

NOTICE  
Decision filed 08/12/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140342-U

NO. 5-14-0342

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 12-CF-225
	)	
WILLIAM HENDERSON,	)	Honorable
	)	Robert B. Haida,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE MOORE delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The defendant's conviction for unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1 (West 2012)) is affirmed where the jury found, based on sufficient evidence, that the defendant had previously been convicted of a felony and was in possession of a firearm. The defendant's sentence enhancement to a Class 2 felony (720 ILCS 5/24-1.1(e) (West 2012)) is affirmed based on the defendant's prior conviction of felony domestic battery because, although the circuit court mistakenly failed to consider the facts and circumstances surrounding the felony domestic battery in order to determine whether it constituted a forcible felony (720 ILCS 5/2-8 (West 2012)), there is sufficient evidence in the record to show that the defendant pled guilty to felony domestic battery and stipulated to the factual basis for the prior felony, which involved the use of physical force against an individual.

¶ 2 The defendant, William Henderson, appeals his conviction for unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1 (West 2012)) and the enhancement of his sentence to a Class 2 felony (720 ILCS 5/24-1.1(e) (West 2012)) based on his prior conviction for felony domestic battery (second subsequent offense). 720 ILCS 5/12-3.2(a)(1) (West 2012).<sup>1</sup> For the following reasons, we affirm.

¶ 3 **FACTS**

¶ 4 On February 16, 2012, the defendant was charged with, *inter alia*, unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1 (West 2012)), and the charging

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<sup>1</sup>The defendant was also convicted of unlawful possession of a weapon by a felon predicated on a 2007 conviction of unlawful delivery of a controlled substance within 1000 feet of a school in violation of 720 ILCS 570/407(b)(2) (West 2012), which is a Class 3 felony, punishable by 2 to 10 years' imprisonment (720 ILCS 5/24-1.1(e) (West 2012)) with one year of mandatory supervised release. 730 ILCS 5/5-4.5-40(a), (l) (West 2012). The circuit court merged these convictions and sentenced the defendant on the Class 2 felony to six years' imprisonment (720 ILCS 5/24-1.1(e) (West 2012)) with two years of mandatory supervised release. 730 ILCS 5/5-4.5-35(l) (West 2012). The defendant has served his sentence of imprisonment and is currently projected to be discharged from mandatory supervised release on March 2, 2017. Based on the defendant's claim on appeal that his conviction on the Class 2 felony should be reversed, the defendant is requesting this court to amend the mittimus to show the one-year term of mandatory supervised release, so that the defendant may be immediately discharged.

instrument placed the defendant on notice that the State was seeking a sentence enhancement to a Class 2 felony (720 ILCS 5/24-1.1(e) (West 2012)) based on the defendant's prior conviction of felony domestic battery (second subsequent offense). 720 ILCS 5/12-3.2(a)(1) (West 2012).

¶ 5 During the defendant's jury trial, the parties, as well as the court, proceeded as if the defendant's sentence enhancement was an element of the offense to be determined by the jury. To that end, People's Exhibit 37, which included a copy of the information, indictment, and order entered on the defendant's guilty plea for the prior felony domestic battery charge, was admitted into evidence. The indictment sets forth the factual basis for the prior felony domestic battery charge as follows:

"defendant, knowingly and without legal justification, caused bodily harm to [Victim], a family or household member of the defendant, in that defendant hit her with his hands, then threw her to the ground and punched her in the nose and the defendant having been convicted of the offense of domestic battery in the circuit court of Madison County, Illinois \*\*\*."

¶ 6 The order entered on the defendant's guilty plea on January 23, 2008, states that the defendant pled guilty to the felony domestic battery charge, stipulating to a factual basis for the plea. However, these portions of People's Exhibit 37, although admitted into evidence at trial, were not published to the jury. Rather, the prosecutor read from the exhibit during the trial, stating:

"People's Exhibit 37 is also a Madison County, Illinois conviction for a felony. And it is for felony domestic battery. And it was entered on October 18th of 2007,<sup>2</sup> also of the defendant, William Henderson."

¶ 7 The remaining evidence presented to the jury concerned the facts and circumstances surrounding the defendant's alleged possession of a weapon in the instant case. The defendant does not challenge the sufficiency of the evidence in this regard, so we find it unnecessary to detail this evidence here. At the close of the evidence, the jury was instructed as follows:

"The word forcible felony means any felony which involves the use of force against any individual.

A person commits the offense of unlawful possession of a weapon by a felon when he, having been previously convicted of felony domestic battery, knowingly possesses a firearm.

To sustain the charge of unlawful possession of weapon by a felon, the State must prove the following propositions:

First proposition: That the defendant knowingly possessed a firearm;

and

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<sup>2</sup>As stated above, the conviction for the felony domestic battery was entered on January 23, 2008. October 18, 2007, was actually the date of the indictment.

