

No. 1-12-2570

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the Circuit Court of
) Cook County.
 Plaintiff-Appellee,)
)
 v.) No. 11 CR 9615
)
 JOHN DEAN,)
)
 Defendant-Appellant.) Honorable Stanley J. Sacks,
) Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham and Presiding Justice Connors concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant’s armed habitual criminal conviction is not subject to being vacated pursuant to *Aguilar*. The evidence as to constructive possession was sufficient to support defendant’s convictions for possession of a stolen firearm and possession of cannabis with intent to deliver, and the evidence as to defendant’s not being entitled to possession of the weapon was sufficient to support defendant’s conviction for possession of a stolen firearm. In addition, defendant’s claim that the trial court erred in giving a non-pattern jury instruction on the possession of a stolen firearm offense is unavailing. Next, trial counsel was not ineffective for failing to object to the admission of hearsay evidence alleging defendant being involved in multiple narcotics transactions. Finally, one of defendant’s convictions for possession of cannabis with intent to deliver should be vacated under the one-act, one-crime rule, and his mittimus should be corrected to reflect his eligibility for day-for-day good conduct credit with respect to his convictions for aggravated battery of a police officer and possession of cannabis with intent to

deliver. The judgment of the trial court is thus vacated in part and affirmed in part as modified.

¶ 2 Following a jury trial, defendant John Dean was found guilty of one count of armed violence (720 ILCS 5/33A-2(a) (West 2010)); one count of possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2010)); two counts of aggravated battery of a police officer (720 ILCS 5/12-4(b)(18) (West 2010)); one count possession of a stolen firearm (720 ILCS 5/16-16(a) (West 2010)); and two counts of possession of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2010)). During a simultaneous bench trial that took place during the deliberations phase of his jury trial, defendant was also found guilty of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)). The trial court sentenced defendant to 16 years' imprisonment for the armed violence conviction; his remaining convictions resulted in concurrent (but lesser) prison terms.

¶ 3 On appeal, defendant made the following contentions of error: (1) his armed habitual criminal conviction must be vacated under *People v. Aguilar*, 2013 IL 112116; (2) the evidence as to constructive possession was insufficient to support convictions for possession of a stolen firearm and possession of cannabis with intent to deliver; (3) the evidence as to defendant's not being entitled to possession of the weapon was insufficient to support his conviction for possession of a stolen firearm; (4) the trial court erred in giving a non-pattern jury instruction on the possession of a stolen firearm offense; (5) trial counsel was ineffective for failing to object to the admission of hearsay evidence alleging defendant's involvement in multiple narcotics transactions; (6) one of his convictions for possession of cannabis with intent to deliver should be vacated under the one-act, one-crime rule; and (7) his mittimus should be corrected to reflect his eligibility for day-for-day good conduct credit with respect to his convictions for aggravated battery of a police officer and possession of cannabis with intent to deliver. We agreed with his

arguments that his armed habitual criminal conviction had to be vacated pursuant to *People v. Aguilar*, 2013 IL 112116 (issue 1), as well as his claims as to the one-act, one-crime rule (issue 6) and his eligibility for good conduct credit (issue 7), but we rejected his remaining claims of error. *People v. Dean*, 2016 Ill App (1st) 122570. The State sought review of our decision in the Illinois supreme court.

¶ 4 On September 28, 2016, the supreme court denied the State’s petition for leave to appeal but issued a supervisory order¹ directing us to vacate our judgment and reconsider our decision in light of *People v. McFadden*, 2016 IL 117424, *pet. for certiorari pending*, No. 16-7346 (U.S. Dec. 22, 2016). *People v. Dean*, No. 119194 (Sept. 28, 2016) (mem.). We have done so, and now vacate in part and affirm in part the judgment of the trial court as modified.

