

No. 1-10-3244

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 11
)	
DERRICK ANDREWS,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment entered on defendant's convictions for unlawful use of a weapon by a felon affirmed in part and reversed in part where, based on a theory of accountability, the evidence was sufficient to establish his possession of a firearm, but not ammunition; remanded with directions to vacate surplus conviction under one act, one crime rule.

¶ 2 Following a joint bench trial with co-defendant Darnell Demary, who is not a party to this appeal, defendant Derrick Andrews was found guilty of four counts of unlawful use of a weapon by a felon (UUWF), then sentenced to concurrent terms of 42 months' imprisonment.¹ On appeal, defendant contends that the State failed to prove him guilty of UUWF beyond a reasonable doubt, that the trial court abused its discretion in considering hearsay statements as substantive evidence of guilt and in allowing the State to re-open its case to present additional evidence. Alternatively, defendant contends that all but one of his convictions should be vacated under the one-act, one-crime rule.

¶ 3 Defendant was charged with multiple counts of armed robbery and UUWF in relation to an incident that occurred about 8:30 p.m. on November 15, 2009, on the west side of Chicago. The record shows, in relevant part, that a group consisting of Cordaro Griggs, Charles Craft, and Tony Green (collectively, the group) were outside of Griggs' house at 1009 North Ridgeway Avenue, at that time, when a man got out of a vehicle and brandished a gun at them. Later that evening, Defendant and Demary were apprehended by police after a car chase and brought to a showup where the group identified them.

¶ 4 At trial, Griggs testified that on the night of the incident, he and his friends "Money" and "Bud," were "just hanging out" on the sidewalk in front of his house when a "pinkish" Crown

¹ Demary filed a direct appeal, in which this court reversed his UUWF convictions based on his possession of ammunition, vacated his UUWF conviction predicated on his prior UUWF conviction, and affirmed his UUWF conviction for possession of a firearm. *People v. Demary*, No. 1-10-3165 (2012) (unpublished order under Supreme Court Rule 23).

Victoria with two occupants pulled up to them. A man exited the car and asked if they had "weed." When Griggs responded in the negative, the man pulled out a shiny, "probably silver" revolver and took money from Bud's pockets, then put the gun to Griggs' hip, went into his pockets and took his cell phone. The other occupant of the vehicle was "[j]ust sitting there," until the gunman returned to the car with the gun, at which point he drove away.

¶ 5 Griggs further testified that later the same evening, the group was riding in a car driven by a friend of Bud's when they saw "a car that looked like the car that robbed us" near Lake Street and Pulaski Road. They followed the car and the driver flagged down police in the intersection, telling them that they had just been robbed. At this point, defense counsel objected to the testimony regarding the driver's statements to the police, and the trial court overruled the objection, noting that the testimony was not for the truth of the matter asserted, but to indicate what happened next.

¶ 6 While the police pursued the car, the group "just stayed back." About 15 minutes later, the police showed him two individuals in separate cars, but he did not tell police anything about them or identify them as the robbers. At trial, Griggs testified that he did not know if those were the individuals who robbed him because he "couldn't see them," and he could not make an in-court identification of either occupant of the vehicle. Griggs testified that police also showed him a bag containing guns, and that one of the guns looked like the gun used during the robbery.

¶ 7 Craft testified that on the night of the incident, he, Green, and Griggs were "[j]ust chilling" near Griggs' house when a red four-door vehicle pulled up, and one of the two

occupants got out and asked them for "weed." After Craft responded that he did not have any, the man pulled out a silver revolver, and took \$180 from Craft's pocket, a phone from Griggs, and money from Green, then returned to the car and was driven away. Craft was able to see the person who robbed him, but did not see the other occupant of the vehicle.

¶ 8 Craft further testified that the group got into a black car belonging to a friend named "Sam," who was not present that night, to take Craft home. As the group approached the intersection of Pulaski Road and Lake Street, they observed the red car from the earlier incident and began to chase it. Griggs flagged down police and told them that the people in the red car had robbed them. At this point, defense counsel again objected to testimony regarding statements to the police, which the court overruled, stating, "[h]e may answer if he was right there."

