FOURTH DIVISION
August 25, 2016

No. 1-14-1573

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. 11 CR 6691
	)	
ANTHONY CONORQUIE,	)	Honorable
	)	Garritt E. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment convicting defendant of attempt murder, aggravated battery with a firearm, and aggravated unlawful use of a weapon is affirmed in part and reversed in part; defendant's conviction for attempt murder is affirmed where the evidence proved beyond a reasonable doubt defendant had a specific intent to kill and disproved defendant acted in self-defense, defendant's conviction for aggravated battery is vacated under one-act, one-crime principles, and two of defendant's three convictions for aggravated unlawful use of a weapon are vacated.

¶ 2 Following a bench trial, the circuit court of Cook County convicted defendant, Anthony Conorquie, of one count of attempt (murder), one count of aggravated battery with a firearm, and

three counts of aggravated unlawful use of a weapon. The trial court denied defendant's motion for a new trial and sentenced him to 33 years' imprisonment each for attempt murder and aggravated battery with a firearm, and 3 years' imprisonment on each count of aggravated unlawful use of a weapon, with all sentences to run concurrently. For the following reasons, we affirm in part and reverse in part.

¶ 3 BACKGROUND

¶ 4 It is not disputed that defendant, Anthony Conorquie, shot Tyree Green in the chest. Green survived after spending a month in the hospital including a period of induced coma after surgery. At trial and on appeal defendant claims he shot Green in self-defense based on a string of incidents between himself and Green in which Green allegedly beat and threatened to kill defendant.

¶ 5 Defendant testified he moved to Evanston in June 2010. That month he and a friend, Glen Williams, rode bicycles to Mason Park in Evanston for the purpose of playing basketball. When they arrived they saw Green and Green's friends. Defendant testified Green and his friends were in the same street gang. Green accosted defendant, then Green and his friends started beating defendant and Williams. Defendant testified Green displayed a handgun, Green pointed the gun at defendant and Williams, and Green hit Williams on the head with the gun. Defendant also testified that Green threatened to kill him and Williams, then Green chased them from the park. Defendant did not report this incident to anyone. Defendant testified he did not tell anyone because he was afraid of the consequences from Green and his friends' gang.

¶ 6 Defendant testified to another incident in November 2010. Defendant was riding his bike to a high school football game. As he approached the gate he saw Green inside. Defendant testified Green lifted his hand and pointed a gun at defendant. Defendant rode away. Defendant did not report this incident to anyone in his family, again because he was afraid of the

consequences from the gang. Defendant did testify that he "mentioned it" to one of his principals.

¶ 7 Another confrontation between defendant and Green occurred in January 2011 at a party being held inside a hotel. Defendant testified he and Williams were invited to the party and when they arrived, they saw Green inside with several of Green's friends, including brothers Shaquille Smith and Michael Smith. Defendant testified Green approached them and "flinched," which defendant testified means acting as if he (Green) had a gun. Green told defendant and Williams to leave. Defendant testified he and Williams attempted to leave but were stopped by Green and Green's friends, who beat defendant and Williams. Defendant testified Green pulled out a gun, pointed it at defendant, put the gun in defendant's mouth, and told defendant "I'm going to kill you." Green pushed defendant down the stairs and told him to leave. Defendant did not report this incident to police, but he did tell his mother. After the January 2011 incident, defendant moved to live with his grandmother and changed schools. He did not see his mother very often after that because he was afraid to go to her house because of Green's threats.

¶ 8 The incident that led to defendant's arrest occurred on April 15, 2011. On that day, he went to his mother's house to surprise her. Defendant testified that his mother was not home so he went to a McDonald's restaurant with Williams and their friends Julian Brown and Antoine Sanders to wait. Defendant testified he received a gun from Williams before going to McDonald's because he was scared. Shortly after defendant, Williams, Brown, and Sanders sat down in the restaurant, a group, who defendant testified were members of Green's gang, entered and approached defendant's group. Green was not among them but Shaquille Smith was. Defendant testified Shaquille "flinched" at Sanders as though he (Shaquille) had a gun. Defendant testified he got between the two of them to prevent a confrontation. Defendant testified he and his friends tried to leave but Shaquille blocked the door. Shortly thereafter

Green entered the restaurant and walked directly toward defendant. According to defendant, when Green was within five feet of defendant, Green stepped back, pulled up his pants, and reached inside his pocket. Defendant testified Green was "tweaking, flinching, acting as if he had a gun." Defendant testified he thought he was going to die because of all the other incidents. Defendant testified he ran and shot once then the gun accidentally fired a second time. Defendant denied trying to kill Green, stating he was just trying to get away from him.

