8 Jasmine Jordan testified that, as she was sitting in the SUV in the driveway, she saw two cars pull up on 12th Avenue and Mr. Wilson and Mr. Steele exited from those vehicles. Ms. Jordan was the only witness who testified that she saw Mr. Clark in possession of a gun at any time. She also testified that she knew Mr. Clark from growing up with him. According to Ms. Jordan, Mr. Steele approached the SUV, initially alone, and "[h]e was angry." He asked Ms. Jordan to get out of the vehicle "so he [could] ask [her] some questions." Ms. Jordan said that she did not comply with his request. Then "[a]bout ten" more men approached and surrounded the SUV, including the three defendants. Ms. Jordan's window was closed and she locked the

doors of the vehicle. Ms. Jordan stated that there was "a lot of screaming going on," the men were banging on the driver's side and passenger's side windows of the SUV, and Mr. Williams was asked "what did he know about the killing."

¶ 9 Ms. Jordan testified that she then heard the sound of breaking glass—the driver's side window shattering—and multiple gunshots "at the same time." Although Ms. Jordan testified that she saw certain individuals with guns at the scene, she provided conflicting testimony as to when she saw each of the guns. She first stated that she saw Mr. Williams with a gun prior to the glass breaking, but then stated that she saw his gun after hearing the glass break and that she did not see anyone with a gun prior to the glass breaking. Ms. Jordan stated that she then looked around to see if anyone else had a gun, and she saw one on Mr. Wilson, who was about two feet from her door. It was a silver gun located in Mr. Wilson's waistband and she saw the handle of the gun when he lifted his shirt up. Ms. Jordan said that she also saw Mr. Clark, who was "on the car" and "[b]anging on the window," with a gun in his hand before the glass broke, but did not see him with a gun after it broke. Ms. Jordan stated that she did not see anyone else with a gun.

¶ 10 Ms. Jordan testified that, just after the window shattered, she exited the SUV and ran to the end of the driveway near her house. According to her, Mr. Wilson followed her and pointed a gun at her head. Then Mr. Clark came up to Mr. Wilson, "grabbed him by his arm," and "directed him" towards the street. Ms. Jordan stated that she did not see where the two went after that. Meanwhile, right after Ms. Jordan exited the SUV, Mr. Williams pulled out of the driveway, took a right on 12th Avenue, and drove away from the scene. Ms. Jordan testified that she saw Mr. Graise standing in the street at the end of the driveway and shooting multiple times at the SUV. She heard multiple gunshots fired and saw no one else firing a gun in that direction. Ms. Jordan then went inside of her house where her mother was already calling the police.

¶ 11 On cross-examination, Ms. Jordan testified that she did not know the difference between a semi-automatic gun and a revolver and that she did not know what gunpowder smelled like. She also testified that she never saw Mr. Clark fire a weapon. After Mr. Clark came up and led Mr. Wilson away from her, she did not see him point or shoot a gun as the two men walked away. When Ms. Jordan was inside her house, she did not know where anyone was except for Mr. Clark, who was "[a]cross the street" by the memorial, which is where he still was when police officers arrived and approached him. At one point she saw him sitting on the sidewalk near the memorial. Ms. Jordan stated that she never saw Mr. Clark with a gun while he was at the memorial before the police arrived, nor did she see him throw his gun or place it anywhere.

¶ 12 Byron Palmer testified that he was at the memorial at the time of the incident and witnessed the events from where he was standing in the middle of the street. He stated that a group of "seven or eight" men approached the SUV after it was parked in the driveway across the street "to find out what happened prior to [Timothy Steele] the day before." Mr. Palmer then heard glass breaking, followed by a number of gunshots, "[a]bout five to ten, about ten or twelve maybe." When he was asked during cross-examination, Mr. Palmer stated that he did not see anyone fire a weapon; he heard the sound of glass breaking and gunshots "simultaneously" and was "not sure" which occurred first. Mr. Palmer testified that, as he ran down 12th Avenue and was approaching Fillmore Street, he heard more gunshots and "heard bullets going past [his] ears." He believed it was Mr. Williams who was shooting at him but did not know whether there was more than one person who was shooting a gun. After getting to 11th Avenue, Mr. Palmer noticed that Mr. Perkins had been shot. Mr. Palmer stated that he did not see Mr. Clark or know where he was when bullets were going past his head.

¶ 13 Officer Luis Vargas testified that on April 8, 2012, he arrived at the 2000 block of South

12th Avenue in response to a call of a shooting. Officer Vargas noticed Mr. Graise "standing on the small patch of grass in front of the residence" and "all of a sudden he bent over and grabbed a handgun" which had been on the grass "and put it in his waistband." Officer Vargas arrested Mr. Graise, took the handgun from his waistband, and laid it on the grass for an evidence technician to inventory. He stated that he later learned that the gun was a .22-caliber revolver.