¶ 9 The police then pursued the red car while the group followed. After the suspects had been caught, Craft saw them in the back of a police car and identified them as the individuals who had robbed him, but he could not identify those same individuals in court. He also testified that police never showed him a gun. On cross-examination, Craft stated that he never saw the driver of the red car, that he could not see the robber's face because he was wearing a hood, and that he was not sure of the identities of the people in the back of the police car.

¶ 10 Green testified that he is currently incarcerated on a drug case, and acknowledged his 2009 conviction for unlawful use of a weapon by a felon, and 2008 conviction in a narcotics case. On the night of the incident, he, Craft, and Griggs were outside of Griggs' house when a

red car pulled up, and the passenger got out and asked Craft for marijuana. Craft responded that he did not have any, and, at that point, Green dropped his phone and walked towards Thomas Street to speak with another friend. When he returned to the group, the car had pulled away and Griggs and Craft told him that they had been robbed. Green testified that no money was taken from him and he never saw the driver of the red car.

¶ 11 Green further testified that the group was subsequently riding in a black Bonneville driven by Sam Howard when Craft pointed out a red car that "looked like the car that robbed us." Green testified that it was not the same vehicle as before and "there is a million red cars," but that while they were at a stoplight doing nothing, "I guess the police, you know, felt probable cause to keep on them and got behind their car. And there was a high speed chase." Green testified that no one in their vehicle said anything to the police. At that point, Sam followed the police and eventually pulled up to where police had apprehended the occupants of the car. Griggs and Craft exited their car and identified those individuals, who were in the back of a squad car, as the robbers. Green testified that he did not identify anyone to the police, and he only identified co-defendant in court as one of the suspects from the back of the squad car.

¶ 12 Chicago police officer Robert Lobianco testified that on the night of the incident, he and his partner were on routine patrol in a marked vehicle and waiting at a stoplight at Lake Street and Pulaski Road when they observed a red four-door Mercury, and a black vehicle with three occupants who were screaming out "they just robbed us, they got guns." The officers engaged in "not a fast" pursuit of the red Mercury through the neighborhood for about five minutes with

their lights and sirens activated. When the vehicle was brought to a stop in the east alley near 400 North Hamlin Avenue, defendant exited from the driver's side, Demary exited from the passenger side and both men fled on foot. Officer Lobianco made an in-court identification of defendant and Demary as the occupants of the red vehicle and then testified that he chased defendant, while other officers chased Demary. After the two were apprehended, the officers brought them to 409 North Hamlin Avenue for a showup where Griggs, Craft and Green separately viewed them outside the squad car and identified Demary as the gunman and defendant as the person who was "sitting in the car." On cross-examination, officer Lobianco testified that the victims and the suspects were all outside when the showup occurred.

¶ 13 Chicago police officer Rocco Pruger testified that on the night of the incident, he and his two partners received a radio call of an armed robbery and drove to the 400 block of North Hamlin Avenue, where the pursued vehicle was stopped. After speaking with Officer Lobianco, he and another officer searched the route of the car chase on foot and found a brown canvas bag "[j]ust off the curb in the middle of the street" at 3802 West End Avenue. Officer Pruger opened the bag and found a silver revolver and a blue steel firearm inside of it.

¶ 14 At this point, the State rested its case and defendant made a motion for judgment of acquittal, arguing that the State had not proven (1) that a robbery occurred, (2) that defendant participated in a robbery, or that (3) defendant possessed any weapons. The court denied the motion and the defense rested without presenting any evidence.

¶ 15 Immediately prior to closing arguments, the court asked whether any testimony had been elicited regarding prior convictions of the co-defendants. The State noted that "there was not," and asked to re-open its case, to which both defendants objected. The court overruled the objections and the State then presented a stipulation that defendant has prior convictions for possession of a controlled substance with intent to deliver (No. 90 CR 18091) and unlawful use of a weapon by a felon (96 CR 17920), and that co-defendant Demary has prior convictions for unlawful use of a weapon by a felon (No. 97 CR 11345) and armed robbery (No. 91 CR 8020).

¶ 16 Following closing argument, the trial court announced its findings, noting, in pertinent part:

"Police got involved in this case when they were flagged down and people were excitedly telling them – spontaneously blurting out 'we got robbed. They got guns. That's the car. There they go.' The police gave chase.