¶ 5 BACKGROUND

¶ 6 Defendant was charged by information with multiple counts of various offenses, including possession of a controlled substance and cannabis with intent to deliver, possession of a stolen firearm, aggravated battery of a police officer, armed violence, and being an armed habitual criminal. Defendant was tried before a jury for all counts except those relating to the armed habitual criminal offense, which was tried in a simultaneous bench trial outside of the presence of the jury. The following evidence was adduced at trial.

¶ 7 Chicago police lieutenant Duane Devries testified that, at around 3 p.m. on May 15, 2011, he was driving on routine patrol in the area of East 93rd Street and South Martin Luther King Drive in Chicago, when a “concerned citizen” near the alley before that intersection flagged him down. That individual informed Devries that another individual known as “J.D. ***

¹ The Illinois supreme court issued its supervisory order to this court pursuant to a mandate issued on November 8, 2016.

was selling drugs” from a house on the corner “on the other side of King Drive, the first street around the curve.” Defense counsel lodged no objection to this testimony. On cross-examination, defense counsel asked Devries regarding how he came into contact with the concerned citizen, and Devries explained that there was a message on the computer in his car that “drug narcotics sales” were taking place in the area of 93rd and King Drive, and when Devries went to that area, a concerned citizen flagged him down. Devries further stated that he did not get the citizen’s name and could not recall what the citizen was wearing.

¶ 8 After speaking to the individual, Devries contacted Sergeant Anthony Schulz, who drove to Devries’s location and got into Devries’s car. The officers went to the general location, and a house at 9151 South Forrest Avenue fit the description they were given. There, they observed an individual (whom they later identified as defendant) standing in front of the house near a van that was parked. According to the officers, defendant took an item from a brown paper bag and handed it to the driver of the van in exchange for a unknown amount of money. Devries and Schulz testified that they had been employed with the Chicago police for 18 years and 15 years, respectively, and that they had each witnessed over 100 narcotics transactions during that time. Both officers believed based upon their experience that they had just witnessed a narcotics transaction.

¶ 9 The van drove off, and defendant looked in the officers’ direction. Defendant then put the paper bag into the left sleeve of his jacket, turned around, and walked quickly to the front gate. Devries got out of the car and began walking to the front gate with Schulz closely behind. Defendant walked through the gate, at which point Devries announced his office and ordered defendant to stop. Defendant shut the gate and ran to the front door of the house. Devries kicked open the gate and chased defendant, reaching defendant at the front door.

¶ 10 Just as defendant was walking through the front door, Devries took hold of defendant's shirt and jacket from behind. Defendant then hit Devries in the chest and neck with his fist. The brown paper bag fell from defendant's left sleeve onto the floor just inside the front door. Schulz saw defendant remove a gun from defendant's right jacket pocket. Devries saw the gun in defendant's hand and yelled, "Gun." Schulz fired his Taser at defendant, hitting him in the back. Defendant fell forward, and with the gun still in his right hand, defendant reached around with his left hand, removed one of the Taser prongs from his back, and fled into the house.

¶ 11 The officers testified that defendant ran through the kitchen into a storage room. Devries testified that he "attempted to" follow defendant into the room, but it was "pitch black" inside. Schulz, however, testified that defendant ran into the storage room and immediately closed the door behind him. According to Schulz, at that point Devries ordered defendant to let the officers in, but eventually Devries opened the door and the officers entered.

¶ 12 Both officers testified that they had heard "banging" from inside the storage room. The officers saw defendant open the back door to the residence that was in the storage room, but when defendant started to run through that door, defendant's right hand hit the door frame and the revolver fell from his hand. Devries chased defendant into the yard across the street from the house, while Schulz went to his car and drove down the street to block defendant. Defendant attempted to climb over a fence in the yard but fell to the ground. At that point, Defendant got up, and face-to-face with Devries, put up his fists and said, "I ain't going[;] it's on."