¶ 14 Sergeant Dennis Diaz testified that he also responded to a call of a shooting around 5:30 p.m. on April 8, 2012. Sergeant Diaz stated that while he was speaking with Ms. Jordan inside of her house, his attention was drawn to one individual, Mr. Clark, who was lying on the ground at the memorial across the street. Sergeant Diaz radioed another officer, Officer Patterson, to "stand by at the end of the block," and Sergeant Diaz approached Mr. Clark, who got up and "proceeded to walk northbound on 12th Avenue." Mr. Clark walked in the direction that Officer Patterson was standing and the officers placed Mr. Clark into custody. On cross-examination, Sergeant Diaz testified that he did not see Mr. Clark discard anything as he was walking northbound on 12th Avenue. Sergeant Diaz also stated that he did not recover a weapon from Mr. Clark after a protective pat down was performed, nor did he recover any weapon from near the memorial where Mr. Clark had been. Sergeant Diaz noted that "there was a gun recovered at the scene," referring to a gun found across the street from the memorial, but he never learned of any weapon recovered from the side of the street with the memorial.

¶ 15 Sergeant Wayne Welch assisted as an evidence technician in the investigation. When shown photographs of the scene, Sergeant Welch identified a .22-caliber revolver that "was laying on the front yard of 2032 South 12th Avenue." Sergeant Welch also identified three .40-caliber shell casings "in the parkway grass of 2030 South 12th Avenue" and two 9-millimeter shell casings "on the sidewalk in front of 2030 South 12th Avenue" and "in the

parkway grass of 2032 South 12th Avenue." Sergeant Welch testified that the revolver "had four spent 22 caliber shell casings still in the cylinder." That was the only actual firearm that he documented and recovered.

¶ 16 Sergeant Tracey Branch and Detective Charles Porter testified as to conversations they had with defendant Savaan Wilson soon after the incident in which Mr. Wilson admitted that when Mr. Williams started shooting, Mr. Wilson "ran to his spot on the block and he got his gun," a revolver. As Mr. Williams pulled out of the driveway and drove towards Fillmore Street, Sergeant Branch testified, Mr. Wilson "said he *** was in the street running behind the car, shooting at the car." After the SUV "left the block," Mr. Wilson "just threw the gun and *** started calling for his friends." Detective Porter specifically noted how Mr. Wilson stated that the driver of the SUV produced a gun *after* one of Mr. Wilson's friends "tried to pull [the driver] out of the vehicle." Detective Porter was briefly recalled as a witness during defendants' rebuttal, and he testified that he interviewed Mr. Williams the day after the incident and Mr. Williams admitted discarding shell casings in the garbage behind his house.

¶ 17 Prior to the close of the State's case, the parties stipulated that Sergeant Patrick Grandberry would have testified that he administered gunshot residue collection kits to Mr. Wilson and Mr. Clark on the evening of April 8, 2012, and, on April 10, 2012, collected a metal projectile that was recovered by medical personnel during medical procedures on Mr. Cole. The parties also stipulated that Ellen Chapman, a forensic scientist, would have testified that she received and separately tested three gunshot residue collection kits which were labeled as having been administered to Mr. Wilson, Mr. Clark, and Mr. Perkins. The results of Ms. Chapman's analysis indicated that Mr. Clark did not discharge a firearm, or if he did, the particles were not deposited, removed by activity, or not detected by the procedure.

¶ 18 The parties also stipulated that Tonia Brubaker, an expert in the forensic science field of firearms examination and identification, would have testified that she examined the .22 long rifle caliber revolver and found it to be in firing condition, and that four Winchester .22 long rifle caliber fired cartridge cases that were collected were fired in that revolver. Ms. Brubaker also would have testified that the two 9-millimeter Ruger caliber fired cartridge cases that she examined were both fired in the same firearm, and the three .40 Smith & Wesson caliber fired cartridge cases that she examined were all fired in the same firearm. Additionally, the bullet that was recovered from Mr. Cole's body was determined to be a 9-millimeter or .38-caliber bullet.

¶ 19 The State also presented a certified copy of conviction for Mr. Clark's October 22, 2008, conviction for aggravated battery to a school employee (720 ILCS 5/12-4(b)(3) (West 2006)).

¶ 20 The defense called Brandon Williams to the stand, who testified that he pled guilty to possessing a gun as a felon and that shell casings were found in the garbage can behind his house. Mr. Williams stated that when he was in the SUV with Ms. Jordan on April 8, 2012, he had his semiautomatic handgun with him. Mr. Williams did not know and had never before seen the group of men who approached the SUV while he and Ms. Jordan were sitting in the driveway. He testified that "[s]ome words were exchanged," that the men wanted Jasmine to get out of the car but she did not want to, and then "things escalated." Mr. Williams stated that the men were yelling at him and that he was fearful at that point. Mr. Williams then pulled the gun out from under his seat and put it on his lap. He stated that "[o]ut [of] the corner of [his] eye, [he] saw a chrome object" but did not see who was holding it because "[i]t all happened so fast."

¶ 21 Mr. Williams further testified that when he saw that chrome object, he "heard [his] window bust and gunfire and [he] fired" his gun three times out of the window of the SUV. Mr. Williams stated that the SUV window was already broken before he fired any shots. According

to him, the group of people "scattered" at that point, and he pulled the SUV out of the driveway and, ducking down, drove south on 12th Avenue. Mr. Williams did not continue firing his gun, but heard other gunshots being fired as he drove away.

