NOS. 4-09-0851, 4-09-0856 cons.

Order Filed 4/14/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-09-0851) MARK A. MOTTON, Defendant-Appellant.	)	Appeal from Circuit Court of Champaign County No. 05CF1814
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-09-0856) WILLIAM E. MOTTON, Defendant-Appellant.	)	No. 05CF1815 Honorable Harry E. Clem, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice McCullough concurred in the judgment.

ORDER

Held: (1) In case No. 4-09-0851, where defendant failed to establish plain error or ineffective assistance of counsel, the issue was forfeited;

(2) Where the State failed to prove defendant was "otherwise armed" with a dangerous weapon, defendant's convictions for armed violence must be vacated; and

(3) Where defendant's conviction for unlawful possession with intent to deliver heroin was not based on the same act as his conviction for calculated criminal drug conspiracy, the former conviction need not be vacated.

Held: (1) In case No. 4-09-0856, where defendant failed to establish plain error or ineffective assistance of counsel, the issue was forfeited; and

(2) Where defendant's convictions for unlawful delivery of heroin and unlawful posses-

sion with intent to deliver were not based on acts included within his conviction for unlawful criminal drug conspiracy, those convictions need not be vacated.

In January 2009, a jury found defendant, Mark A. Motton, guilty of two counts of armed violence and single counts of unlawful possession of a weapon by a felon, calculated criminal drug conspiracy, unlawful possession with intent to deliver a controlled substance, and unlawful possession of a controlled substance. The jury also found defendant, William E. Motton, guilty of unlawful delivery of a controlled substance, unlawful possession with intent to deliver a controlled substance, and criminal drug conspiracy. In October 2009, the trial court sentenced both defendants to prison.

On appeal in case No. 4-09-0851, Mark argues (1) he was denied his right to a fair trial and the effective assistance of counsel, (2) his convictions for armed violence must be vacated, and (3) his convictions for unlawful possession with intent to deliver heroin and unlawful possession of methadone must be vacated under the one-act, one-crime rule. We affirm in part, vacate in part, and remand with directions.

On appeal in case No. 4-09-0856, William argues (1) he was denied his right to a fair trial and the effective assistance of counsel and (2) his convictions for unlawful delivery of heroin and unlawful possession with intent to deliver must be vacated under the one-act, one-crime rule. We affirm.

I. BACKGROUND

In September 2005, the State charged Mark Motton in case No. 05-CF-1814 with the offense of unlawful calculated criminal drug conspiracy (count I) (720 ILCS 570/405(a) (West 2004)), alleging he conspired with Paul Dozier, Ricky Exum, and William Motton to deliver heroin and received more than $500 from the conspiracy.

In March 2007, the State charged Mark with seven additional counts, including unlawful calculated criminal drug conspiracy (count II) (720 ILCS 570/405(b) (West 2004)), unlawful criminal drug conspiracy (count III) (720 ILCS 570/405.1(a) (West 2004)), armed violence (counts IV and V) (720 ILCS 5/33A-2(a) (West 2004)), unlawful possession of a weapon by a felon (count VI) (720 ILCS 5/24-1.1(a) (West 2004)), unlawful possession with intent to deliver a controlled substance (heroin) (count VII) (720 ILCS 570/401(d) (West 2004)), and unlawful possession with intent to deliver a controlled substance (methadone) (count VIII) (720 ILCS 570/401(e) (West 2004)).

Also in September 2005, the State charged William Motton in case No. 05-CF-1815 with the offense of unlawful calculated criminal drug conspiracy (count I) (720 ILCS 570/405(b) (West 2004)). In March 2007, the State charged William with unlawful criminal drug conspiracy (count II) (720 ILCS 570/405.1(a) (West 2004)), unlawful delivery of a controlled

substance (count III) (720 ILCS 570/401(d) (West 2004)), and unlawful possession with intent to deliver a controlled substance (count IV) (720 ILCS 570/401(d) (West 2004)).

In January 2009, defendants' joint jury trial commenced. The State moved to dismiss count I against both defendants, which the trial court allowed.