¶ 9 Williams also testified as to the previous encounters with Green. Williams testified he gave defendant the gun before they all went to McDonald's because he (Williams) knew the gang was often in that area and Williams hoped to scare them and run in the event of a confrontation. Williams also testified there was a confrontation between Shaquille and Sanders in which defendant intervened. He testified Green initially approached defendant and their group then backed away from defendant acting as if he (Green) had a gun. Williams testified Green reached into his pocket before defendant fired a shot and that he (Williams) saw a bulge in Green's pocket that looked like a gun.

¶ 10 Green testified he did not really remember the incident and that he was only testifying as to what he saw on a surveillance video from the restaurant. Green testified the mother of his daughter drove him to McDonald's. Green walked inside and recognized several of his friends who were there. Green went over to his friends before he ordered his baby's mother's food. Green noticed defendant ten feet away from where he met his friends. Green did walk into the restaurant with his hands in his pockets and he did pull up his pants. Green denied that he went toward defendant and denied that he put his hands in his pockets when he saw defendant. Green stated defendant put on a hood and moved toward him. Green testified he heard a loud pop and felt a sharp pain in his side. Green then returned to the mother's car and made several phone calls before an ambulance arrived.

¶ 11 The State played the surveillance video for the trial court.

¶ 12 On the night of the shooting, two Evanston Police Department detectives interviewed defendant at the Evanston Police Department. Defendant initially told police he was not at the McDonald's when the shooting occurred. Defendant admitted he was present after police showed him the surveillance video, but told police he was sitting with his friends when he heard a gunshot and ran out. The next day, one of the detectives and an assistant state's attorney (ASA) interviewed defendant a second time. Defendant told the detective and ASA that he, Williams, Brown, and Sanders were at the restaurant when some members of the gang to which Green allegedly belongs came in. Shaquille approached Sanders "beefing" (which was explained to mean arguing) and flinched at Sanders. Defendant got between Shaquille and Sanders and told them to "take it outside." At that moment Green entered, looked at defendant, and pulled up his pants as if he wanted to fight. Defendant told the ASA Green was "tweaking," which was later explained to mean posturing, speaking loudly, and being demonstrative. Defendant told the detective and ASA that as Green was "tweaking," he (defendant) reached into his pocket, pulled out the gun, and told Green to back up. Defendant told them Green did not back up so he waved the gun and fired.

¶ 13 After speaking with the detective and ASA, the ASA typed a written statement and allowed defendant to make corrections and initial the written statement. The trial court admitted defendant's written statement into evidence. In the written statement defendant said that he and Green fought because Green thought defendant was a member of a different gang. Defendant told Green he was not a member of that gang. Defendant's written statement states that on April 15, 2011 Sanders found a gun at Loyola Park and gave it to defendant. Later at the McDonald's, after defendant intervened between Sanders and Shaquille, defendant tried to leave but Shaquille blocked the doors. Defendant pulled out the gun and walked toward the other door just as Green

was entering that door. Green walked up to defendant pulling up his pants and reaching into his pocket. Defendant stated he did not see anything in Green's hands. Defendant held the gun in front of him with his finger on the trigger. Defendant told Green to move and then the shot was fired.

¶ 14 In its oral ruling, the trial court stated, in part, as follows:

> "We don't even know for sure whether or not Tyree Green had a gun, and the defendant could not have known that either. Just because a person may have had a gun on prior occasions, you can't jump to the conclusion well, he must have [a] gun on this particular day. A person pulling up their pants or putting their hands in their pocket—if we allowed people that have problems with people to shoot anybody that they had a problem with on prior occasions any time they pulled up their pants or put their hand in their pockets, we would have a lot of shootings going on out there. This is not a case of self-defense. Even if I was to accept the defendant's frame of mind as he testified to, that does not justify the shooting. We don't know—there was no gun recovered. And it's not even a close case on self-defense. You just can't take out a gun, shoot a person in the chest just because you think they might have a gun. The law does not permit that especially at 4:00 o'clock in the afternoon in a McDonald's restaurant."