Police, in furtherance of their investigation, went back over the very path from where the people pointed them out to the police in the first place, pointing out the car, saying 'they robbed us. They got guns.'

Something obviously has gone on between November 15th and the time of trial. I am not sure what the rhythm is on the street

and why people say one thing one day and why they say something entirely different under oath at trial. I have my own strong suspicions and hunches about how those things occur and why they occur."

The court concluded that it could not "say that I know beyond a reasonable doubt that an armed robbery ever took place," and found defendant not guilty of armed robbery. However, it noted that defendant "did run away from the car," and that "[t]hose guns that were recovered came out of that car," and found defendant guilty on all counts of UUWF.

¶ 17 Defendant filed a motion for a new trial, and, at the hearing on the motion, the court noted that the police had been alerted to the red car by some citizens who "talked about a gun." Defense counsel argued that the complaint by the citizens was hearsay and could not be used by the State as substantive evidence of defendant's guilt. The court stated, "[t]hey saw the guns. What are you talking about here?" The court ultimately denied the motion, and, in doing so, noted that "the police went like a laser after this car" because citizens had alerted them "there were guns involved in this car," and that guns were found "in the very path" the chase had taken place. Viewing the evidence as a whole, the court concluded that there was proof beyond a reasonable doubt that the guns came out of the car which defendant was driving. The court then sentenced defendant to 42 months' imprisonment on the four UUWF convictions, and defendant now challenges the propriety of that judgment on appeal.

¶ 18 Defendant initially claims that his two UUWF convictions for possession of ammunition should be reversed because the State did not introduce any evidence at trial regarding firearm

ammunition. The State concedes that these convictions are not supported by the record. We agree, and accordingly, reverse defendant's convictions on counts 9 and 11 for unlawful possession of firearm ammunition by a felon.²

¶ 19 That said, we consider defendant's further challenges to his remaining UUWF convictions based on his possession of a firearm. Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question on review 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. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). This standard applies to all criminal cases, whether the evidence is direct or circumstantial, and acknowledges the responsibility of the trier of fact to determine the credibility of witnesses, to weigh the evidence, and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 20 To sustain defendant's conviction of UUWF in this case, the State was required to prove that defendant knowingly possessed a firearm after having been previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008). Defendant contends that the State failed to prove beyond a

² We note that counts 9 and 11 from the indictment are referred to as counts 5 and 7 on the mittimus.

reasonable doubt that he ever saw or possessed a gun. The State responds that defendant was properly convicted under an accountability theory for Demary's possession of two firearms. Defendant takes exception to that in his reply, asserting that this theory is unsupported by the evidence, is "impossible as a matter of law," and should be rejected out of hand.

¶ 21 In *People v. McIntyre*, 2011 IL App (2d) 100889, ¶¶ 12-13, *People v. Gibson*, 403 Ill. App. 3d 942, 950 (2010), and *People v. Chirchirillo*, 393 Ill. App. 3d 916, 925 (2009); however, the reviewing court determined that a defendant may be found guilty of UUWF on an accountability theory, but noted that the felony status that must be proven is that of the principal and not of defendant. In each of the cited cases, this element was missing and the State's accountability argument was rejected. Here, by contrast, the parties stipulated to the prior felony convictions of defendant and co-defendant. As a result, this case does not suffer the infirmity of the cited cases, and defendant's argument on this basis fails.

¶ 22 Having so found, we consider whether his conviction may be sustained under the principle of accountability. Under Illinois law, a person is legally accountable for the conduct of another when, either before or during the commission of the offense, with the intent to promote or facilitate the commission thereof, he aids, abets, or attempts to aid that person in planning or committing the offense. 720 ILCS 5/5-2(c) (West 2008). Active participation is not required to be found guilty under a theory of accountability, and a defendant may be deemed accountable for the acts of another person if they shared a common criminal plan or purpose. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). A common purpose or design may be inferred from the following

nonexhaustive circumstances: (1) proof that defendant was present during the perpetration of the offense without disapproval, (2) that he maintained a close affiliation with the principal after the commission of the offense, (3) that he failed to report the crime, (4) that he fled from the scene, and (5) that he destroyed or disposed of evidence. *People v. Turner*, 375 Ill. App. 3d 1101, 1104 (2007), citing *Taylor*, 164 Ill. 2d at 141.