Champaign police officer Jack Turner testified he was assigned to the narcotics unit, which uses confidential sources to conduct controlled drug buys. In November 2004, Jerry Thomas, a confidential source, notified the narcotics unit he had been purchasing heroin from Ricky Exum. Officer Turner conducted a controlled drug buy between Thomas and Exum on November 1, 2004. Thomas agreed to purchase three bags of heroin for $60, and the transaction took place in the parking lot of the American Legion. Thomas later turned over three bags of a brown powdery substance (exhibit No. 1) that field-tested positive for heroin.

On February 18, 2005, the narcotics unit utilized Thomas to conduct a second buy from Exum. The buy resulted in three bags of a substance that field-tested positive for heroin (exhibit No. 2). A third controlled drug buy was conducted between Thomas and Exum on April 20, 2005, which resulted in the purchase of three individual bags containing a substance that field-tested positive for heroin (exhibit No. 3).

On April 27, 2005, Turner conducted a fourth controlled

buy with Jerry Thomas. The man who met with Thomas was later identified as William Motton. Thomas turned over three plastic bags that field-tested positive for heroin (exhibit No. 4).

Officer Turner testified he used a second confidential source, Leslie Bauchamp, to conduct a controlled drug buy on September 12, 2005. Bauchamp indicated she called a particular telephone number to purchase heroin, and Turner recognized the number as the one used by Thomas in the previous four drug buys. Bauchamp met with Exum and purchased three plastic bags, the contents of which field-tested positive for heroin (exhibit No. 6). On September 22, 2005, Bauchamp met with Exum and purchased three plastic bags containing heroin (exhibit No. 8). On September 23, 2005, Bauchamp met with Exum and purchased three plastic bags of suspected heroin (exhibit No. 9).

On September 26, 2005, Bauchamp participated in two separate controlled drug buys. On the first buy, she met with Exum and purchased six plastic bags of suspected heroin (exhibit No. 10). Later in the day, Bauchamp met with Exum and again purchased six bags of suspected heroin (exhibit No. 11). On this second buy, Officer Turner recorded the serial numbers on the money provided to Bauchamp. Those bills were recovered on September 27, 2005, during the execution of two search warrants.

Officer Turner testified he participated in the execution of a search warrant at 111 East Church. Turner encountered

Mark Motton inside the residence. Mark told the officers he had a small bag of heroin in his pocket. He also told them they would find a pistol in an upstairs closet. Turner stated the money from Bauchamp's second drug buy on September 26, 2005, was found on the headboard in Mark's bedroom.

Officer Turner explained to Mark Motton that officers were also executing a search warrant at 801 West Hill as a result of their investigation regarding Exum's heroin sales. Mark stated he himself used approximately one-half gram of heroin per day. He also stated he traveled to Chicago "about once a week" to purchase heroin for sale in Champaign. Mark told Officer Turner that he would go to 801 West Hill to package the heroin for redistribution with the assistance of William Motton and Exum. The latter two also assisted in the sale of the heroin. During the packaging, Mark indicated they would mix the heroin with a product called Dormin.

On cross-examination, Officer Turner testified Mark Motton told him during the search that the gun in the upstairs closet belonged to his wife. Turner also stated William Motton was arrested at 801 West Hill as the police were inside searching. William did not appear to have a key to 801 West Hill.

Champaign police officer Matt Henson testified he conducted a controlled drug buy with Leslie Bauchamp on September 21, 2005. She met with Exum and returned with three bags of

suspected heroin (exhibit No. 7). Henson stated Bauchamp is now deceased.

Champaign police detective Mark Vogelzang testified he assisted in the collection of evidence at 111 East Church. He stated a plastic bag of heroin weighing 1.1 grams (exhibit No. 25) was recovered from Mark Motton's shorts. A 9mm handgun (exhibit No. 26) was recovered from the closet of Mark's bedroom. Although the gun was unloaded, it was found in a box with two loaded magazines. Exhibit No. 29 consisted of $315 in United States currency that was recovered from Mark's bed stand. An additional $90 (exhibit No. 13) was identified as funds advanced for narcotics transactions. Vogelzang stated exhibit No. 30 consisted of a plastic bottle containing suspected methadone that was found in the basement stairway of Mark's house.