¶ 22 On cross-examination, Mr. Williams testified that several individuals came to the passenger's side of the SUV where Ms. Jordan was seated, and several individuals came to the driver's side where he was seated. Mr. Williams did not remember if, prior to hearing any gunshots, he or Ms. Jordan threatened any of the men standing around the SUV or told them to back away. Mr. Williams stated that he heard at least one and possibly two gunshots just prior to the driver's side window breaking. At the time he heard the second gunshot, his gun was on his lap, but he had not pointed it at anyone prior to hearing the window break. The reason he put his gun in his lap was to try to scare the men away. According to Mr. Williams, that was also the reason he fired the gun out of the driver's side window—at "nobody in particular"—because he feared for his own safety and wanted "to scare them off so [he] [could] leave."

¶ 23 Mr. Williams stated that before it broke, the driver's side window was partially open and a man who Mr. Williams had never seen before, but who he later identified from a photograph to be Mr. Clark, had reached his arm inside the window. Mr. Williams said that man "stood out because of his skin complexion," which he described as being "a bright color." Mr. Williams stated that he "grabbed his arm and tried to let the window up," and the man's arm was still in the window when the window broke.

¶ 24 Mr. Williams testified that, at the time of the incident, he saw a chrome handgun in someone's hand, but he did not see the person who was holding it. Mr. Williams stated that the gun was to his side, "[n]ot even a couple feet" away from him, but "right at the door at the window" and it was pointed down, not at anyone. Mr. Williams stated that he heard the first

gunshot a "[c]ouple seconds" after he saw that gun, and the second gunshot a "[c]ouple seconds" after the first. After hearing those two gunshots, he took his gun in his hand and immediately fired about three times out the SUV window while looking the other direction and trying to pull out of the driveway. Mr. Williams stated that he fired his first shot only after hearing at least two gunshots. Before he fired his gun, he was not able to see the hands of every person that surrounded the SUV or what each of them was doing. Mr. Williams testified that once he started driving on 12th Avenue, he did not fire any additional gunshots. When he looked in his rear view mirror as he drove away, he saw "a figure standing in the middle of the street" and heard three or four gunshots which sounded like they all came from the same gun, but he was not sure if the person he saw in the street was the one who fired the shots.

¶ 25 Leon Mays and Haneef Perkins testified for the defense. They were both at the memorial on April 8, 2012. Mr. Mays saw the SUV pull into the driveway across from the memorial and was about 20 feet away from where it was parked when he witnessed Mr. Steele approach it and ask the driver about what happened to his brother, an exchange that soon turned into an argument. Mr. Mays stated that two additional people then approached the SUV, while Mr. Steele and the driver continued to argue, and that he then "saw a gun fired from inside the car, muzzle, bright light of a gun, [and] heard the window bust out." He saw that it was the driver firing a silver revolver. Although Mr. Mays stated that he saw Mr. Graise when the SUV pulled out of the driveway, he did not see Mr. Graise with anything in his hands or pointing any object towards the SUV, or anything that looked like an explosion or fire coming from Mr. Graise. He acknowledged on cross examination that, after he returned to the memorial, he saw Mr. Graise pick up a revolver from the grass near the driveway where the SUV had been parked. On redirect examination, Mr. Mays clarified that the first person to fire a gun was the driver of the SUV,

after which Mr. Wilson fired his gun. Mr. Mays denied that it was "possible that other people may have fired." As he ran away, he kept looking at the area where the shooting was happening to make sure the SUV was not coming towards him and that he was not being shot at. He saw the driver of the SUV continue to shoot out the window. Mr. Mays stated that, at that time, he saw Mr. Graise running and did not see him holding or firing a gun.

¶ 26 Mr. Perkins stated that he never saw Mr. Graise holding or firing a gun. On cross-examination, Mr. Perkins stated that once he was away from the scene, he heard a different kind of gun being fired than the kind he initially heard. Although Mr. Perkins stated that he never saw a gun in anyone's hand and did not know how many people were shooting that afternoon, he heard two different types of guns fired during the incident.

¶ 27 Before the defense rested, the parties stipulated that Commander Willis would have testified that on April 9, 2012, he recovered two 9-millimeter shell casings from the garbage can directly behind Mr. Williams' residence.

¶ 28 Each of the three defendants elected not to testify in their own defense.

¶ 29 The circuit court issued its ruling on August 11, 2014. After providing a detailed chronology of what occurred during the incident, the court found that Mr. Williams, Mr. Wilson, and Mr. Graise each fired a weapon during the incident of April 8, 2012:

> "The evidence is clear that there [were] at least three shooters out there. We know Brandon Williams shot out of his car. We know Savaan Wilson shot at Brandon Williams who was driving away in that vehicle. We know that. From Jasmine [Jordan] we know that Arthur Graise had a gun and was firing also at the vehicle."

The court noted that although the type of bullet that struck Mr. Cole possibly came from the same gun that was used by Mr. Williams, under the "theory of accountability," because Mr.

Wilson and Mr. Graise also shot at Mr. Williams' vehicle, they were also accountable for injuries that resulted, whether from their own weapons or from Mr. Williams' weapon. The court also found that, "[w]ith regard to Shurron Clark, [Ms. Jordan] [saw] him with a gun standing at the driver's seat of the vehicle when all these ten people or so converge[d] on the SUV."

¶ 30 The circuit court read the transcripts to sort through the evidence that had been presented over the four trial days that had been spread out over almost a year and then issued its rulings. The court found Mr. Wilson and Mr. Graise not guilty of attempt first degree murder because the State did not sustain its burden to show the specific intent to shoot Mr. Cole. The court, however, found both Mr. Wilson and Mr. Graise guilty of, among other charges, aggravated battery for the shooting of Mr. Cole and mob action.