¶ 23 Viewed in the light most favorable to the prosecution (*Siguenza-Brito*, 235 Ill. 2d at 224), the evidence presented at trial showed that on the evening of November 15, 2009, Demary, a twice convicted felon, was the passenger in a car driven by defendant. Defendant stopped the car in front of 1009 North Ridgeway Avenue and waited inside while Demary brandished a silver revolver at the group, seeking marijuana, after which he returned to the car with the gun and defendant drove him away. The evidence further showed that defendant maintained a close affiliation with Demary after that point in time, as he continued to serve as Demary's driver and was later observed in the same car by the group, who pointed them out to police later that evening. This resulted in a five-minute car chase down various streets in the area, and when the car was eventually stopped, Demary and defendant emerged from the car and fled on foot. This evidence established defendant's continuing close affiliation with Demary, his failure to report the incident (*People v. Smith*, 321 Ill. App. 3d 669, 674 (2001)), his aid to Demary and failure to detach himself from the ongoing criminal enterprise (*People v. Lee*, 247 Ill. App. 3d 505, 509 (1993)), and his consciousness of guilt (*People v. Hart*, 214 Ill. 2d 490, 519 (2005)).

¶ 24 In addition, shortly after the car chase, the police conducted a foot search along the route taken and recovered a brown canvas bag in the middle of one of the streets. The bag contained two guns, including a silver revolver that Griggs testified looked like the one used during the alleged robbery earlier that evening. Based on these facts, it was reasonable for the trial court to infer that the bag was not there by mere coincidence, but rather, that it was disposed of during their flight from police. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Under these circumstances, we conclude that there was sufficient evidence to find that defendant shared a common criminal purpose with Demary (see *Taylor*, 164 Ill. 2d at 140-41), and was proved guilty of UUWF under an accountability theory.

¶ 25 Defendant also maintains that the trial court erred in considering hearsay statements of the victims to Officer Lobianco as substantive evidence of guilt. It is well settled that defendant must both object at trial and include an issue in a written post-trial motion in order to preserve a claim of trial error. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant complains of three statements, but defense counsel objected to only two of them and failed to raise any of them in a post-trial motion, thereby forfeiting the issue for review. In this case, defendant acknowledges his failure to preserve this claim of error as to only one of the three statements, and maintains that we may review the hearsay issue under plain error.

¶ 26 The plain error rule is a narrow exception to the waiver rule and allows a court to consider unpreserved claims of error where a defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the

integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). However, under both prongs, defendant bears the burden of persuasion, and must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Accordingly, before addressing whether the plain error exception applies, we must first determine whether any error occurred. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009).

¶ 27 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Reid*, 179 Ill. 2d 297, 313 (1997).

Testimony regarding out-of-court statements which are offered for a purpose other than to prove the truth of the matter asserted is not hearsay (*People v. Williams*, 181 Ill. 2d 297, 313 (1998)), and out-of-court statements offered to show why an individual subsequently acted as they did is admissible (*People v. Sorrels*, 389 Ill. App. 3d 547, 553 (2009)). At a bench trial, the trial court is presumed to know the law and to consider only proper evidence in making its judgment.

People v. Duff, 374 Ill. App. 3d 599, 605 (2007).

¶ 28 Defendant points to three statements he contends constitute hearsay: (1) Griggs' testimony that the driver of his car told police, "we had just got robbed," (2) Craft's testimony that Griggs told police that "they robbed us," and (3) Officer Lobianco's testimony that occupants in the Group's car were shouting, "they robbed us! They got guns!" When the trial court overruled defense counsel's objection to the first of these statements, it noted that the testimony was not for the truth of the matter asserted, but to indicate the sequence of events. Following each of the three above quoted statements, the witness went on to testify that the police began to pursue

defendant's car, thereby buttressing the court's reasoning that these statements were offered to explain why the police acted as they did, namely, pursue the car where no traffic violation had been observed or other reason for such action reported.

¶ 29 In announcing its decision at trial, the trial court referred to the statements made to police regarding being robbed and "they got guns" in reference to why "police got involved in this case" and "gave chase." In ruling on defendant's post-trial motion, the trial court stated that "the police went like a laser after this car because they were alerted by citizens that there were guns involved." In viewing the trial court's comments as a whole, it is evident that it admitted these statements for the limited purpose of establishing why the police acted in the way they did, and limited its consideration of this evidence for that purpose. Thus we find no abuse of discretion,³ or error by the court to require a plain error analysis. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008).