Champaign police officer Jason Yandell testified he assisted in the controlled drug buy on April 27, 2005. The confidential informant met with a black male, later identified as William Motton. On September 12, 22, and 26, 2005, the informant met with Exum, who was driving a black Chevy pickup truck. The truck was registered to Mark Motton. After the buys, Yandell followed Exum and noticed he went to an apartment at 801 West Hill and a house at 111 East Church.

On September 27, 2005, Officer Yandell participated in the execution of the search warrant at 801 West Hill. Yandell

interviewed Paul Dozier, who was inside the apartment. Yandell stated Dozier had delivered heroin to a confidential informant the day before. Officers recovered a plastic bag containing suspected heroin (exhibit No. 14). A digital scale was also recovered in the same room as empty bottles of a cutting agent.

During the search, Officer Yandell stated William Motton came to the door. He was taken into custody. A search of his person revealed two cell phones, one of which matched the number used by the confidential informants to arrange drug buys. William also had a set of keys to the black truck used by Exum in several of the drug transactions.

Officer Yandell interviewed William Motton, who stated Mark supplied heroin to William and Exum to sell. William stated his brother would give him 10 bags of heroin per day, William would bring the bags to 801 West Hill, and then he or Exum would distribute it. William indicated he received free heroin in exchange for selling it.

Champaign police sergeant Brian Gallagher testified he assisted in the service of the search warrant at 111 East Church. In Mark Motton's bedroom, Gallagher located $405 in cash on the headboard of the bed. He also observed a handgun in the closet.

Kristen Stiefvater, a forensic scientist with the Illinois State Police (ISP), testified the three plastic bags in exhibit No. 1 contained 0.2 grams of a tan powder containing

heroin. John Martin, an ISP forensic scientist, testified the powder in exhibit No. 2 weighed 0.2 grams and contained heroin. Michael Cravens, an ISP forensic scientist, testified exhibit Nos. 3, 4, 6, 7, 8, 9, 10, 11, 14, and 25 all contained heroin. Exhibit No. 14 also contained a blue capsule that contained diphenhydramine, which could have been Dormin or Sleepinol. Exhibit No. 30 was a liquid containing methadone.

Jerry Thomas testified he served as a confidential source in the fall of 2004. He had prior convictions for manufacture and delivery of a controlled substance, felony theft, misdemeanor theft, and burglary. Exum had supplied heroin to Thomas, and Thomas would call him to arrange a buy. On April 27, 2005, Thomas met a man named Willie, who was related to Mo. He identified William Motton as Willie and Mark Motton as Mo. Thomas gave William $60 in exchange for the heroin.

After the close of the State's case, both defendants exercised their constitutional right not to testify. Counsel for Mark made a motion for a directed finding on the charges of unlawful possession of a weapon by a felon and armed violence. Counsel argued Mark never had direct access to the gun when it was unloaded and on another floor of the residence. Counsel for William made a motion for a directed finding on the charge of unlawful possession with intent to deliver a controlled substance. The trial court denied the motions.

Pursuant to Mark's counsel's request, the jury was instructed on the lesser-included offenses of unlawful possession of heroin and unlawful possession of methadone. Following closing arguments, the jury found William guilty of unlawful delivery of a controlled substance, unlawful possession with intent to deliver a controlled substance, and criminal drug conspiracy. The jury also found Mark guilty of armed violence (methadone), armed violence (heroin), unlawful possession of a weapon by a felon, calculated criminal drug conspiracy, possession with intent to deliver a controlled substance (heroin), and possession of a controlled substance (methadone).

In February and April 2009, Mark filed motions for a new trial. In October 2009, the trial court denied the motions. Thereafter, the court sentenced Mark to 20 years in prison for unlawful calculated criminal drug conspiracy, 20 years for armed violence (heroin), 15 years for armed violence (methadone), 15 years for possession with intent to deliver heroin, 10 years for unlawful possession of a weapon by a felon, and 5 years for unlawful possession of a controlled substance (methadone). The court ordered all sentences to be served concurrently.