¶ 15 The trial court found defendant guilty on all counts. The court sentenced defendant to 33 years imprisonment for the attempt murder conviction and 33 years imprisonment for the aggravated battery with a firearm conviction. Both of those convictions included a 25-year sentence enhancement for personally discharging a firearm causing great bodily harm. The court sentenced defendant to three years' imprisonment on each aggravated unlawful use of a weapon conviction. All of the sentences were to run concurrently.

¶ 16 This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant raises multiple arguments on appeal, not all of which we will be required to address.

¶ 19 1. Sufficiency of the Evidence to Disprove Self-Defense

¶ 20 Defendant first argues the State failed to disprove defendant acted in self-defense when he shot Green after Green approached defendant and acted as if he had a gun, where Green had repeatedly beat defendant and threatened his life. "Self-defense is an affirmative defense ([citation]), and the raising of such a defense necessarily constitutes an admission by the defendant that he committed the crime for which he is being prosecuted ([citation])." (Internal quotation marks omitted.) *People v. Cacini*, 2015 IL App (1st) 130135, ¶ 44. "An affirmative defense has the legal effect of admitting that the acts occurred, but denying legal responsibility for them." *People v. Freneey*, 2016 IL App (1st) 140328, ¶ 32. To raise a claim of self-defense, a defendant must present evidence supporting each of the following elements: (1) force was threatened against the defendant; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the force threatened was unlawful; (5) the defendant actually believed that a danger existed and that the kind and amount of force he used was actually necessary to avert the danger; and (6) the defendant's beliefs were reasonable. *People v. Dunlap*, 315 Ill. App. 3d 1017, 1025 (2000). Once a defendant has raised self-defense as an affirmative defense, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *Freneey*, 2016 IL App (1st) 140328, ¶ 30. "The State only needs to negate one of these elements to disprove the claim of self-defense. [Citations.]" *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 64. On appeal, the State does not dispute it had the burden to disprove self-defense beyond a reasonable

doubt. The State argues it met that burden and proved the elements of the offense beyond a reasonable doubt.

¶ 21 Defendant argues that given Green's history of threatening to kill defendant with a gun, he reasonably believed he faced an imminent threat of deadly force when Green approached defendant, took a step back, pulled up his pants, and reached into his pocket as though he were removing a gun. The bulk of defendant's argument on this point asserts how the evidence (1) demonstrates that his belief that he faced an imminent threat of death or great bodily harm was reasonable and (2) fails to rebut his own testimony. "It is the province of the trial court as the trier of fact to determine, on the basis of the evidence presented and the facts and the circumstances of a given case, whether the use of force was justified as self-defense." *People v. Broumas*, 24 Ill. App. 3d 32, 34 (1974). "This court will not upset the trial court's finding unless the evidence is so improbable or unsatisfactory that it raises a reasonable doubt as to the defendant's guilt." *People v. Florey*, 153 Ill. App. 3d 530, 536 (1987). "The question on review is whether, after viewing all of the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt defendant did not act in self-defense. [Citation.]" *People v. Brown*, 406 Ill. App. 3d 1068, 1081 (2011). The State responds the evidence negates all six elements of self-defense. Specifically the State argues the evidence demonstrates that (1) no unlawful force was threatened against defendant, (2) Green was not the aggressor, (3) there is no evidence defendant was in any imminent danger, and (4) defendant's beliefs were not objectively reasonable. The State argues defendant's argument is based on a construction of the evidence in his favor, which is contrary to the established standard of review.

¶ 22 We agree with the State that, viewed in a light most favorable to the State, the evidence demonstrates that force was not threatened against defendant and the danger of harm was not imminent. A reasonable trier of fact could find beyond a reasonable doubt, even accepting

defendant's testimony as to his history with Green as true, that Green's act of stepping back from defendant, pulling up his pants, and reaching into his pocket was not a threat of an imminent use of force against defendant. Even if defendant subjectively perceived Green's actions as threatening and believed Green was armed with a gun, a reasonable trier of fact could find beyond a reasonable doubt that defendant's beliefs were not objectively reasonable. "In the context of self-defense, it is the defendant's perception of the danger, and not the actual danger, which is dispositive. ([Citation.])" *People v. Sawyer*, 115 Ill. 2d 184, 193–94 (1986). The issue is whether the facts and circumstances induced a reasonable belief that the threatened danger, whether real or apparent, existed. *Id.* "The reasonableness of a defendant's subjective belief that he was justified in using deadly force is a question of fact for the jury to determine. ([Citations.])" *Id.* This court will not disturb a verdict unless the evidence is "palpably contrary to the verdict or so unreasonable, improbable, or unsatisfactory that it justifies entertaining a reasonable doubt of the defendant's guilt." *Id.*