Second proposition: That at the time the defendant possessed the firearm, the defendant had previously been convicted of a felony domestic battery; and

Third proposition: That felony domestic battery is a forcible felony."

¶ 8 The jury returned a verdict of guilty, and a sentencing hearing was held on April 16, 2014. After considering the arguments of counsel and the testimony of the defendant's mother, along with the presentence investigation report, the circuit court sentenced the defendant to six years in the Department of Corrections with two years of mandatory supervised release. This sentence is within the range set forth for unlawful possession of a weapon by a felon with an enhancement to a Class 2 felony based on a prior conviction of a forcible felony. See 720 ILCS 5/24-1.1(e) (West 2012). The defendant subsequently filed a motion to reconsider the sentence, which the circuit court denied. The defendant filed a timely notice of appeal.

¶ 9

#### ANALYSIS

¶ 10 On appeal, the defendant argues that his conviction should be reversed because his prior conviction for felony domestic battery is not a forcible felony and therefore is not a predicate felony for purposes of enhancing his unlawful possession of a weapon by a felon conviction from a Class 3 felony to a Class 2 felony. The defendant's argument presents a question of law, which we review *de novo*. *People v. White*, 2015 IL App (1st) 131111, ¶ 30. Section 24-1.1 of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.1 (West 2012)), which sets forth the elements of the offense of unlawful possession of a weapon by a felon, provides as follows:

"It is unlawful for a person to knowingly possess on or about his person \*\*\* any firearm \*\*\* if the person has been convicted of a felony \*\*\*."

¶ 11 Subsection (e) of section 24-1.1 (720 ILCS 5/24-1.1(e) (West 2012)) sets forth the available sentencing classifications for a person convicted of unlawful possession of a weapon by a felon, and provides in pertinent part:

"Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person shall be sentenced to no less than 2 years and no more than 10 years \*\*\*. Violation of this Section by a person not confined in a penal institution who has been convicted of a forcible felony \*\*\* is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years."

¶ 12 Section 2-8 of the Criminal Code defines "forcible felony" as follows:

" 'Forcible felony' means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement *and any other felony which involves the use or threat of physical force or violence against any individual.*"

(Emphasis added.) 720 ILCS 5/2-8 (West 2012).

¶ 13 Our courts have held that felony domestic battery, in and of itself, does not fall within the above-emphasized "residual clause," and thus does not inherently constitute a forcible felony. *White*, 2015 IL App (1st) 131111, ¶¶ 33, 42. This is because domestic

battery does not necessarily involve physical force or violence, but can also be based upon physical contact of an insulting or provoking nature. See 720 ILCS 5/12-3.2 (West 2012). For this reason, in order for a felony domestic battery conviction to constitute a forcible felony under the residual clause of section 2-8 of the Criminal Code, the record must show that the specific circumstances of the conviction involved "the use or threat of physical force or violence against any individual." *White*, 2015 IL App (1st) 131111, ¶ 33 (citing *People v. Carmichael*, 343 Ill. App. 3d 855, 861 (2003)).

¶ 14 In the case at bar, the parties proceeded at the trial, and continue to make their arguments on appeal, as if the question of whether the defendant's prior felony domestic battery conviction constituted a forcible felony was an element of the offense which was required to be found by the jury. As such, the defendant argues that the jury had insufficient evidence to make such a finding because it heard no evidence of the facts and circumstances surrounding the felony domestic battery conviction. Our review of the record, as set forth above, confirms that the defendant is correct in that People's Exhibit 37 was not published to the jury, and the only information given to the jury from that exhibit was the name and date of the charge. However, the State counters that any error in this regard was "invited error" because defense counsel argued in the trial court against any such facts and circumstances coming into evidence due to its prejudicial impact on the jury. For the reasons set forth below, we find that these arguments are misplaced, as the characterization of the defendant's prior conviction as a forcible felony is not an element of the offense of felon in possession of a weapon, and was thus not required to be put before the jury.

¶ 15 Section 111-3(c) of the Criminal Code states as follows:

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c) (West 2012).

¶ 16 We recognize that our Illinois Supreme Court has held that section 111-3 (725 ILCS 5/111-3 (West 2012)) does not apply in the case of unlawful possession of a weapon by a felon when only one class of felony conviction is possible for the offense as alleged in the charging instrument. *People v. Easley*, 2014 IL 115581, ¶ 19. In *Easley*, the defendant was charged with unlawful possession of a weapon by a felon and the predicate felony was unlawful possession of a weapon by a felon. *Id.* ¶ 22. Pursuant to subsection (e) of section 24-1.1 (720 ILCS 5/24-1.1(e) (West 2012)), any subsequent violation of that section shall be a Class 2 felony. Accordingly, this classification is not considered an enhancement because there is only one classification of felony available based on the nature of the prior conviction. Similarly, when a defendant is charged with



unlawful possession of a weapon by a felon predicated on a prior Class 2 felony under the Illinois Controlled Substances Act, section 111-3 (725 ILCS 5/111-3 (West 2012)) would not apply because subsection (e) of section 24-1.1 (720 ILCS 5/24-1.1(e) (West 2012)) makes clear that type of predicate felony makes unlawful possession of a weapon by a felon a Class 2 felony. See *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 27. The same is true for unlawful possession of a weapon by a felon predicated on a prior felony that fits squarely within the definition of "forcible felony" set forth in section 2-8 of the Criminal Code (720 ILCS 5/2-8 (West 2012)), such as conspiracy to commit murder. See *People v. Polk*, 2014 IL App (1st) 122017, ¶ 28.