The trial court sentenced William to 20 years for unlawful criminal drug conspiracy, 15 years for unlawful delivery of a controlled substance, and 15 years for unlawful possession with intent to deliver a controlled substance. The court ordered

all sentences to be served concurrently.

In November 2009, William filed a motion to reduce sentence, which the trial court denied. Defendants appealed, and this court consolidated both cases.

II. ANALYSIS

A. Mark Motton (No. 4-09-0851)

1. *Brother William's Confession*

Mark Motton argues he was denied his rights to confront and cross-examine and to a fair trial when the jury was allowed to hear the confession of his brother William, a nontestifying codefendant, without a limiting instruction. The State argued defense counsel did not object to the suspect testimony and did not raise the issue in a posttrial motion. Thus, the State contends defendant has forfeited the issue. Mark counters that even if the issue has been forfeited, this court should review it under the plain-error doctrine.

To preserve a claim of error for review, defense counsel must object at trial and raise the issue in a posttrial motion. *People v. McLaurin*, 235 Ill. 2d 478, 485, 922 N.E.2d 344, 349 (2009). The plain-error doctrine allows a court to disregard a defendant's forfeiture and address the merits of the alleged error in two situations. *People v. Owens*, 394 Ill. App. 3d 147, 152, 914 N.E.2d 1280, 1285 (2009).

"'(1) [A] clear and obvious error occurs and

> the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.'" *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009), quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). As the first step in the analysis, we must determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

In the case *sub judice*, police officers executed search warrants at Mark's residence, 111 East Church, as well as 801 West Hill. Officer Turner spoke with Mark, who told him there was a small bag of heroin in his pocket and a pistol in an upstairs closet. Mark also told Officer Turner he was using

approximately one-half gram of heroin per day, he traveled to Chicago once a week to purchase heroin to resell in Champaign, and he would go to 801 West Hill to package the heroin for redistribution. Mark stated William Motton and Ricky Exum assisted in the packaging and the sales.

Mark complains of the testimony given by Officer Yandell, who interviewed William. In discussing the hierarchy of the operation, William indicated Mark supplied the heroin and William and Exum sold it for him. William also stated he would receive 10 bags of heroin from Mark, and William would bring them to 801 West Hill and distribute them to Exum for delivery.

In his argument on the first prong of the plain-error analysis, Mark argues the State presented no evidence, other than William's statements against him, that Mark was the organizer, director, and financier of the conspiracy to distribute heroin. However, Mark neglects to mention his own statement to Officer Turner. Mark's own statement established he organized, directed, or financed the conspiracy to deliver the heroin and had sufficient influence over William and Exum to instruct them on carrying out the plan of delivery. Mark has not met his burden under the first prong.

Under the second prong, Mark argues he was deprived of his rights to confrontation and due process and the error should be reviewed for fundamental fairness. Mark relies on *Bruton v.*

United States, 391 U.S. 123, 126 (1968), which held it is impermissible to allow testimony that a nontestifying codefendant implicated the defendant in the crime. Mark also relies on *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), which prohibited the use of hearsay in an attempt to circumvent the confrontation clause.

Our supreme court has "equated the second prong of plain-error review with structural error, asserting that 'automatic reversal is only required where an error is deemed "structural," *i.e.*, a systemic error which serves to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial."' [Citations.]" *Thompson*, 238 Ill. 2d at 613-14, 939 N.E.2d at 413. "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 609, 939 N.E.2d at 410. Structural errors have been found only in a limited class of cases, including those involving "a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Thompson*, 238 Ill. 2d at 609, 939 N.E.2d at 411.

Mark does not cite any case holding *Bruton*, *Crawford*, or other confrontation-clause error amounts to structural,

systemic, or second-prong plain error. In fact, *Bruton* violations (*People v. Kubik*, 214 Ill. App. 3d 649, 659-60, 573 N.E.2d 1337, 1344 (1991)), and *Crawford* violations (*In re Rolandis G.*, 232 Ill. 2d 13, 43, 902 N.E.2d 600, 617 (2008)), have been found to be harmless. Mark has failed to establish second-prong plain error and thus cannot provide a basis for excusing his procedural default.