¶ 30 In reaching this conclusion we have considered *People v. Pryor*, 181 Ill. App. 3d 865 (1989), relied upon by defendant, and find it distinguishable. In *Pryor*, the reviewing court found that in a jury trial where an officer testified to the substance of a conversation, such testimony was hearsay that should not have been admitted absent a limiting instruction. *Pryor*, 181 Ill. App. 3d at 870. In this bench trial, no limiting instructions were necessary, and, as noted above,

³ We note that, contrary to defendant's contention that the trial court used the first two statements as substantive evidence of guilt, namely that defendant and Demary had robbed the group, clearly that is not the case, as the trial court found them both not guilty of armed robbery.

the trial court was aware of the evidentiary rules and applied them accordingly. Thus, we find *Pryor* inapplicable here.

¶ 31 Defendant further maintains that the evidence against him was insufficient in that, at the time he moved for a directed verdict, no evidence had been presented regarding his prior felony convictions. We disagree.

¶ 32 After the trial court granted its motion to re-open evidence, the State submitted a stipulation delineating the prior felony convictions of both defendant and Demary. This court has previously observed that, based on two supreme court cases, one can infer that on appeal from the denial of a motion for directed verdict made at the close of the State's case, a reviewing court should examine all of the evidence presented at trial, including evidence submitted after the denial of the motion. *People v. Kelley*, 338 Ill. App. 3d 273, 278-80 (2003), citing *People v. Washington*, 23 Ill. 2d 546 (1962) and *People ex rel. Kubala v. Woods*, 52 Ill. 2d 48, 54 (1972). In light of the stipulation entered by the parties, defendant's argument fails.

¶ 33 Defendant, nevertheless, contends that it was an abuse of discretion for the trial court to allow the State to re-open the evidence, and he is thereby entitled to a new trial. It is well settled that a trial court has discretion to grant a motion to re-open evidence after the State has rested its case and defendant has made a motion for directed verdict, and that absent an abuse of discretion, a court's ruling thereon will remain undisturbed. *People v. Cross*, 40 Ill. 2d 85, 90 (1968). Such is the case both where the additional proof sought to be introduced relates to formal matters

(*Cross*, 40 Ill. 2d at 90) and where it is necessary to establish the very facts essential for conviction (*People v. Bennett*, 331 Ill. App. 3d 198, 201 (2002)).

¶ 34 Here, defense counsel did not include lack of evidence of prior felony convictions as a basis for his motion for directed verdict. According to defendant, it would have been an abuse of discretion for the trial court to allow the State to re-open evidence if defense counsel had raised it as a basis at the time he moved for a directed verdict, and thus, it was an abuse of discretion for the trial court to allow the State to re-open evidence at an even later point in time. Courts, however, have allowed the State to re-open its case in order to introduce evidence that is necessary for conviction, and the deficiency of which was raised on a motion for directed verdict. See *People v. Berrier*, 362 Ill. App. 3d 1153, 1165-66 (2006), and *People v. Henderson*, 223 Ill. App. 3d 131, 134 (1991).

¶ 35 Defendant concedes that it is within a court's discretion to re-open a case "in the interest of fairness and justice." Here, allowing the State to re-open its case to submit a stipulation regarding the prior convictions, evidence which defendant has not claimed took him by surprise, was a good faith effort to achieve justice in this case (see *Bennett*, 331 Ill. App. 3d at 202), and we, therefore, find no abuse of discretion on the part of the trial court in doing so.

¶ 36 In reaching this conclusion, we have considered *People v. Jose*, 241 Ill. App. 3d 104 (1993), upon which defendant relies, and find it distinguishable. In *Jose*, the trial court granted defendant's motion to suppress evidence and subsequently denied the State's motion to re-open evidence to submit bags at issue. *Jose*, 241 Ill. App. 3d at 110-12. In affirming that ruling on

appeal, the reviewing court observed, *inter alia*, that the State did not seek to re-open evidence until after it had received an adverse ruling, and, even though the State's first witness at the motion to suppress hearing was asked whether he had brought the bags to court, the State failed to produce them when the hearing was concluded on another day. *Jose*, 241 Ill. App. 3d at 113.