¶ 17 In contrast to the above-cited cases, where section 111-3 (725 ILCS 5/111-3 (West 2012)) is inapplicable because subsection (e) of section 24-1.1 (720 ILCS 5/24-1.1(e) (West 2012)) unquestionably establishes that the predicate felony makes unlawful possession of a weapon by a felon a Class 2 felony, in the case at bar, the predicate felony is not inherently a "forcible felony" (see *White*, 2015 IL App (1st) 131111, ¶¶ 33, 42), and thus there is more than one classification of felony available for the defendant's conviction of unlawful possession of a weapon by a felon. If the predicate felony domestic battery did not involve "the use or threat of physical force or violence against any individual," the unlawful possession of a weapon charge would be a Class 3 felony, and there would be no enhancement. See 720 ILCS 5/24-1.1 (West 2012). If, however, the felony domestic battery did involve the use or threat of physical force or violence, the unlawful possession of a weapon charge would be enhanced to a Class 2 felony. Accordingly, we find that section 111-3 of the Criminal Code (720 ILCS 5/111-3 (West

2012)) is applicable in this situation, because the State was seeking an enhancement based on the nature of the prior domestic battery.

¶ 18 Pursuant to section 111-3 of the Criminal Code (720 ILCS 5/111-3 (West 2012)), which is set forth verbatim above, the State was required to give notice to the defendant that it was seeking to enhance his sentence to a Class 2 felony based on the nature of his prior felony conviction. The State did so by stating this fact in the charging instrument. However, pursuant to section 111-3 of the Code (720 ILCS 5/111-3 (West 2012)), and for the reasons set forth above, although the fact that the defendant was previously convicted of a felony was an element of the offense, the determination of whether that felony was to be considered a "forcible felony" for the purposes of the sentence enhancement from a Class 3 felony to a Class 2 felony was not an element of the offense and did not need to be determined by the jury. The jury had sufficient evidence before it to make its finding regarding the two essential elements of the offense—that the defendant was in possession of a weapon and that he had been previously been convicted of a felony. The determination of whether the felony domestic battery was to be considered a "forcible felony" was one of law (see *White*, 2015 IL App (1st) 131111, ¶ 30) to be made by the circuit court upon sentencing. See *People v. Watson*, 322 Ill. App. 3d 164, 166 (2001) ("where an enhanced sentence is based solely on the defendant's prior convictions, the prosecution need not establish those convictions beyond a reasonable doubt at trial" (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998))); see also *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶ 19 Here, we recognize that the circuit court did not make the determination at the sentencing hearing as to whether the facts and circumstances surrounding the defendant's prior felony domestic battery conviction were such that the conviction could be considered a conviction for a "forcible felony," having mistakenly presented the question to the jury. However, we may affirm the defendant's sentence on any basis in the record. *People v. Horrell*, 235 Ill. 2d 235, 241 (2009). People's Exhibit 37 included a copy of the information, indictment, and order entered on the defendant's guilty plea for the prior felony domestic battery charge. The indictment sets forth the factual basis for the prior felony domestic battery charge as follows:

"defendant, knowingly and without legal justification, caused bodily harm to [Victim], a family or household member of the defendant, in that defendant hit her with his hands, then threw her to the ground and punched her in the nose and the defendant having been convicted of the offense of domestic battery in the circuit court of Madison County, Illinois, on June 20, 2007 \*\*\*."

¶ 20 People's Exhibit 37 also included the order entered on the defendant's guilty plea on January 23, 2008, which states that the defendant pled guilty to the felony domestic battery charge, stipulating to the above factual basis for the plea. A plea of guilty constitutes an admission of every fact alleged in the indictment as long as each fact admitted is an ingredient of the fact charged. *People v. Feldman*, 409 Ill. App. 3d 1124, 1128 (2011). Accordingly, we find that the record supports a finding that the defendant's prior conviction for felony domestic battery involved "the use or threat of force or

violence against any individual" such that an enhancement to a Class 2 felony was appropriate.

¶ 21

#### CONCLUSION

¶ 22 For the foregoing reasons, the defendant's conviction and sentence are affirmed.

¶ 23 Affirmed.