¶ 23 The evidence is sufficient to permit a reasonable trier of fact to find that it was not reasonable to believe that Green's acts indicated Green was about to shoot defendant. There is no reasonable basis for believing that Green would pull out a gun and shoot defendant in the McDonald's, particularly in light of their prior confrontations. Accepting defendant's testimony, Green had actually displayed a gun to defendant and threatened to kill him in a park (where presumably there were no security cameras, even if onlookers were present), in a darkened area underneath football bleachers, and another time in a stairwell of a hotel (where, even if there were security cameras defendant's testimony suggests the only onlookers were defendant's fellow gang members). In the situation confronting defendant on April 15, 2011, there were in fact security cameras and witnesses present. Further, defendant testified he had not encountered Green for over three months. A reasonable trier of fact could find that it was not objectively

reasonable for defendant to believe that after Green succeeded in scaring defendant away Green nonetheless was waiting for the opportunity to carry out his alleged threat should defendant return and Green elected to do so when that opportunity unexpectedly presented itself (while Green was fortuitously armed) in a public setting with security cameras in the middle of the afternoon.

¶ 24 Defendant complains that the trial court was "improperly fixated upon the lack of evidence that Green had a gun," noting that "the law does not require that the aggressor be armed in order that the use of deadly force in self-defense be justified." *People v. Willis*, 217 Ill. App. 3d 909, 918 (1991). The *Willis* court went on to say that the law "does require that the person against whom self-defense is allegedly used be an aggressor *** and that he appears to intend to inflict serious bodily harm." *Id.* In finding that the defendant in *Willis* had failed to present evidence to support a theory of self-defense, the *Willis* court relied, in part, on the fact that no one saw the individual against whom self-defense was allegedly used with a weapon. *Id.* at 919. Defendant argues that in this case the trial court nonetheless "insisted, both in announcing its verdict and at sentencing, that the outcome of the case turned upon proof that Green was armed." The State responds the trial court's comments "were a proper reflection of the lack of evidence establishing the reasonableness of defendant's actions."

¶ 25 We do not find that the trial court rejected defendant's claim of self-defense on the sole grounds Green did not display a weapon, and we reject defendant's argument the trial court wrongly included the presence of a gun as an element of self-defense. After noting that defendant could not have known that Green had a gun, the court concluded: "You just can't take out a gun, shoot a person in the chest just because you think they might have a gun. The law does not permit that especially at 4:00 o'clock in the afternoon in a McDonald's restaurant." The trial court could have intended its comments to convey a finding that defendant's subjective

belief Green had a gun was not reasonable ("Just because a person may have had a gun on prior occasions, you can't jump to the conclusion well, he must have [a] gun on this particular day."). Alternatively, the court could have meant it found that force was not actually threatened against defendant, that Green was not the aggressor, or that any perceived threat was not imminent ("You just can't *** shoot a person in the chest just because you think they might have a gun."). We need not speculate as to the import of the trial court's comments. "In reviewing a decision of the trial court, the controlling question is the correctness of the trial court's conclusion, not the validity of its rationale. ([Citations.]) It is the judgment and not what may have been said by the trial court that is on appeal to the reviewing court, and the court's judgment may be sustained on any ground discernible from the record. [Citation.]" *People v. Ortiz*, 170 Ill. App. 3d 1083, 1089 (1988). "[A] conviction may be affirmed on any basis in the record, even if the circuit court did not rely on those grounds." *People v. Burnette*, 325 Ill. App. 3d 792, 805 (2001). For the reasons stated above (*supra* ¶ 22), we find that the evidence is sufficient to prove beyond a reasonable doubt that defendant did not act in self-defense.

¶ 26 2. Sufficiency of the Evidence to Prove Attempt Murder

¶ 27 Next, defendant argues his subjective belief deadly force was necessary to prevent Green from shooting him negates the specific intent required for attempt murder and therefore his conviction for that offense should be reversed. To prove a defendant guilty of attempt first degree murder the State is required to prove beyond a reasonable doubt that the defendant acted with the specific intent to kill. *People v. Brown*, 2015 IL App (1st) 131873, ¶ 14. Section 9-1(a) of the Criminal Code defines first degree murder as follows:

> "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a) (West 2010).