¶ 31 The circuit court then ruled on the charges against Mr. Clark. The court found him not guilty of each of the four aggravated unlawful use of a weapon charges. As to the remaining charges, the court stated:

> "With regard to Shurron Clark, I find him not guilty of the attempt first degree murder. With regard to the aggravated battery, I believe Shurron Clark, though he has engaged in the conduct of mob action when they went over to the car and he was viewed with the gun, there is no evidence that he fired any weapon. I believe there was sufficient evidence in this case when he ran up to Savaan Wilson and pulled him away from [Ms. Jordan], that there may have been a withdrawal on his part from this activity. Therefore, I am finding him not guilty of aggravated battery.
>
> With regard to the unlawful use or possession of a weapon by a felon, there was sufficient evidence that he had a gun there that day. The State gave me evidence that he has a prior aggravated battery charge; and therefore, I find him guilty of unlawful

possession of a weapon by a felon.

The next count of unlawful possession of a weapon by a felon is based on firearm ammunition. I find him guilty of that.

* * *

With regard to mob action, I do believe that he is guilty of that count. And with regard to the mob actions, there has to I believe—all parties engaged in unlawful activity, they acted together without authority with the intention of and did inflict a violent injury.

With regard to that, I do not believe it's necessary that everybody inflict that injury, just that one of the parties inflicts an injury that all are accountable for."

¶ 32 Each of the three defendants filed a motion asking the circuit court to reconsider its rulings or, in the alternative, for a new trial. In denying these motions, the court stated, as it pertains to Mr. Clark's convictions:

"A group of people from across the street armed with weapons ***, including the three defendants, crossed the street. *** When they got to the window, [Ms. Jordan's] testimony is clear about what she saw, who she saw have guns. *** I believe that her testimony was supported by other witness testimony as to the people who had guns and who didn't have guns.

* * *

There is accountability here by the defendants as to what occurred. They were in a group. They were the mob. They were the group that surrounded the car. They began the loud discussion, the request, or demand that [Ms. Jordan] get out of the car, who did not want to get out of the car. ***

* * *

> Mr. Clark was on the driver's side armed with a weapon [and] tried to reach into the car to either open the door or pull *** Mr. Williams out of the car. Mr. Williams didn't want to have any part of that and he fled.
>
> * * *
>
> [Ms. Jordan] said Mr. Clark had a weapon, and therefore I believe he was found guilty beyond a reasonable doubt of the charges."

¶ 33 The circuit court sentenced Mr. Clark to seven-year terms of incarceration for each of the two UUWF convictions and a two-year term for the mob action conviction, noting that the sentences would run concurrently and be served at 50%. The court denied Mr. Clark's motion to reconsider his sentence.

¶ 34 JURISDICTION

¶ 35 Mr. Clark timely filed his notice of appeal in this matter on November 24, 2014, the same day that he was sentenced. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 36 ANALYSIS

¶ 37 I. Unlawful Use of a Weapon by a Felon

¶ 38 To sustain a conviction of a criminal offense, due process requires the State to prove every element of an alleged offense beyond a reasonable doubt. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008). When a criminal defendant challenges the sufficiency of the evidence that resulted in a conviction, the function of the reviewing court is not to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, the reviewing court must "carefully examine the evidence

while giving due consideration to the fact that the [trier of fact] saw and heard the witnesses." *People v. Smith,* 185 Ill. 2d 532, 541 (1999). The relevant question is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). It is within the province of the trier of fact to weigh the credibility of the witnesses and to resolve any conflicts and inconsistencies in the evidence. *People v. Schott,* 145 Ill. 2d 188, 206 (1991). A conviction will not be reversed by a reviewing court "unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *People v. Evans,* 209 Ill. 2d 194, 209 (2006).

¶ 39 Mr. Clark's two UUWF convictions were pursuant to section 24-1.1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.1(a) (West 2012)), for which the State must prove that he (1) knowingly possessed a firearm or firearm ammunition, and (2) was previously convicted of a felony (*People v. Sams,* 2013 IL App (1st) 121431, ¶ 10). Although Mr. Clark contests whether his prior felony conviction was a "forcible felony," an issue we address later in this order, he does not dispute the fact that his prior felony conviction was sufficient to satisfy the second element of the UUWF statute. Rather, Mr. Clark argues specifically that the State failed to prove the element of possession with respect to each conviction. He argues that the UUWF conviction based on his possession of a firearm was not proved beyond a reasonable doubt because it was based solely on the testimony of Ms. Jordan that she saw Mr. Clark with a gun, and this testimony was undermined by inconsistencies, a lack of detail, and the absence of any physical evidence or corroborating testimony by any other eyewitness. Mr. Clark also argues that the State produced no evidence to sustain his UUWF conviction based on his possession of firearm

ammunition. We address these arguments in turn.