¶ 13 Devries and defendant struggled and fell to the ground, and both officers testified to defendant punching Devries in the chest and kicking him in the legs. Schulz arrived at the scene and tried to handcuff defendant but was unable to do so, and defendant kicked Schulz in the left knee. Schulz removed the cartridge from his Taser and "dry stunned" defendant (*i.e.*, placed the

Taser directly in contact with defendant's body). After multiple dry stuns, defendant stopped resisting. Schulz was then able to handcuff defendant as multiple units arrived to assist.

¶ 14 After a custodial search that revealed \$285 in cash, defendant was placed in the back of Officer Bennett's car, and Schulz read defendant his *Miranda* rights. Schulz and Devries then assisted in a search of the residence. Devries recovered the brown paper bag that defendant had dropped. A forensic chemist testified that the bag contained 32.9 grams of cannabis and 2.7 grams of cocaine. Another officer recovered the .38 caliber revolver.

¶ 15 Devries searched the storage room where defendant had fled and found a semiautomatic AR 15 assault rifle that was taped behind the water heater. Devries identified People's Exhibit 5 as a photograph of the assault rifle he had recovered, noting that the photograph had been taken at the police station after he recovered it from the house. Gary Washburn, a sergeant with the Illinois Secretary of State Police, testified that he had been issued a semiautomatic AR 15 assault rifle, but it was stolen in 2010 when his house was burglarized. Washburn identified People's Exhibit 5 as a photograph of his stolen rifle, and he confirmed that he did not give defendant permission to possess the rifle. Washburn added that his rifle fires a ".226 caliber." Washburn stated that, after checking a national database in 2011, he discovered that the rifle had been recovered by the Chicago Police Department, from which he retrieved the rifle. Washburn, however, said that he had the weapon destroyed because it was not in working condition due to rust. The rifle was not tested for fingerprints or DNA. The parties stipulated that Chicago police officer Amber Toledo inventoried a "DPMS Panther Arms .223 caliber *** M4 A15 blue steel rifle" bearing serial number F087568K with one live .223 caliber round under inventory number 12315740, and which was depicted in the photograph comprising People's Exhibit 5.

¶ 16 Schulz and another officer searched the two upstairs bedrooms in the residence, finding \$5,299 in cash under the bed in one of the bedrooms and a shoe box containing a plastic bag with suspected cannabis in the other bedroom. The shoebox was later found to have contained approximately 192.8 grams of cannabis. Officer Bennett testified that, while defendant was seated in the squad car, various officers gave him the evidence that was recovered in the house, which Bennett placed in the rear cargo area of the car.

¶ 17 When the search of the house was complete, Schulz stated that he spoke to defendant's mother and explained to her that they would be taking defendant to the police station. During that conversation, Schulz stated that defendant called him over to the car. According to Schulz, when he walked over, defendant said, "All the sh** you got in the house is mine. All the drugs and the guns, it is all mine. Please don't take my mom to jail."

¶ 18 Defendant was brought to the hospital for treatment as a result of being tased, and he was returned to police custody at around 9 p.m. Schulz spoke to defendant at that time, asking him where he had obtained the weapons. Defendant stated that the .38 caliber revolver belonged to his brother, and the rifle was defendant's. Defendant said that he took the rifle after finding it on top of a cabinet in a house where he was working as a mover. Defendant added that he believed that the occupant's boyfriend was the owner but was incarcerated at that time.

¶ 19 After the State rested and the trial court denied defendant's motion for a directed verdict, defendant called Wanda Dean, defendant's mother, to testify. Dean testified that she had lived at the house at 9151 South Forest since December 2009, and that defendant had never lived there; instead, defendant lived with his girlfriend at East 78th Street and South Constance Avenue in Chicago. Dean, however, stated that defendant visited several times a week.