Second degree murder is a "lesser mitigated offense" of first degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995). First degree murder is mitigated to second degree murder only when the defendant proves by a preponderance of the evidence the presence of a statutory mitigating factor which the State fails to disprove beyond a reasonable doubt. *Id.*; *People v. Izquierdo-Flores*, 332 Ill. App. 3d 632, 638 (2002). The mental state required for second degree murder is identical to the mental state required for first degree murder. *Jeffries*, 164 Ill. 2d at 122.

> "Intent is a state of mind which can be established by proof of surrounding circumstances, including the character of the assault, the use of a deadly weapon, and other matters from which an intent to kill may be inferred. [Citation.] It is the function of the trier of fact to determine the existence of the requisite intent, and its determination will not be disturbed on review unless it clearly appears that there is a reasonable doubt on the issue. [Citation.]" *Id.*

The State responds the record indicates defendant had the requisite intent to commit first degree murder when he shot at Green.

¶ 28 Relying on our supreme court's decisions in *People v. Reagan*, 99 Ill. 2d 238 (1983), and *People v. Lopez*, 166 Ill. 2d 441 (1995), defendant argues that "a defendant who believes he is justified in using deadly force, even if that belief is unreasonable, cannot be convicted of an attempt crime at all, since he does not intend to commit any crime." The *Lopez* court, relying on

Reagan, held that "two different intents, intent to kill unlawfully and intent to kill in self-defense, cannot coexist in the same crime." *Lopez*, 166 Ill. 2d at 448. In *Lopez*, one of the defendants in a consolidated appeal tendered a jury instruction on "attempted second degree murder based on an imperfect self-defense, the unreasonable belief in the need to use deadly force." *Id.* at 444. The trial court refused to give that instruction because the offense "attempt second degree murder" does not exist in Illinois. *Id.* at 443. Our supreme court affirmed, holding that "under the Illinois attempt statute, no crime of attempted second degree murder exists." *Id.* at 451. Defendant does not assert that he committed attempt second degree murder. Rather, defendant's argument is that he is not guilty of the offense of attempt first degree murder because he did not intend to kill "without lawful justification" because he actually believed he was acting in self-defense. See *People v. Morgan*, 203 Ill. 2d 470, 495 (2003) (Thomas, J., dissenting) overruled on other grounds by *People v. Sharpe*, 216 Ill. 2d 481 (2005) ("In *Lopez*, we noted that attempted first degree murder requires the intent to kill without lawful justification." (quoting *Lopez*, 166 Ill. 2d at 445)). See also *People v. Cruz*, 248 Ill. App. 3d 473, 477 (1993) ("Attempt (murder) requires defendant to intend to kill his victim without lawful justification, not simply to '[t]ry to kill.' [Citation.]").

¶ 29 The cornerstone of defendant's argument is his assertion it was clear that, irrespective of its reasonableness, defendant actually held the belief that he needed to defend himself from an imminent danger of death or great bodily harm from Green when Green approached him, pulled up his pants, and reached into his pocket as though retrieving a gun. In *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 142, the defendant asked the court to reduce his murder conviction to second degree murder arguing, as defendant argues in this case, that he proved by a preponderance of the evidence that he had an actual, although unreasonable, belief in the need to

act with deadly force to defend himself. The *Castellano* court's explanation of this court's responsibility in this situation is instructive:

> "The question of whether a defendant's actions were committed under mitigating circumstances—here, the question of whether defendant unreasonably believed that circumstances justifying the use of lethal force were present—presented a question of fact. [Citation.] In the case at bar, the trial court found that the mitigating factor was not present. In an appeal challenging a factual determination that no mitigating factor was present, the question presented is *** whether the fact finder correctly concluded that the defendant did not prove the existence of a mitigating factor by a preponderance of the evidence. [Citation.] When a trial court determines that the defendant failed to prove the presence of a mitigating factor by a preponderance of the evidence, the reviewing court will not reverse if it determines that after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present. [Citation.]
>
> In a bench trial, the responsibility of weighing the credibility of the witnesses rests with the trial court. [Citation.] This court will not substitute its judgment for that of the trial court on questions involving the credibility of witnesses. [Citation.] A trial court's decision to believe one witness's account of an attack over another is virtually unassailable on appeal. [Citation.]
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> [T]his deference does not require a mindless rubber stamp on every bench trial guilty verdict we address. [Citation.] The trial judge must consider all the evidence presented in determining the matter before it, and a reviewing court will review the record to ensure this was done. [Citation.] A trial court's failure to

> recall and consider testimony crucial to defendant's defense result[s] in a denial of defendant's due process rights. [Citation.] Likewise, [a]lthough the trial court's findings of fact are given great weight, they are not conclusive where *** the finding is unsupported by the testimony given at trial. [Citation.]" (Internal quotation marks omitted.) *Id.*, ¶¶ 144-146.

