2024 IL App (3d) 230570-U

Order filed September 30, 2024

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2024

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-23-0570 |
| v. | ) | Circuit No. 22-CF-398 |
| | ) | |
| COURTNEY M. PERKINS, | ) | Honorable H. Chris Ryan Jr., Judge, Presiding. |
| Defendant-Appellant. | ) | |

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JUSTICE ALBRECHT delivered the judgment of the court.
Presiding Justice McDade and Justice Peterson concurred in the judgment.

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**ORDER**

¶ 1 *Held*: (1) The State presented sufficient evidence to convict defendant of armed violence. (2) The court erred when it entered consecutive sentences under the mistaken belief the sentences were mandatory. (3) Defendant's convictions for armed violence and unlawful delivery of a controlled substance violated the one-act, one-crime rule.

¶ 2 Defendant, Courtney M. Perkins, appeals his convictions for armed violence and unlawful delivery of a controlled substance. Defendant appeals, arguing (1) the State presented insufficient evidence to support his conviction for armed violence, (2) the La Salle County circuit court erred when it imposed mandatory consecutive sentences, and (3) his convictions for armed violence and

unlawful delivery of a controlled substance violated the one-act, one-crime rule. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On October 11, 2022, the State charged defendant by indictment with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(2) (West 2022)), armed violence (*id.* § 33A-2(b)), aggravated discharge of a firearm (*id.* § 24-1.2(a)(3)), and unlawful delivery of a controlled substance (720 ILCS 570/401(d)(iii) (West 2022)). Relevant to this appeal, the indictment for armed violence alleged that defendant, "while armed with a dangerous weapon, a firearm, *** delivered a controlled substance, *** and while committing that offense the defendant personally discharged the firearm[.]"

¶ 5 At a jury trial, several Tri-DENT task force agents testified regarding their participation in a controlled drug purchase involving defendant on September 29, 2022. On that day, Agent Bernard Larsen entered the Superwash in Streator, dressed as a civilian, to purchase drugs with $350 of marked currency. Larsen parked in a carwash bay and exited the vehicle. He observed Alainna Cravatta's vehicle park in front of the bay. Cravatta approached Larsen at the entrance of the bay and showed Larsen a bag containing several pills of methylenedioxymethamphetamine (MDMA). Larsen and Cravatta exchanged $350 of marked currency and MDMA simultaneously. Larsen then loudly stated, "Police, you're under arrest" and began placing Cravatta under arrest. During a struggle to arrest Cravatta, Larsen "caught movement out of the corner of [his] eye and instantaneously heard a gunshot." Larsen "looked immediately to where the sound of the gunfire came from" and observed defendant pointing a black handgun at him. Larsen retrieved his concealed firearm and moved Cravatta into the bay away from defendant. Larsen and Cravatta dropped the MDMA and $350, respectively, within several feet of the entrance of the bay. Within

a "[c]ouple seconds," defendant ran into the bay, picked up the money, and fled the scene. Larsen pursued defendant on foot and saw defendant throw a black object over a fence. Following defendant's apprehension, Larsen located three $100 bills on the ground near the place defendant had been taken into custody. Larsen also retrieved a black handgun from the yard that he observed defendant throw an object into.

¶ 6 Agent James Mandujano surveilled the drug purchase from his location at the Superwash, approximately 30 to 40 feet from where Larsen parked. Mandujano first observed defendant approach his location on foot and stand nearby. Mandujano saw Cravatta pull into the Superwash and approach Larsen. While Cravatta spoke to Larsen, Mandujano observed defendant walking toward the Superwash. Larsen and Cravatta then exchanged the money for MDMA. When Larsen initiated Cravatta's arrest, defendant pointed a firearm at Larsen. Defendant discharged the firearm. Defendant ran toward the bay entrance and "crouch[ed] down to grab something" before fleeing the scene.

¶ 7 Agent Mason Sarti parked his surveillance vehicle, which included Agents Jason Mohr and Jake Foster, in an alleyway next to the Superwash. Sarti observed defendant walk through a yard near their location. Sarti began driving toward the location upon hearing that the transaction was about to occur. Sarti heard Larsen announce himself, stating "Police, you're under arrest" and "immediately" drove into the Superwash parking lot. When Sarti exited the vehicle, he heard Foster ask if there had been a gunshot. This occurred "[l]ess than five seconds" after Larsen announced himself. Sarti observed defendant running from the scene and pursued him on foot.

¶ 8 Agent Mohr had coordinated with defendant to purchase the MDMA. While Mohr conducted surveillance at the Superwash, he observed defendant approach and "look[ ] around the location." When Mohr heard Larsen announce "Police, you're under arrest," they pulled into the

Superwash lot. Mohr observed defendant walking toward Larsen and Cravatta in the bay. Defendant raised his right hand at a 90-degree angle and held "something" black. When Mohr exited the vehicle, he heard a gunshot, and observed defendant flee the scene. Mohr placed Cravatta under arrest and collected the MDMA and $50 from the ground. Later, during a police interview, defendant "admitted to firing the shot at the Superwash."