Mark, however, argues this court should review this issue because defense counsel's failure to object to the admission of the *Bruton* evidence and to preserve the error for review constitutes ineffective assistance of counsel.

Claims of ineffective assistance of counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004), citing *Strickland*, 466 U.S. at 687. Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would

have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953, citing *Strickland*, 466 U.S. at 694. A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000).

Here, Mark cannot establish the prejudice prong of the *Strickland* standard. Even if counsel erred in failing to object to the admission of William's statement, the result of the proceeding would not have been different. Barring admission of William's statement against Mark would not have prevented the jury from hearing Mark's own statement establishing his commission of calculated criminal drug conspiracy. As the result of the proceeding would not have been different, Mark cannot show counsel was ineffective.

2. *Armed-Violence Convictions*

Mark Motton argues his convictions for armed violence must be vacated because the State failed to prove he was "otherwise armed" with a dangerous weapon when he did not have immediate access or timely control over the handgun recovered in the upstairs closet. We agree.

"A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law," with certain exceptions. 720 ILCS 5/33A-2(a) (West 2004).

"A person is considered armed with a dangerous weapon for purposes of this Article, when he or she carries on or about his or her person or is otherwise armed" with, *e.g.*, a handgun. 720 ILCS 5/33A-1(c)(1) (West 2004).

Our supreme court has noted the purpose of the armed-violence statute "is to deter felons from using dangerous weapons, thereby minimizing the deadly consequences which may result when a felony victim resists." *People v. Smith*, 191 Ill. 2d 408, 412, 732 N.E.2d 513, 514 (2000). For the purpose of the statute to be served, "the defendant [must] have some type of *immediate access to* or *timely control over* the weapon." (Emphasis in original.) *People v. Condon*, 148 Ill. 2d 96, 110, 592 N.E.2d 951, 958 (1992).

In *Condon*, 148 Ill. 2d at 110, 592 N.E.2d at 958, the underlying felonies were delivery and possession of a controlled substance. Following a police raid, the defendant was arrested in the kitchen of the home he shared with his brother. *Condon*, 148 Ill. 2d at 100-01, 592 N.E.2d at 953. Thirteen weapons were found in various rooms of the two-story house, most of them on the second floor, and only an unloaded shotgun and rifle in a first-floor bedroom. *Condon*, 148 Ill. 2d at 101, 592 N.E.2d at 954.

The supreme court affirmed the appellate court's reversal of the defendant's armed-violence conviction, finding he

"did not have the capability to maintain control and possession of guns that were not even in the same room with him." *Condon*, 148 Ill. 2d at 112, 592 N.E.2d at 959. The court also stated, as follows:

> "The State contends that because the possession of cocaine was an ongoing felony, and the guns were in the house with the cocaine, the armed violence statute should apply. Such a finding reaches too far. Were we to find the presence of guns in the house with the cocaine enough to violate the armed violence statute, such a finding would be contrary to the purpose for which the statute was enacted. Rather, we find that defendant would have had to carry a weapon on his person or alternatively to have had 'immediate access to' or 'timely control over' a weapon when the police entered to have been 'otherwise armed' for purposes of the statute." *Condon*, 148 Ill. 2d at 110, 592 N.E.2d at 958.

In *People v. Harre*, 155 Ill. 2d 392, 393, 614 N.E.2d 1235, 1236 (1993), a jury found the defendant guilty of armed violence based on the commission of the underlying felony of

possession with intent to deliver. The defendant was apprehended by police during a drug raid as he moved toward his car, which contained a pistol and a rifle. *Harre*, 155 Ill. 2d at 395, 614 N.E.2d at 1237.