¶ 20 According to Dean, on May 15, 2011, she was at the house with her mother, two daughters and her younger son. Dean said her son (defendant) arrived between 8 and 9 a.m. that morning, and at around 3 p.m., he finished smoking a cigarette outside and came back into the house. As defendant was closing the front door, however, police officers burst into the house. Defendant and one of the officers fell to the ground. Dean stood up, but one of the officers grabbed defendant's shirt, and defendant again fell to the ground, at which point the other officer used his Taser on defendant. Dean did not see her son drop a brown paper bag or run through the house, and she denied seeing a weapon in his hand. The officers then brought defendant back outside through the front door, and when defendant tried to run to a neighbor's yard, the officers caught him and placed him in handcuffs.

¶ 21 Dean said she was then placed in handcuffs while the officers searched her home. She denied seeing what the officers recovered from her home and denied ever seeing the assault rifle in her home. Dean also denied ever speaking to the police about where they were taking defendant. Dean explained that the \$5,300 in cash recovered from her home consisted of her cash earnings and tax refund, which she used to pay her bills. Dean confirmed that she later recovered about \$2,000 of the cash from the police department. Following Dean's testimony, defendant elected not to testify.

¶ 22 Outside of the presence of the jury, the trial court held a jury instructions conference. The State informed the trial court that there was no Illinois Pattern Instruction (IPI instruction) related to the offense of possession of a stolen firearm. The State therefore proposed the following non-IPI instruction with respect to the definition of possession of a stolen firearm:

“A person commits the offense of possession of a stolen
firearm when he, not being entitled to the possession of a firearm,

to wit, semi-automatic rifle, possessed the firearm knowing it to have been stolen or converted.”

The trial court asked defense counsel whether that instruction was appropriate; defense counsel responded, “Yes. That’s fine.”

¶ 23 The State also proposed a non-IPI “issues” instruction, which provided in part as follows:

“To sustain the charge of possession of a stolen firearm, the State must prove the following propositions:

First: That the defendant possessed the firearm; and

Second: That the defendant knew the firearm to have been stolen or converted.”

Defense counsel initially stated that the term “knowing” was “left out of the elements.” The trial court then asked if defense counsel believed the instruction should indicate that defendant “[k]nowingly possessed a firearm,” but defense counsel replied, “No. Then that’s fine, Judge.”

¶ 24 After the jury instructions conference, the jury was brought back, the defense rested, and the cause proceeded to closing arguments. During defendant’s closing argument, defense counsel noted that Washburn testified that his rifle that was stolen was a .226 caliber and that the stipulated testimony of Toledo was that the inventoried weapon was a “Panther Arms .223 caliber.” Defense counsel then argued, “That’s a different gun. They are clearly not the same. .226 caliber is not the same as a .223 caliber and the man whose gun who was actually stolen told you what was taken from him was a .226 ***.” Defense counsel further observed that Washburn’s identification of the photograph of the gun as being his took place nearly one year after May 15, 2011. Defense counsel concluded that the State failed to prove that the photograph of the gun was “exactly the same one” taken from Washburn’s house. Defense counsel further

pointed out the discrepancies in Devries's and Schulz's testimony, upon which counsel claimed the State's "entire case" rested. Specifically, defense counsel noted that Schulz had previously testified that the concerned citizen also flagged down and spoke to Schulz, whereas Devries stated that he was alone when the citizen flagged him down and spoke to him.

¶ 25 Following closing arguments, the trial court instructed the jury, *inter alia*, that the jurors "must not single out certain instructions and disregard others." The trial court also gave the jury the non-IPI instruction with respect to the definition of possession of a stolen firearm. As to the "issues instruction," the trial court stated as follows:

"THE COURT: Let me go back for one moment. There was something out of order. Possession of a stolen firearm, firearm, that being a semiautomatic rifle, possessed a firearm, knowing it was stolen or converted.

To sustain the charge, the state must prove the following propositions:

First: That the defendant possessed a firearm; and

Second: That the defendant knew the firearm to have been stolen or converted."