¶ 40 A. Possession of a Firearm

¶ 41 The circuit court's finding that Mr. Clark possessed a firearm was supported by Ms. Jordan's testimony that she saw Mr. Clark holding a firearm when he was standing next to the SUV. Ms. Jordan already knew who Mr. Clark was, and she was sitting on a few feet away in the front passenger seat of the SUV when she saw Mr. Clark at the driver's side window. Her testimony that she saw Mr. Clark, while it was not corroborated by other witnesses, was also not contradicted by any other witness. The circuit court was in the best position to assess Ms. Jordan's credibility and its finding, based on her testimony, that Mr. Clark possessed a firearm is not "so unreasonable, improbable or unsatisfactory" that it raises a reasonable doubt of Mr. Clark's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 42 The testimony of a single witness is sufficient to establish guilt beyond a reasonable doubt, so long as the testimony is positive and the witness credible. *Smith*, 185 Ill. 2d at 541. Indeed, it is the general rule that, "[w]here the testimony of a witness is neither contradicted, either by positive testimony or by circumstances, nor inherently improbable, and the witness has not been impeached, that testimony cannot be disregarded." *People ex rel. Brown v. Baker*, 88 Ill. 2d 81, 85 (1981).

¶ 43 The fact that no other witnesses testified that Mr. Clark had a gun does not make Ms. Jordan's testimony unbelievable. First, Ms. Jordan stated that she saw Mr. Clark holding a gun when he was at the SUV around the time that the gunshots were fired, and she was one of only two witnesses who testified that they were present at the SUV when this happened—the other witnesses were across the street or even further away. The other person at the SUV who testified was Mr. Williams. Mr. Williams testified that he saw a gun but did not know who was holding it.

There is no reason to assume that this evidence is inconsistent with Ms. Jordan's testimony. This could have been the same gun that Ms. Jordan testified Mr. Clark had or it could have been that Mr. Williams did not observe all of the guns. As Mr. Clark recognizes, "[Mr.] Williams also [described] a chaotic scene: people were yelling and [Mr. Williams] could not see what everyone was doing." It is well established that, "where the evidence presented is capable of producing conflicting inferences, the matter is best left to the trier of fact for proper resolution." *People v. Campbell*, 146 Ill. 2d 363, 380 (1992).

¶ 44 Nor do we find that the inconsistencies in Ms. Jordan's testimony itself render it incredible. Mr. Clark accurately notes that Ms. Jordan was inconsistent in her description of precisely when she first saw Mr. Clark—or anyone else—with a gun. However, these inconsistencies are specific to the timing of when she saw Mr. Clark with a gun, before or after she heard the sound of the driver's side window breaking during what was described as a quickly-escalating and chaotic confrontation. This is a relatively minor discrepancy. For purposes of Mr. Clark's UUWF conviction based on possession of a firearm, the relevant question was whether Mr. Clark possessed a gun at any point during the encounter. The court found Ms. Jordan to be a credible witness and relied on her testimony in making its ruling, and we find it was reasonable for the court to have done so.

¶ 45 Mr. Clark further argues that the State did not sufficiently prove that the object Ms. Jordan testified she saw in Mr. Clark's hand was a gun and not something else like a BB gun. Mr. Clark contends that Ms. Jordan did not describe the gun or provide any basis for her claim that it was a gun, and her testimony showed that she was inexperienced with guns. Mr. Clark points out further that the weapon he was convicted of unlawfully possessing was never recovered, he tested negative for gunshot residue, and there is no evidence that he threatened to

shoot anyone—circumstantial evidence that he possessed the means to do so.

¶ 46 As Mr. Clark acknowledges, the failure to recover the weapon does not preclude a UUWF conviction, nor do the elements of the crime include firing or threatening someone with the weapon. See 720 ILCS 5/24-1.1(a) (West 2012). We also do not believe that Ms. Jordan's relative personal inexperience with guns—specifically that she did not know the smell of gunpowder or the difference between a semi-automatic gun and a revolver—rendered her unable to recognize a gun when she saw one in the hand of someone several feet away from her. We further note that, although it is true that Ms. Jordan did not describe the gun that she saw Mr. Clark holding, she was never asked to do so during direct or cross examination.

¶ 47 Mr. Clark's reliance on *People v. Ross*, 229 Ill. 2d 255 (2008), is misplaced. Our supreme court was asked in that case to consider whether the State had proffered sufficient evidence to prove that the defendant was holding a "dangerous weapon" to sustain a conviction for armed robbery under a previous version of the armed robbery statute. *Id.* at 272 (citing 720 ILCS 5/18-1, 18-2(a) (West 2004)). In *Ross*, the victim described the gun wielded by the defendant as " 'a black, very portable gun' " which was " 'small' and 'something you can conceal.' " *Id.* at 258. At trial, the gun the defendant used during the robbery was revealed to be a BB gun with a three-inch barrel. *Id.* Our supreme court affirmed the appellate court's conclusion that the evidence was insufficient to prove that the gun was a dangerous weapon, noting that the trial court "incorrectly based its ruling on the subjective feelings of the victim, rather than the objective nature of the gun." *Id.* at 277. As our supreme court noted in *People v. Washington*, 2012 IL 107993, when it distinguished *Ross*, "given [the victim's] unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a real gun." *Id.* ¶ 36.

¶ 48 B. Possession of Firearm Ammunition

¶ 49 The circuit court also found Mr. Clark guilty of UUWF based on the possession of firearm ammunition. The court issued this ruling without any explanation of how it reached this determination. The State asserts that, based on Mr. Clark approaching the SUV with the other men "looking for information regarding a recent shooting death" and because he was seen holding a gun, the court was able to "reasonably infer that [Mr. Clark's] gun was loaded with ammunition." The State, however, fails to explain why this inference was reasonable, nor has the State provided us with any basis the court could have used to find Mr. Clark possessed firearm ammunition other than the fact that he was seen holding a gun.