¶ 30 The State asserts the trial court found defendant acted with intent to kill. The State argues "there is nothing here to suggest that the court ever believed that defendant thought he acted in self-defense, as it rejected his affirmative defense and found him guilty." Defendant replies the trial court improperly found that he possessed the specific intent to kill. We disagree. In finding defendant guilty, the trial court stated the issue was whether defendant was acting in self-defense, and that "both sides frame the proper issue in whether or not the defendant acted with specific intent to kill." The court did not "find the defendant's testimony very credible," nor did the court find Williams' testimony, the other key defense witness, "very credible either." The court did give more credence to defendant's version of events at Mason Park over Williams' version of events because Williams' and defendant's testimony were inconsistent regarding "what exactly happened at Mason Park." ("I give those versions that the defendant testified to more credence.") The court stated it accepted the State's theory that defendant acted in retaliation for "bad blood" between defendant and Green. The court stated, in part:

> "[Defendant] decided if he ran into the guy again or one of those guys, he was going to retaliate for what they did to him before. He didn't seek to go through the criminal justice procedure by reporting it to the police, getting him arrested, come into court and having a trial. He decided he was going to do it on his own. I think that's more likely than the defense's version of what they think happened."

The court found the State had proved their case beyond a reasonable doubt and found defendant guilty on all counts.

¶ 31 We find that a rational trier of fact could have found that defendant failed to prove by a preponderance of the evidence that he unreasonably believed that Green posed an imminent threat of death or great bodily harm. Defendant does not argue nor do we find that the trial court failed to recall or consider any evidence crucial to the defense. The trial court found the video was the key piece of evidence in this case. The State published the video and went through what it showed with Green. That evidence established that Green entered the restaurant and approached a group of his friends who were already inside. He saw defendant approach him putting on the hood from the sweater defendant was wearing. That is when defendant shot him, as Green was talking with his friends. Green admitted pulling up his pants when he entered the restaurant but said he did so because his pants started sagging. He also testified that he walked in with his hands in his pockets. Based on all of the evidence, the court found that defendant acted with the specific intent to kill to retaliate against Green for prior incidents. We cannot say that the trial court's findings are unsupported by the testimony given at trial. Accordingly, defendant's conviction for attempt murder is affirmed.

¶ 32 3. Aggravated Battery Conviction and Attempt Murder Sentence

¶ 33 Defendant argues that if this court upholds his conviction for attempt murder, which we do, then his conviction for aggravated battery with a firearm must be vacated on one-act, one-crime principles. Although not raised below, "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." *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). The State concedes this court should vacate defendant's conviction and sentence for aggravated battery with a firearm, but as a lesser-included offense of attempt murder. "The one-

act, one-crime rule prohibits multiple convictions when (1) the convictions are carved from precisely the same physical act, or (2) one of the offenses is a lesser-included offense of the other." *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 45. The State argues that "the evidence adduced at trial indicates defendant committed separate and distinct acts sufficient to support each conviction." The State asserts "a second act *** occurred when, after shooting Mr. Green, defendant was running out of the restaurant and the gun discharged again;" but nonetheless, this court "has determined that aggravated battery with a firearm is a lesser-included offense of attempt first degree murder" (see *People v. Temple*, 2014 IL App (1st) 111653, ¶ 93 (finding aggravated battery with a firearm a lesser included offense of attempt first degree murder where victim suffered multiple gunshot wounds)).

¶ 34 We agree that if multiple acts occurred, then in this case aggravated battery with a firearm is a lesser included offense of attempt murder. "[T]he abstract-elements approach *** applies when a defendant alleges a one-act, one-crime violation as to multiple charged offenses." *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 57. Under the abstract-elements approach, for an offense to qualify as a lesser-included offense, "it must be impossible to commit the greater offense without necessarily committing the lesser offense." *People v. Miller*, 238 Ill. 2d 161, 166 (2010). However, although both defendant and Green testified the gun discharged a second time when defendant fell as he fled the restaurant, there was no testimony that a second shot struck Green or that defendant intentionally fired at Green a second time. "[T]o sustain a charge of aggravated battery with a firearm, the State must prove that the defendant 'knowingly or intentionally' caused injury to another person by means of discharging a firearm. [Citation.]" *People v. Tabb*, 374 Ill. App. 3d 680, 692 (2007). Moreover, "the definition of an 'act' is 'any overt or outward manifestation which will support a different offense.' [Citation.]" *Harvey*, 211 Ill. 2d at 390. The court has held that