¶ 9 Agent Foster observed defendant approach the Superwash. Soon after, Foster heard Larsen announce himself as "Police," and the agents "mov[ed] in." Foster heard a gunshot "[a]s soon as" he exited the vehicle. After Foster observed that Cravatta was detained, he pursued defendant.

¶ 10 The jury received several instructions regarding the armed violence offense, which included allegations that defendant was "armed with a firearm" and "personally discharged a firearm." Additionally, the jury received separate verdict forms asking for a determination of whether defendant "personally discharged a firearm during the commission of the offense of armed violence." During deliberations, the jury sent several questions regarding the instructions and verdict forms relating to the offense of attempted first degree murder. The jury found defendant guilty of armed violence, aggravated discharge of a firearm, and unlawful delivery of a controlled substance and not guilty of attempted first degree murder. Separately, the jury entered a guilty verdict finding that, while committing armed violence, defendant personally discharged a firearm. Defendant filed a motion for a new trial, alleging that the State failed to prove him guilty beyond a reasonable doubt of all offenses. The court denied defendant's motion.

¶ 11 At sentencing, the court discussed the factors in aggravation and mitigation, including defendant's age; minor criminal history; children; familial ties; education; employment; alcohol, drug, and mental health issues; and the nature of the charged offenses. Specifically, the court considered the "necess[ity] to deter others," and that defendant's conduct "threaten[ed] to harm,"

though no one was injured. Before imposing a sentence, the court stated, "[a]rmed violence and aggravated discharge [defendant's] going to get sentences on, and then unlawful delivery is mandatory and consecutive by law. And that's a single crime, I got that, but these are mandatory in sentencing hearings." The court sentenced defendant to 21 years' imprisonment for armed violence, 5 years' imprisonment for aggravated discharge of a firearm, and 3 years' imprisonment for unlawful delivery of a controlled substance, to be served consecutively. Defendant did not file a motion to reconsider sentence. Defendant appealed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues (1) the State presented insufficient evidence of armed violence under section 33A-2(b) of the Criminal Code of 2012 (Code) (720 ILCS 5/33A-2(b) (West 2022)) "because the offense of unlawful delivery of *** MDMA was completed before Defendant discharged his weapon," (2) the circuit court erred in imposing consecutive sentences when it mistakenly believed they were mandatory, and (3) his convictions for armed violence and unlawful delivery of a controlled substance violate the one-act, one-crime rule. We consider each argument in turn.

¶ 14 A. Sufficiency of the Evidence

¶ 15 When a defendant makes a challenge to the sufficiency of the evidence, " '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.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). When presented with a challenge to the sufficiency

of the evidence, we will not retry a defendant and must allow all reasonable inferences from the evidence in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. "A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 16 A person commits armed violence when he personally discharges a firearm while committing certain felonies defined by Illinois law, including unlawful delivery of a controlled substance. 720 ILCS 5/33A-2(b) (West 2022). A person commits unlawful delivery of a controlled substance when he "knowingly and unlawfully delivered *** [a] controlled substance" containing MDMA. See 720 ILCS 570/401(d)(iii) (West 2022).

> "The intended purpose of the armed violence statute is to deter felons from using dangerous weapons so as to avoid the deadly consequences which might result if the felony victim resists. [Citation.] ***
>
> A felon with a weapon at his or her disposal is forced to make a spontaneous and often instantaneous decision to kill without time to reflect on the use of such deadly force. [Citation.] Without a weapon at hand, the felon is not faced with such a deadly decision. Hence, we have the deterrent purpose of the armed violence statute. Thus, for this purpose to be served, it would be necessary that the defendant have some type of immediate access to or timely control over the weapon." (Emphasis omitted.) *People v. Anderson*, 364 Ill. App. 3d 528, 538 (2006) (quoting *People v. Condon*, 148 Ill. 2d 96, 109-10 (1992)).

"[A] conviction of armed violence must be based on evidence that the defendant was armed with a dangerous weapon at a point where there was the immediate potential for violence, such as during a drug transaction or during a confrontation with police." *Id.* at 538-39. "[A] defendant is not guilty

of armed violence unless he possesses a weapon at a time when there is the immediate potential for violence, such as during a drug transaction or an escalating encounter with the police." *Id.* at 542. "[W]hether or not the immediate potential for violence exists will depend on the unique facts of each case." *Id.*

¶ 17 Defendant solely challenges his conviction for armed violence. Specifically, defendant contends that he discharged a firearm after his codefendant, Cravatta, completed the delivery of a controlled substance. Thus, defendant reasons that the evidence is insufficient to prove that he personally discharged a weapon during the delivery of a controlled substance, the offense predicating his armed violence conviction. Defendant only challenges the element of the offense that requires the firearm to have been fired *during the commission* of the unlawful delivery of a controlled substance.