¶ 50 Mr. Clark's conviction depended on the inference that he would not have approached the SUV and brandished an unloaded gun. There is no other evidence in the record that supports the finding that Mr. Clark possessed firearm ammunition. No ammunition recovered in this case was ever attributed to Mr. Clark; no witness testified seeing Mr. Clark possessing any ammunition, firing his weapon, or doing anything that would have suggested that his weapon was loaded; the gunshot residue test indicated that Mr. Clark did not discharge any firearm that day; and the court found in its ruling that "there [was] no evidence that [Mr. Clark] fired any weapon."

¶ 51 Our supreme court has interpreted the UUWF statute to "authorize[ ] separate convictions for the simultaneous possession of a firearm and ammunition in a single loaded firearm" because the plain language of the statute "unambiguously treats each possession as a separat[e] violation." *People v. Almond*, 2015 IL 113817, ¶ 43. In order to sustain two convictions in this manner, however, the State must present sufficient evidence to support the finding of each of the two possessions. Here, there is evidence of the first violation—that Mr. Clark possessed a firearm—but without even a scintilla of any additional evidence, there is no basis for the finding

that the firearm also contained ammunition. As this court has noted, "[a] reasonable inference may support a criminal conviction. However, there is a line between reasonable inference and mere speculation." *People v. Sanchez*, 2013 IL App (2d) 120445, ¶ 28. Here, although we could speculate that the firearm Mr. Clark was holding was loaded, "this speculation cannot rise to the level of an inference from the actual evidence presented at trial" (*id.* ¶ 30).

¶ 52 II. Mob Action

¶ 53 To sustain a conviction for mob action pursuant to section 25-1(a)(1) of the Code (720 ILCS 5/25-1(a)(1) (West 2008)), the State must prove that the defendant "and at least one other person, acted together, without legal authority, with the use of force or violence to disturb the peace." *People v. Jimerson*, 404 Ill. App. 3d 621, 636 (2010). The indictment in this case provided additional detail beyond a recitation of the elements of the crime. It specified that the three defendants:

> "engaged in the knowing use of force, disturbing the public peace, by two or more persons acting together and without authority of law, *to wit: they shot Devonte Co[l]e about the body*." (Emphasis added.)

In its ruling, however, the circuit court stated that Mr. Clark "engaged in the conduct of the mob action when [he and the other men] went over to the car and he was viewed with a gun." The court also stated that, in finding Mr. Clark not guilty of aggravated battery for the shooting of Mr. Cole, the court "believe[d] there was sufficient evidence in this case when [Mr. Clark] ran up to Savaan Wilson and pulled him away from [Ms. Jordan], that there may have been a withdrawal on his part from this activity."

¶ 54 Mr. Clark argues that the State failed to prove beyond a reasonable doubt that he engaged in mob action according to his charging instrument, which specified that the use of force that

disturbed the peace was the shooting of Mr. Cole. Rather, the court found him guilty of mob action based on walking to the SUV with a gun, which was not the crime he was charged with committing. Mr. Clark asserts that the court's finding that he withdrew from "this activity" when he pulled Mr. Wilson away from Ms. Jordan—an action the court concluded required an acquittal on the charge of aggravated battery—also required his acquittal for the mob action charge because it rested on Mr. Clark's accountability for the same action.

¶ 55 Mr. Clark primarily fashions this as a "sufficiency of the evidence" argument. However, Mr. Clark does not argue that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt based on the evidence presented by the State. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). The real issue he raises is whether there was a variance between the facts alleged in the indictment and the facts proved at trial that requires reversal.

¶ 56 A defendant's due process right to notice of the charges brought against him prevents him from being "convicted of an offense he has not been charged with committing." *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). "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). An indictment must state the name of the accused; set forth the name, date, and place of the offense; cite the statutory provision the defendant allegedly violated; and set forth in the statutory language the nature and elements of the charged offense. *Collins*, 214 Ill. 2d at 219. "Where an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage." *Id.*

¶ 57 In *People v. Simpkins*, 48 Ill. 2d 106 (1971), our supreme court considered a similar issue in regards to a mob action prosecution. The defendants in *Simpkins* were charged with mob

action for each having "use[d] force in such a manner as to disturb the peace by firing a revolver." *Id.* at 107. However, after the evidence at trial "established only that a shot was fired," the State sought to convict the defendants for "disturbing the peace by participating in a gang fight." (Internal quotation marks omitted.) *Id.* at 110. The defendants argued that the variance between the indictment and the evidence presented at trial was "prejudicial because it misled the defendants in making their defenses" in that "[i]n responding to the charged transaction of disturbing the peace by firing a revolver, [the defendants] took the stand to prove that neither they nor any of their companions had fired a weapon, only to find that *** they [were] charged with gang fighting, based solely on their own testimony." (Internal quotation marks omitted.) *Id.*

¶ 58 The *Simpkins* court found the defendants' argument unavailing. First, our supreme court noted that the defendants "[did] not suggest that any of their testimony was inaccurate" because of the indictment, or that they "omitted to put before the court any facts bearing upon their guilt or innocence." *Id.* at 110-11. The court then found that:

> "[E]ach complaint stated the name of the accused, the name, date and place of the offense, cited the statutory provision alleged to have been violated and set forth in the language of the statute the nature and elements of the offense charged. The additional phrase was unnecessary and could be disregarded as surplusage without affecting the validity of the complaints. [Citations.] The particular means by which each defendant participated in the creation of the disturbance was not critical, and the fact that none of the individual defendants had fired a revolver was immaterial." *Id.* at 111.