> "separate blows, although closely related, may constitute separate acts sufficient to support multiple convictions. [Citation.] However, a defendant may be prejudiced when the State treats closely related acts as one but changes its course on appeal to assert separate acts to support separate convictions. [Citation.] To sustain multiple convictions for closely related separate blows, the State must provide the defendant notice of its intent to treat each blow as a separate act by apportioning those separate blows at the trial level. [Citation.] If the court determines that the State pursued the charges against the defendant as a single physical act, then multiple convictions are improper and the reviewing court need not proceed to the lesser-included step of the one-act, one-crime analysis. [Citation.]" *In re Rodney S.*, 402 Ill. App. 3d 272, 282 (2010).

¶ 35 In this case, the State did not attempt to prove at trial that the second discharge was aimed at or struck Green. In closing argument, the prosecutor stated that the gun discharged as defendant was "falling on the way out the door" and the second shot struck a wall near the entrance of the McDonald's. Further, the second shot as defendant fled the scene would not support a separate offense. We find defendant did not commit multiple acts. We vacate defendant's conviction for aggravated battery because defendant's convictions are carved from precisely the same physical act. *Mimes*, 2014 IL App (1st) 082747-B, ¶ 45. We have no need to address defendant's argument the trial court erroneously added a 25-year sentence enhancement to his conviction for aggravated battery for personally discharging a firearm resulting in great bodily harm.

¶ 36 Defendant next argues that the trial court should be afforded the opportunity to reconsider its sentencing decision in light of the fact that only one conviction may stand. Defendant asserts it is unclear from the record whether the trial court's sentence was influenced by the aggravated

battery conviction. This court has recognized that the trial court's considerations in imposing sentence on a single conviction rather than multiple convictions might be different. See generally *People v. Rodriguez*, 336 Ill. App. 3d 1, 19 (2002). In *People v. Lopez*, 147 Ill. App. 3d 127, 128 (1986), the court explained as follows:

> "[T]he court explained that remandment for resentencing is not necessary where separate sentences are imposed for each of multiple convictions, some of which are vacated on appeal, and there is no indication in the record that the sentencing court took into account the conviction being vacated in determining the length of the sentence for the remaining offense. By clear implication, where either factor is present-*i.e.*, a single sentence is imposed or where it appears from the record that the vacated conviction influenced the term imposed for the conviction being affirmed-fairness requires that defendant be afforded a new sentencing hearing." *Lopez*, 147 Ill. App. 3d at 128.

¶ 37 In *People v. Dworzanski*, 220 Ill. App. 3d 185, 194 (1991), the court found that it was unclear from the record whether the defendant's sentence was based on the trial judge's erroneous belief that the defendant had been convicted of two crimes, and held that the cause should be remanded for resentencing. More recently, this court wrote as follows:

> "When a defendant receives multiple convictions, a new sentencing hearing is not warranted when a conviction is vacated where there is nothing in the record to indicate that the vacated conviction had any effect on the other sentences. *** A reviewing court cannot conclude, solely from a trial court's imposition of separate sentences for multiple convictions, that the sentence imposed for one offense has been influenced by the conviction or sentence for another offense. [Citations.]"

(Internal quotation marks omitted.) *People v. Radford*, 359 Ill. App. 3d 411, 419 (2005).

¶ 38 Under *Radford*, we must look to the transcript of the sentencing hearing to determine if there is any indication the trial court increased defendant's sentence for attempt murder due to his conviction for aggravated battery. *Id.* During sentencing, the court noted that the "legislature has gotten quite tough on people that use handguns in committing violent crimes, especially when they shoot somebody, which is what you did." The court continued, in part, as follows:

> "[T]he minimum that I could sentence you to is 31 years in the Illinois Department of Corrections. I've taken into account that you do not, well, I don't consider those disciplinary reports from the school is really relevant at all.
>
> So, for all practical purposes, you have no criminal history as far as I'm concerned. But, you did something that the legislature has imposed a very serious penalty.
>
> When I consider everything that I mentioned, I come up with the sentence of 33 years in the Illinois Department of Corrections. That's two years above minimum."