The supreme court contrasted the facts in that case with those in *Condon*, where the defendant did not have direct access to a dangerous weapon. *Harre*, 155 Ill. 2d at 400, 614 N.E.2d at 1239. The court found circumstantial evidence supported the inference that the defendant Harre "had moments before his apprehension been riding in the car on his way to a drug delivery with a weapon inches from his grasp." *Harre*, 155 Ill. 2d at 400, 614 N.E.2d at 1239. The defendant argued he could not be found guilty of armed violence because he did not reach inside the car for the weapon. *Harre*, 155 Ill. 2d at 401, 614 N.E.2d at 1240. "However, the determination of whether a defendant is armed is not made at the moment of arrest. Rather, armed violence occurs if a defendant commits a felony while having on or *about* his person a dangerous weapon or if a defendant is *otherwise* armed." (Emphasis in original.) *Harre*, 155 Ill. 2d at 401, 614 N.E.2d at 1240.

In *Smith*, 191 Ill. 2d at 410, 732 N.E.2d at 514, the defendant was found guilty of armed violence, unlawful possession of a controlled substance, unlawful possession of a weapon by a felon, and unlawful possession of cannabis. The evidence indi-

cated the defendant dropped an unloaded handgun out of an apartment window upon the approach of police. *Smith*, 191 Ill. 2d at 410, 732 N.E.2d at 513. Thereafter, police found the defendant, cocaine, and cannabis inside the apartment. *Smith*, 191 Ill. 2d at 410, 732 N.E.2d at 514.

The supreme court reversed the defendant's conviction for armed violence. *Smith*, 191 Ill. 2d at 412, 732 N.E.2d at 515. The court found he did not have immediate access to or timely control over a weapon when the police entered because he had dropped it out of the window. *Smith*, 191 Ill. 2d at 412, 732 N.E.2d at 515.

> "Permitting an armed violence conviction to stand against a felon such as defendant, who exhibited no propensity to violence and dropped the unloaded gun out of the window as the police approached his apartment to search for drugs, would not serve, but rather would frustrate, the statute's purpose of deterring criminals from involving themselves and others in potentially deadly situations."
> *Smith*, 191 Ill. 2d at 412-13, 732 N.E.2d at 515.

In her dissent, Justice McMorrow criticized the majority decision, saying it *sub silentio* overruled *Harre*. *Smith*, 191

Ill. 2d at 419, 732 N.E.2d at 518 (McMorrow, J., concurring in part and dissenting in part, joined by Miller and Freeman, JJ.). Instead, the dissent pointed out as follows:

> "As *Harre*, which postdates *Condon*, makes absolutely clear, the only question that must be answered under the armed violence statute is whether the defendant was armed at the time of the commission of the felony." *Smith*, 191 Ill. 2d at 420, 732 N.E.2d at 519 (McMorrow, J., concurring in part and dissenting in part, joined by Miller and Freeman, JJ.).

In *People v. Neylon*, 327 Ill. App. 3d 300, 762 N.E.2d 1127 (2002), this court applied the *Condon-Harre-Smith* line of cases to the facts before it. There, while in possession of a controlled substance, the defendant was arrested outside of the house and an unloaded gun was found in a closet inside the house. *Neylon*, 327 Ill. App. 3d at 308, 762 N.E.2d at 1135. The State, citing *Harre*, argued the determination of whether a defendant is armed is not made at the time of the arrest. *Neylon*, 327 Ill. App. 3d at 308, 762 N.E.2d at 1135.

This court noted the gun was not immediately accessible to the defendant, as he was arrested outside and the unloaded gun was in a closet inside the house. *Neylon*, 327 Ill. App. 3d at

309, 762 N.E.2d at 1135-36.

> "Even if there were evidence defendant had been in the house minutes before his arrest, the gun was still not immediately accessible to him unless he were standing next to the open closet door and the gun were loaded. Under the facts of this case, the precedent of *Smith* suggests the danger the armed violence statute seeks to curb was not present and the evidence was not sufficient to support a conviction for armed violence (possession of a firearm)." *Neylon*, 327 Ill. App. 3d at 309, 762 N.E.2d at 1136.

Although noting its agreement with Justice McMorrow's dissent in *Smith*, this court concluded it was bound to follow the majority opinion. *Neylon*, 327 Ill. App. 3d at 310, 762 N.E.2d at 1136.