¶ 59 In this case, the circuit court found that Mr. Clark participated in the public disturbance by approaching the SUV with the group of men while he was armed with a gun. As Mr. Clark acknowledges, "[t]he evidence the State produced against [him] was that he was part of a group

that walked up to [Mr.] Williams' SUV, got his arm stuck in the driver side window and may or may not have banged a gun against the window." Mob action does not require the infliction of injury, and the allegation of infliction of injury in the mob action charge, *i.e.*, that Mr. Cole was shot, was surplusage. The additional phrase could be disregarded without affecting the validity of the indictment. Mr. Clark makes no argument that he was prejudiced because the testimony presented at trial was inaccurate, that the variance led him to omit or fail to place any relevant facts into evidence, or that it exposed him to double jeopardy.

¶ 60 Although he does not discuss *Simpkins*, Mr. Clark cites *People v. Daniels*, 75 Ill. App. 3d 35 (1979), to suggest a different outcome is warranted. In *Daniels*, the defendant's conviction for armed robbery was reversed where the charging instrument was based on him taking "an amount of United States Currency" from the victim, but the evidence at trial focused on the taking of a watch and "the taking of currency was not proved or even mentioned at trial." *Id.* at 40. However, the reviewing court also found that the evidence was insufficient to prove even that the defendant took the victim's watch. *Id.* at 40-41. Thus, *Daniels* is quite different from the present case where the evidence presented at trial was sufficient to prove the essential elements of mob action against Mr. Clark.

¶ 61 III. Forcible Felony Enhancement

¶ 62 A UUWF violation is generally a Class 3 felony punishable by imprisonment for 2 to 10 years. 720 ILCS 5/24-1.1(e) (West 2012). However, if the defendant has been previously convicted of a "forcible felony" or certain other specified crimes, a UUWF violation is a Class 2 felony punishable by imprisonment for 3 to 14 years. *Id.* Mr. Clark contends that, should this court not reverse either of his UUWF convictions on sufficiency of the evidence grounds, we should reduce that UUWF conviction from a Class 2 felony to a Class 3 felony and remand his

case for resentencing because his prior conviction for aggravated battery of a school employee was not a forcible felony, as required to enhance the offense to a Class 2 felony. We agree.

¶ 63 Mr. Clark acknowledges that he failed to properly preserve this issue for review because he did not object at sentencing and raised the issue for the first time in his motion to reconsider sentence. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.)). He argues that we should nonetheless reach the merits of this claim under plain-error review.

¶ 64 The plain-error doctrine allows a reviewing court to consider unpreserved claims of error under specific circumstances. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). As this court recently recognized, if the circuit court erroneously enhanced Mr. Clark's UUWF conviction because the underlying conviction was not a forcible felony, this is plain error because it affected his fundamental right to liberty. *People v. Smith*, 2016 IL App (1st) 140496, ¶ 15. We agree with Mr. Clark that there was no basis in the record for finding that he had previously been convicted of a "forcible felony."

¶ 65 "Forcible felony" is defined under the Code as:

> "[T]reason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2012).

¶ 66 The prior conviction used as the basis for Mr. Clark's enhancement was for aggravated

battery of a school employee pursuant to section 12-4(b)(3) of the Code (720 ILCS 5/12-4(b)(3) (West 2006)) which occurs when the defendant commits a battery and "[k]nows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes ***." A person commits battery by "knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (West 2012).

¶ 67 Mr. Clark argues that the inclusion in the definition of "forcible felony" of a residual category for "any other felony which involves the use or threat of physical force or violence against any individual" does not include aggravated battery because the definition specifies that aggravated battery is included only where it results "in great bodily harm or permanent disability or disfigurement." Mr. Clark points out that the State has made no such showing in this case that his conviction for aggravated battery resulted in great bodily harm or permanent disability or disfigurement. In response, the State argues that Mr. Clark's conviction for aggravated battery does fall into the residual part of the definition of forcible felony and therefore qualifies as a forcible felony regardless of whether it caused great bodily harm or permanent disability or disfigurement. The State also argues that, because the certified copy of Mr. Clark's prior conviction is not a part of the record on appeal, Mr. Clark has failed to carry his burden as the appellant on this issue. We reject both of these arguments by the State.

¶ 68 This court recently, in *People v. Smith*, 2016 IL App (1st) 140496, a case involving a defendant's prior conviction for aggravated battery to a peace officer, agreed with Mr. Clark that this residual category within the definition of forcible felony does not encompass an aggravated battery. Thus, under *Smith*, an aggravated battery is not a "forcible felony" unless it resulted in

great bodily harm or permanent disability or disfigurement. *Id.* ¶ 11. We think *Smith* is well reasoned and we follow it here.