¶ 39 We do not find that the trial court was influenced by defendant's aggravated battery conviction. Instead, the trial court's sentence rests squarely on the fact defendant committed attempt murder by shooting Green in the chest. The court made no reference to multiple convictions but instead focused on the nature of the offense for which defendant was properly convicted. Therefore, we find that the vacatur of the aggravated battery conviction does not require a remand for resentencing. See *Id.*

¶ 40 Defendant separately argued that if we remand for resentencing, we should remand with instructions for the trial court to apply section 5-4.5-105 of the Code of Corrections (Code) (730

ILCS 5/5-4.5-105 (West 2016)). However, we have determined that resentencing is not required; therefore, it is unnecessary for us to resolve this issue. Defendant's sentence for attempt murder is affirmed.

¶ 41 4. AUUW Convictions

¶ 42 Finally, defendant argues two of his three convictions for aggravated unlawful use of a weapon (AUUW) must be vacated because one is unconstitutional and the State failed to adduce any evidence in support of another. Defendant argues his conviction for AUUW under section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(a) (West 2010)) is void under our supreme court's decision in *People v. Aguilar*, 2013 IL 112116. The State concedes defendant's conviction for this charge, which is count III of the indictment, must be vacated.

¶ 43 Defendant also argues that his conviction under count IV of the indictment must be vacated. Count IV charges defendant with AUUW based on having not been issued a currently valid firearm owner's identification (FOID) card. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010). Defendant argues the State "offered no proof whatsoever that he had not been issued a valid FOID card on April 15, 2011." The State responds that although there was no direct evidence illustrating that defendant did not possess a valid FOID card the circumstantial evidence is sufficient to prove he did not. In addition to asserting that evidence defendant obtained the gun from Williams is circumstantial evidence defendant did not possess a valid FOID card, the State also asserts defendant was under 18-years old at the time of the offense, and a person cannot obtain a valid FOID card if the person is under 21-years old.

¶ 44 Section 4(a)(2)(i) of the Firearm Owners Identification Card Act reads, in pertinent part, as follows: "Each applicant for a Firearm Owner's Identification Card must: (2) Submit evidence to the Department of State Police that: (i) He or she is 21 years of age or over, *or if he*

or she is under 21 years of age that he or she has the written consent of his or her parent or legal guardian to possess and acquire firearms and firearm ammunition ***." (Emphasis added.) 430 ILCS 65/4(a)(2)(i) (West 2010). "[T]he State is constitutionally required to prove every element of a crime beyond a reasonable doubt." *People v. Jordan*, 218 Ill. 2d 255, 265 (2006). Although the State proved defendant was under 21 years of age, the State failed to prove directly or circumstantially the absence of the written consent of defendant's parents for defendant to possess a firearm and firearm ammunition.

> "When met with a challenge to the sufficiency of the evidence, this court, viewing the evidence in the light most favorable to the State, considers whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. [Citation.] The critical question is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. [Citation.] This standard of review applies, regardless of whether the evidence is direct or circumstantial [citation], and regardless of whether the defendant receives a bench or jury trial [citation]. [Citations.]" *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 62.

"A court of review will not set aside a verdict based on circumstantial evidence unless the proof is so unsatisfactory that a reasonable doubt of guilt does appear." *People v. Armstrong*, 111 Ill. App. 3d 471, 476 (1983).

¶ 45 The State's purported circumstantial evidence defendant did not possess a valid FOID card is so unsatisfactory that a reasonable doubt of defendant's guilt of that offense does appear. Although it is true that to prove guilt beyond a reasonable doubt does not mean that the trier of fact must disregard the inferences that flow normally from the evidence before it, the converse should also be true: the standard of review does not require this court to strain to find inferences

that do not flow normally from the evidence to sustain a conviction. An inference that defendant did not have a valid FOID card does not flow normally from evidence he obtained the gun used in this crime from his friend. The State simply failed to support that charge in any way. We find the evidence leaves a reasonable doubt of defendant's guilt of AUUW based on failure to possess a valid FOID card, which is count IV of the indictment. Therefore, count IV of defendant's conviction is vacated.

¶ 46 Defendant's conviction and sentence for attempt murder are affirmed. Defendant's convictions and sentences for aggravated battery with a firearm and AUUW under counts III and IV of the indictment are vacated.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, the circuit court of Cook County is affirmed in part and reversed in part.

¶ 49 Affirmed in part and reversed in part.