¶ 37 Here, unlike *Jose*, there was no adverse ruling to the State before it sought to re-open evidence. Moreover, in *Jose*, the State had been alerted to the need to introduce the bags in question, yet still failed to submit them. *Jose*, 21 Ill. App. 3d at 113. That is not the case here, where defense counsel did not include a lack of evidence regarding defendant's prior convictions as one of the three bases he specified for the motion at issue. Accordingly, *Jose* is inapplicable.

¶ 38 Finally, defendant maintains that one of his two remaining UUWF convictions should be vacated under the one act one crime doctrine because they arise from the same physical act of possessing a firearm. The State responds that the one-act, one-crime rule was not violated where defendant was charged with and convicted under a theory of accountability of separate counts of UUWF for each weapon in Demary's possession. In reply, defendant maintains that because the indictment did not specify separate firearms, he cannot be punished twice for the same conduct.

¶ 39 Although not addressed by the parties, we note, that in failing to object at trial or raise the issue in a post-trial motion, defendant has forfeited this issue for review. *Enoch*, 122 Ill. 2d at 186. However, the State does not argue forfeiture, and we observe that our supreme court has held that a one-act, one-crime violation affects the integrity of the judicial process, and is reviewable under the second prong of the plain error test. *In re Samantha V.*, 234 Ill. 2d at 378-

79. Accordingly, we must first determine whether such a violation occurred here. *In re Samantha V.*, 234 Ill. 2d at 368.

¶ 40 Under the one-act, one-crime rule, defendant may be convicted of only one crime resulting from a single act. *People v. Jimerson*, 404 Ill. App. 3d 621, 635 (2010). Thus, where the State intends to treat defendant's conduct as multiple acts in order to sustain multiple convictions, it must indicate as much in the indictment. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

¶ 41 Here, the State presented evidence at trial establishing that defendant was accountable for Demary's possession of two handguns on the night of the incident, which constitutes separate violations under the UUWF statute. 720 ILCS 5/24-1.1(e) (West 2008). However, the State did not indicate in the indictment that it was seeking to prosecute defendant for possessing multiple firearms. Rather, count 8 of the indictment charged defendant with UUWF for possessing a *firearm* after having previously been convicted of possession of a controlled substance with intent to deliver in case No. 90 CR 18091, and of the same in count 10 of the indictment for possessing a *firearm* after having been previously been convicted of UUWF in case No. 96 CR 17920.⁴

¶ 42 Accordingly, because neither of these charges refers to different firearms, we find that the indictment was insufficient to sustain multiple UUWF convictions against defendant (*Crespo*, 203 Ill. 2d at 345), and that the court erred in entering convictions for two offenses. Because this

⁴ As noted above, the counts of the indictment do not match the counts in the mittimus.

error merits review under the second prong of the plain error test (*In re Samantha V.*, 234 Ill. 2d at 378-79), we now consider the appropriate remedy.

¶ 43 In light of the one-act, one-crime violation, defendant should be sentenced only on the most serious offense, and the less serious offense should be vacated. *In re Samantha V.*, 234 Ill. 2d at 379. The only distinction between counts 8 and 10 in this case is the underlying predicate felony conviction. In count 8, the predicate felony was a conviction for possession of a controlled substance with intent to deliver (No. 90 CR 18091), for which defendant was sentenced to two years of probation. In count 10, the predicate felony was a conviction for UUWF (96 CR 17920), for which defendant was sentenced to five years' imprisonment.

¶ 44 From the limited record before us in relation to defendant's prior convictions, the amount and type of controlled substance is not apparent. Because those missing details factor into the class of felony and applicable sentencing range, we are unable to determine which of the two UUWF convictions is the lesser category of offense. Accordingly, we remand this matter for the trial court to undertake that determination. *In re Samantha V.*, 234 Ill. 2d at 379-80.

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County finding defendant guilty of UUWF for possession of a firearm, reverse defendant's UUWF convictions based on his possession of ammunition (counts 9 and 11), and remand the matter to the circuit court with directions to vacate one of his UUWF convictions for possession of a firearm.

¶ 46 Affirmed in part, reversed in part and remanded with directions.

1-10-3244