¶ 69 As the *Smith* court recognized, there is a split among Illinois appellate courts as to whether an aggravated battery may constitute a forcible felony under the residual clause of section 2-8 of the Code. *Id.* ¶ 8. The *Smith* court first examined *People v. Jones*, 226 Ill. App. 3d 1054 (1992), and *People v. Hall*, 291 Ill. App. 3d 411 (1997), both of which were cited by the State in the present case and suggest a more expansive reading of the forcible felony definition as it pertains to aggravated battery to include any aggravated battery that involved physical force or violence. *Smith*, 2016 IL App (1st) 140496, ¶ 9. The *Smith* court then turned to a more recent case, *People v. Schmidt*, 392 Ill. App. 3d 689, 695 (2009), in which the court found that the legislature intended the residual category of the forcible felony statute to refer only to felonies not specifically included in the list of felonies contained within that section. *Smith*, 2016 IL App (1st) 140496, ¶ 10. As explained in *Schmidt*:

> "[B]y using the word 'other' after listing 14 specific felonies, the legislature clearly intended the residual category to refer to felonies not previously specified. Where the statute specifically enumerated aggravated battery resulting in great bodily harm or permanent disability or disfigurement, 'other felony' must refer to felonies other than aggravated battery. While the State argues that section 2-8 defines 'forcible felony' as '*any* felony involving the threat or use of physical force or violence against any individual,' this argument ignores the phrase 'any *other* felony.' " (Emphasis in original.) *Schmidt*, 392 Ill. App. 3d at 695-96.

The *Schmidt* court further noted that the 1990 amendment to the forcible felony definition, "which added the phrase 'resulting in great bodily harm or permanent disability or

disfigurement' after 'aggravated battery,' " was an expression of the legislature's "intent to limit the number and types of aggravated batteries that would qualify as forcible felonies." *Id.* at 696 (citing Pub. Act. 86-291, § 1 (eff. Jan. 1, 1990)).

¶ 70 The *Smith* court found the reasoning in *Schmidt* persuasive and we agree. *Smith*, 2016 IL App (1st) 140496, ¶ 11; see also *In re Rodney S.*, 402 Ill. App. 3d 272 (2010) (recognizing the split in the appellate court on this issue and adopting the analysis in *Schmidt*); *In re Angelique E.*, 389 Ill. App. 3d 430, 433 (2009) (holding that the definition of forcible felony "excludes an aggravated battery that involves only bodily harm, not great bodily harm").

¶ 71 The State concedes that "there is no information in the record regarding the facts surrounding [Mr. Clark's] prior felony conviction for aggravated battery of a school employee." Thus, there is no dispute that the State failed to present any evidence that this aggravated assault of a school employee resulted in great bodily harm or permanent disability or disfigurement. Nonetheless, the State argues that, because the certified copy of the prior aggravated battery conviction is not in the record, Mr. Clark failed to provide this court with an adequate record on this issue and his Class 2 felony conviction should stand.

¶ 72 Although it is true that "an appellant has the burden of presenting the court with an adequate record regarding a claimed error, and *any doubts* arising from an inadequate record will be resolved against him" ((emphasis added) *People v. Urdiales*, 225 Ill. 2d 354, 419 (2007)), our review of the record does not leave us with any doubts in need of resolution. The State's argument is premised on the implication that the certified copy of conviction presented at trial *may have* contained evidence that the underlying aggravated assault resulted in great bodily harm or permanent disability or disfigurement, but the State never actually makes that assertion and indeed concedes that there is no evidence in the record regarding the facts of the prior

conviction. The State also does not dispute that the certified copy of conviction for an aggravated assault on a school employee that Mr. Clark attached to his brief on appeal, which is devoid of facts of the underlying crime, was the same certified copy of a conviction that the State offered into evidence against him. As Mr. Clark points out, the other defendants in his case have taken separate appeals and some of the trial exhibits, including this one, ended up in one of their appellate records instead of his. While we could take judicial notice of that record, there is no need to do so. It was the State's burden to establish that Mr. Clark's prior conviction qualified as a forcible felony for enhancement purposes, and the State acknowledges that it did not do so. We vacate Mr. Clark's sentence on his conviction for UUWF for possession of a firearm and remand for resentencing as a Class 3 felony. In light of this ruling, we need not address Mr. Clark's alternative argument that the failure of trial counsel to preserve this issue by objecting at sentencing constituted ineffective assistance.

¶ 73 IV. Correction of Mittimus

¶ 74 Mr. Clark's final argument pertains to correcting the mittimus—which currently lists two UUWF convictions for possession of a firearm—to accurately reflect that he was convicted on one count of UUWF for possession of a firearm and one count of UUWF for possession of firearm ammunition. The State notes that count 4 at trial specifically charged Mr. Clark with possessing firearm ammunition and does not object to modifying the mittimus to show his conviction under that count was for possessing firearm ammunition rather than for a second conviction for possessing a firearm. We agree that such a change would be necessary to accurately reflect Mr. Clark's convictions. However, in light of our ruling that there was insufficient evidence to sustain his conviction for UUWF for possession of firearm ammunition, there is no need to remand for the purpose of correcting the mittimus.

¶ 75 CONCLUSION

¶ 76 In sum, we affirm Mr. Clark's convictions for UUWF based on possession of a firearm and for mob action, and reverse Mr. Clark's conviction for UUWF based on possession of firearm ammunition. We also reduce Mr. Clark's conviction for UUWF based on possession of a firearm from a Class 2 felony to a Class 3 felony, vacate the sentence imposed, and remand the cause for resentencing on that conviction.

¶ 77 Affirmed as modified; vacated in part; reversed in part; remanded with directions.