> "[W]e are constrained to hold that if Smith, who the police saw drop his weapon out a window as they approached, is not guilty of armed violence, then a conviction of defendant in this case cannot stand. We believe the dissents in *Smith* are consistent with precedent and public policy, but we must adhere to the majority decision." *Neylon*,

327 Ill. App. 3d at 310, 762 N.E.2d at 1136.

Here, a dangerous weapon was not immediately accessible to defendant. When he was arrested on the first floor of the house, the unloaded gun was upstairs in a box in a bedroom closet. As this court stated in *Neylon*, 327 Ill. App. 3d at 309, 762 N.E.2d at 1136, "the precedent of *Smith* suggests the danger the armed violence statute seeks to curb was not present." The State argues the dissent in *Smith* is more consistent with precedent and public policy and the supreme court's narrowing of the time at which a defendant must be armed is contrary to the plain language of the armed-violence statute. Although we agree, those arguments are best made to the supreme court. As we must follow the majority opinion in *Smith*, we reverse defendant's convictions for armed violence. We remand for the issuance of an amended sentencing judgment.

3. *One-Act, One-Crime Rule*

Mark Motton argues his convictions for unlawful possession with intent to deliver heroin and unlawful possession of methadone must be vacated under the one-act, one-crime rule. The State notes Mark did not raise this issue in the trial court. Mark asks this court to consider the issue under the plain-error doctrine, and a one-act, one-crime-rule violation affects the integrity of the judicial process, thereby satisfying the second prong of the plain-error rule. *People v. Harvey*, 211 Ill. 2d

368, 389, 813 N.E.2d 181, 194 (2004). Thus, we will review the issue.

Our supreme court has noted the one-act, one-crime doctrine involves a two-step analysis:

> "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010).

Mark argues his convictions for unlawful possession with intent to deliver heroin and unlawful possession of methadone must be vacated under the one-act, one-crime rule because they formed the predicate offenses for his armed-violence convictions. But since we have vacated his armed-violence convictions, we need not disturb the convictions for unlawful possession with intent to deliver heroin and unlawful possession of methadone.

Mark also argues his conviction for unlawful possession with intent to deliver heroin must be vacated as the charge was

based on the same act as his conviction for calculated criminal drug conspiracy. Where, as here, we are analyzing whether an offense is a lesser-included offense, the supreme court has found the abstract-elements approach to be applicable.

> "Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Miller*, 238 Ill. 2d at 166, 938 N.E.2d at 502.

Section 405(b) of the Illinois Controlled Substances Act sets forth the offense of a calculated criminal drug conspiracy, and one will be found guilty when:

> "(1) he violates any of the provisions of subsection (a) or (c) of Section 401 or subsection (a) of Section 402; and
>
> (2) such violation is a part of a conspiracy undertaken or carried on with two or more other persons; and
>
> (3) he obtains anything of value greater than $500 from, or organizes, directs or

finances such violation or conspiracy." 720 ILCS 570/405(b) (West 2004).

Unlawful possession with intent to deliver heroin is codified at section 401(d) of the Illinois Controlled Substances Act. 720 ILCS 570/401(d) (West 2004). However, section 401(d) is not listed in section 405(b) defining the offense of calculated criminal drug conspiracy. As section 401(d) is not among the offenses that will establish the first element of calculated criminal drug conspiracy, his conviction for unlawful possession with intent to deliver heroin is not a lesser-included offense under the one-act, one-crime rule.

B. William Motton (No. 4-09-0856)

1. *Brother Mark's Confession*

William Motton argues he was denied his rights to confront and cross-examine and to a fair trial when the jury heard the confession of his brother Mark, a nontestifying codefendant, without a limiting instruction. As in Mark's case, the State argues defense counsel did not object to the suspect testimony and did not raise the issue in a posttrial motion. Thus, the State contends the issue is forfeited. William argues that even if the issue has been forfeited, this court should review it as a matter of plain error.

Here, William makes arguments identical to Mark's as to the second prong of the plain-error analysis. As we found the

issue procedurally defaulted as to Mark, we find the same as it pertains to William.