¶ 18 The evidence showed that defendant coordinated the sale of MDMA with Mohr, and Cravatta made the physical transaction while defendant was present and surveilled the interaction. Importantly, defendant possessed a firearm during the sale, while he watched from a short distance. Within seconds of Cravatta's arrest, defendant approached Larsen and was surrounded by several other officers. The moment officers confronted defendant, he aimed and discharged his firearm in Larsen's direction. Defendant maintained possession of the firearm when he collected the proceeds from the transaction and during his flight from police before he threw the firearm into a yard. See *id.* at 543 (the defendant's conviction for armed violence predicated on possession with intent to distribute a look-a-like substance was upheld where the court found that the defendant "possessed a gun when the police confronted him" but not at the time of his arrest). Based on the facts of this case, there is no question that defendant discharged a firearm "at a point where there was the immediate potential for violence, such as during a drug transaction or during a confrontation with

police," squarely within the purpose and intent of the statute. See *id.* at 539. More specifically, defendant's actions occurred "at a time when there [was] the immediate potential for violence, such as during *** an escalating encounter with the police." *Id.* at 542. Finding otherwise would counteract the "[armed violence] statute's purpose of deterring criminals from involving themselves *** in potentially deadly situations." *People v. Smith*, 191 Ill. 2d 408, 413 (2000). Accordingly, taken in the light most favorable to the State, we find that the evidence established that defendant personally discharged the firearm during the delivery of a controlled substance and established defendant's guilt of armed violence.

¶ 19 In reaching this conclusion, we find defendant's reliance on *People v. Jones*, 86 Ill. App. 3d 253, 257 (1980), *rev'd in part on other grounds*, 85 Ill. 2d 559 (1981), to be without merit. Defendant attempts to draw similarities between *Jones* and the armed violence charge predicated on a burglary offense with defendant's own armed violence charge predicated on the delivery of a controlled substance offense. However, the facts in the present case differ substantially where, here, defendant possessed a firearm during the *entire encounter*, including the delivery of the controlled substance, and chose to discharge his firearm *within seconds* of police confrontation for the offense predicating his armed violence charge. See *Anderson*, 364 Ill. App. 3d at 542-43 (finding "a basis for defendant's conviction in the fact that he possessed a gun when the police confronted him"). This unique set of facts makes defendant's discharge of a firearm inseverable from the delivery of a controlled substance offense for purposes of the armed violence analysis. *Supra* ¶ 18. The same conclusion could not be drawn in *Jones*, where the offense of burglary was completed when the defendant entered a residence with the intent to commit a felony within, and the knife was not obtained or used until later. *Jones*, 86 Ill. App. 2d at 256.

¶ 20 Finally, we note that within defendant's sufficiency of the evidence argument, he suggests that language in the jury instructions, combined with an additional instruction and verdict forms, misled the jury to believing that discharging a firearm was a sentencing enhancement instead of an element of the offense. As previously stated, when reviewing the sufficiency of the evidence, the relevant inquiry is " 'whether, after reviewing 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*, 443 U.S. at 319). It is not our function to retry defendant, nor will we substitute our judgment for that of the trier of fact. *People v. McLaurin*, 2020 IL 124563, ¶ 22. Jury instructions aside, we have found that the State presented sufficient evidence to support defendant's armed violence conviction.[1] *Supra* ¶ 18.

¶ 21 B. Consecutive Sentencing

¶ 22 Defendant argues that the circuit court imposed consecutive sentences when it mistakenly believed they were mandatory. Though defendant forfeited this issue by failing to raise it below, he asks that we consider it under the plain error doctrine. The State confesses error and agrees that it can be considered under the second prong of the plain error doctrine. See *People v. Wilkins*, 343 Ill. App. 3d 147, 149 (2003).

[1]It appears defendant only raises the jury instruction issue "as support" for his sufficiency of the evidence argument. However, to the extent that defendant asks us to consider his improper jury instructions argument, we note defendant did not preserve the issue independently for appeal and has not provided an argument to avoid forfeiture. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appellate review, a defendant must object to it at trial and raise it in a posttrial motion). While "forfeiture is a limitation on the parties and not the court" (*People v. Sophanavong*, 2020 IL 124337, ¶ 21), we decline to consider defendant's improper jury instruction claim, as defendant failed to preserve the issue in a posttrial motion and chose not to respond to the State's forfeiture argument on appeal. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) ("In the absence of a plain-error argument by a defendant, we will generally honor the defendant's procedural default.").