William also argues this court should review the issue because defense counsel rendered ineffective assistance by failing to object to the admission of the *Bruton* evidence and not preserving the error for review.

Upon speaking with Officer Turner regarding the heroin operation, Mark stated he used his own money along with money from William and Ricky Exum to purchase heroin in Chicago. Once he brought it back to Champaign, Mark stated William and Exum assisted in the packaging and sale of the heroin. William argues this testimony prejudiced him.

As in Mark's case, William cannot establish the prejudice prong of the *Strickland* standard. Even if Mark's statement was admitted in error, the result of the proceeding would not have been different. William was charged with criminal drug conspiracy. The jury, therefore, had to find that with the intent the offense of delivery of a controlled substance be committed, he agreed with Paul Dozier, Exum, and/or Mark to the commission of that offense and an act in furtherance of the agreement was performed by any party to that agreement.

The evidence at trial, including William's own statement, overwhelmingly established his guilt of criminal drug conspiracy. William told Officer Yandell how he and Exum sold

the heroin supplied by Mark. One of the phones found on William's person was used to take orders from customers for the sale of heroin. Officers described 10 controlled drug buys, each initiated by a call to the number on the phone found on William. Also, William was identified as the man who met with the confidential source during the fourth buy. In looking at the totality of the evidence, even if Mark's statement had not been introduced, the result of the proceeding would not have been different. Thus, William cannot show counsel was ineffective.

2. *One-Act, One-Crime Rule*

William Motton argues his convictions for unlawful delivery of heroin and unlawful possession with intent to deliver must be vacated under the one-act, one-crime rule because the charges were based on acts included within his conviction for unlawful criminal drug conspiracy. The State notes William did not raise this issue in the trial court. William asks this court to consider the issue under the plain-error doctrine. As a one-act, one-crime-rule violation affects the integrity of the judicial process, it satisfies the second prong of the plain-error rule. *Harvey*, 211 Ill. 2d at 389, 813 N.E.2d at 194. Thus, we will review the issue.

In his reply brief, William sets forth the rule that "[n]o person shall be convicted of both the inchoate and the principal offense." 720 ILCS 5/8-5 (West 2004). He then goes on

to argue his convictions for unlawful delivery and unlawful possession with intent to deliver are lesser-included offenses of unlawful criminal drug conspiracy and should be vacated.

William was charged with unlawful delivery of a controlled substance for his conduct on April 27, 2005, when he personally delivered less than one gram of heroin to the confidential source, Jerry Thomas. William was also charged with possession with intent to deliver a controlled substance relating to the heroin found at 801 West Hall pursuant to a search warrant executed on September 27, 2005. Williams seems to argue these two charges were the necessary acts in furtherance of his agreement with Dozier, Exum, and Mark to support his conviction for unlawful criminal drug conspiracy. We disagree.

William's conviction for unlawful criminal drug conspiracy was based upon his acts and conduct between November 1, 2004, and September 27, 2005. This record contains a plethora of evidence supporting William's conspiracy conviction unrelated to William's conduct on the specific dates of April 27, 2005, and September 27, 2005. Indeed, each controlled buy during the time period between November 1, 2004, and September 27, 2005, other than the April 27, 2005, controlled buy, would have supported the "act in furtherance" to sustain his conspiracy conviction. Accordingly, William's charges for his conduct on April 27, 2005, and September 27, 2005, were not predicate offenses for his

unlawful-criminal-drug-conspiracy conviction. These charges were not based on the same act as his conspiracy conviction, and thus were not lesser-included offenses as William argues. We note also the drug-conspiracy conviction was not a lesser-included offense of unlawful delivery or possession with intent to deliver.

III. CONCLUSION

For the reasons stated, we vacate Mark Motton's convictions and sentences for armed violence in No. 4-09-0851, affirm in all other respects, and remand for issuance of an amended sentencing judgment. In case No. 4-09-0856, we affirm the trial court's judgment. Also in both cases and as part of our judgment, we award the State its $50 statutory assessment against defendants as costs of these appeals.

No. 4-09-0851: Affirmed in part and vacated in part; cause remanded with directions.

No. 4-09-0856: Affirmed.