¶ 23 "Where the trial court imposes a sentence due to a misapprehension of the applicable law, the defendant is entitled to a new sentencing hearing." *Id.* at 150. "When considering whether the sentencing court's mistaken belief influenced the sentence, a reviewing court considers the sentencing court's comments to determine whether the mistaken belief served as a reference point when fashioning the defendant's sentence." *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 70; see also *People v. Myrieckes*, 315 Ill. App. 3d 478, 484 (2000) (remanded for resentencing where the record suggested the circuit court erroneously believed defendant was extended-term eligible).

¶ 24 Section 5-8-4(d)(3) of the Unified Code of Corrections (Unified Code) and section 33A-3(d) of the Code govern the imposition of consecutive sentences relating to the offense of armed violence. 730 ILCS 5/5-8-4(d)(3) (West 2022); 720 ILCS 5/33A-3(d) (West 2022). Generally, the statutes state that the court shall impose consecutive sentences for armed violence, when a defendant is convicted of armed violence with the predicate offense being "a violation of subsection (a) of Section 401 of the Illinois Controlled Substances Act [(Act) (720 ILCS 570/401(a) (West 2022))]" or "controlled substance trafficking involving a Class X felony amount of controlled substance under Section 401 of the *** Act." 720 ILCS 5/33A-3(d)(viii), (ix) (West 2022); see also 730 ILCS 5/5-8-4(d)(3) (West 2022). Alternatively, the court may impose permissive consecutive sentences under section 5-8-4(c) when "it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court *shall* set forth in the record." (Emphasis added.) See 730 ILCS 5/5-8-4(c) (West 2022).

¶ 25 In the present case, the record shows that the court believed it was required to impose mandatory consecutive sentences. However, both sections requiring consecutive sentences involved an armed violence offense (*id.* § 5-8-4(d)(3); 720 ILCS 5/33A-3(d)(viii), (ix) (West

2022)) are inapplicable in the present case. First, these sections apply when a defendant is convicted under section 401(a) of the Act, but here, defendant was specifically charged and convicted under section 401(d)(iii). See 720 ILCS 570/401(a), (d)(iii) (West 2022). Second, section 5-8-4(d)(3) of the Unified Code applies when the predicate delivery offense for armed violence involves a Class X amount of a controlled substance. 730 ILCS 5/5-8-4(d)(3) (West 2022). Here, defendant was convicted of delivering only a Class 2 felony amount of a controlled substance. See 720 ILCS 570/401(d)(iii) (West 2022). Moreover, while the court may impose permissive consecutive sentences under section 5-8-4(c) of the Unified Code, the basis for such a sentence was not set forth in the record. See 730 ILCS 5/5-8-4(c) (West 2022). Therefore, we accept the State's concession that the court mistakenly believed it was required to impose mandatory consecutive sentences for each conviction. Accordingly, we reverse and remand for resentencing.

¶ 26 C. One-Act, One-Crime Violation

¶ 27 Defendant asserts that his convictions for armed violence and unlawful delivery of a controlled substance violate the one-act, one-crime rule. Though defendant again failed to raise this contention in the circuit court, he asks that we consider the issue under the plain error doctrine. The State confesses error. Under the one-act, one-crime rule, "a defendant may not be convicted of multiple offenses that are based upon precisely the same single physical act." *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). "[M]ultiple convictions of both armed violence and the underlying felony cannot stand where a single physical act is the basis for both charges." *People v. Miller*, 284 Ill. App. 3d 16, 26 (1996). A violation of the one-act, one-crime rule is an error subject to reversal under the second prong of the plain error doctrine. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004) ("an alleged one-act, one-crime violation and the potential for a surplus conviction and

sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule").

¶ 28 Here, the court imposed separate sentences for defendant's convictions of armed violence and the underlying predicate offense of unlawful delivery of a controlled substance, which derived from a single act, in violation of the one-act, one-crime rule. See *Miller*, 284 Ill. App. 3d at 26. Following our review of the record, we accept the State's concession. Defendant's armed violence conviction is a Class X felony (720 ILCS 5/33A-2(b), 33A-3(b-5) (West 2022); 720 ILCS 570/401(d)(iii) (West 2022)) and the unlawful delivery of a controlled substance is a Class 2 felony (720 ILCS 570/401(d)(iii) (West 2022)), thus, we remand with directions for the circuit court to vacate defendant's unlawful delivery of a controlled substance conviction and resentence defendant's remaining convictions for armed violence and aggravated discharge of a firearm. See *People v. Ellis*, 401 Ill. App. 3d 727, 729 (2010) ("If a defendant is convicted of two offenses based on the same act, the conviction for the less serious offense must be vacated.").

¶ 29 III. CONCLUSION

¶ 30 The judgment of the circuit court of La Salle County is affirmed in part, vacated in part, and remanded with directions.

¶ 31 Affirmed in part, vacated in part, and remanded with directions.