Finally, the trial court informed the jury that it would have a copy of all of the instructions the trial court had read to it. The jury was then excused to deliberate, and the cause proceeded to a stipulated bench trial with respect to the charge of being an armed habitual criminal.

¶ 26 Defendant's bench trial primarily consisted of a stipulation to his prior convictions for aggravated unlawful use of a weapon (AUUW). Specifically, the parties stipulated that defendant had two prior convictions for AUUW in 2006 (under case number 06-CR-6769) and in

2004 (under case number 04-CR-27409). Both prior convictions were for offenses under section 24-1.6(a)(1)/(a)(3)(A) of the Criminal Code of 1961 (720 ILCS 5/24-1.6(a)(1)/(a)(3)(A) (West 2006); 720 ILCS 5/24-1.6(a)(1)/(a)(3)(A) (West 2004)). Following the arguments of the parties, the trial court found the defendant guilty.

¶ 27 At the conclusion of its deliberations, the jury found defendant not guilty of armed violence with respect to the assault rifle but guilty of: armed violence with respect to the .38 caliber handgun, possession of a stolen firearm (with respect to the assault rifle), possession of cannabis with intent to deliver (with respect to the cannabis found both in the shoebox and in the brown paper bag), aggravated battery of a police officer (as to both Devries and Schulz), and possession of a controlled substance with intent to deliver (with respect to the cocaine recovered). The trial court entered the convictions, including both convictions for possession of cannabis with intent to deliver. The trial court then denied defendant's motion for a new trial.

¶ 28 Following a sentencing hearing, the trial court sentenced defendant to concurrent prison terms of 16 years (for the armed violence conviction), 9 years (armed habitual criminal), 6 years (possession of a controlled substance with intent to deliver), 5 years (for the possession of a stolen firearm and both aggravated battery of a police officer convictions); and 3 years (for each of the two convictions for possession of cannabis with intent to deliver). The trial court further stated that the convictions for aggravated battery of a police officer as well as those for possession of cannabis would be served "at 50 percent" (*i.e.*, eligible for day-for-day good conduct credit). The mittimus, however, indicates that one of the aggravated battery convictions and both cannabis possession convictions are to be served at "80%."

¶ 29 This appeal followed.

¶ 30

ANALYSIS

¶ 31

Aguilar and Defendant's Armed Habitual Criminal Conviction

¶ 32 Defendant first contends that his armed habitual criminal conviction must be reversed. Specifically, defendant notes that the State relied at trial upon his two prior convictions for the Class 4 felony of AUUW. Defendant, however, adds that the Class 4 felony version of the AUUW statute was found unconstitutional and void *ab initio* in *People v. Aguilar*, 2013 IL 112116. Defendant thus argues that, since a statute held to be void *ab initio* is viewed as if it had never been passed, defendant's two prior convictions were similarly of no effect and the State failed to prove defendant had two prior felony convictions, which formed the predicate for his armed habitual criminal conviction. The State responds that defendant's armed habitual criminal conviction should not be vacated because, at the time that he possessed the firearm in violation of the armed habitual criminal statute, he already had two felony convictions for AUUW.

¶ 33 In *Aguilar*, our supreme court found the Class 4 version of the AUUW statute to be unconstitutional as it violated the right to bear arms under the second amendment. *Id.* ¶ 22. On June 16, 2016, however, our supreme court issued its decision in *People v. McFadden*, 2016 IL 117424. In *McFadden*, the court held that a defendant's status as a felon was not affected by *Aguilar* and that unless and until the prior conviction was vacated, the prior felony conviction precluded that defendant from possessing a firearm. *Id.* ¶ 31. We directed the parties to submit supplemental briefs regarding *McFadden*'s impact on this case.

¶ 34 In his supplemental brief, defendant argues that *McFadden* is in applicable on two grounds. First, defendant asserts that *McFadden*'s reasoning was limited to the offense of unlawful use of a weapon by a felon (UUWF), which requires the State to prove only defendant's status as a convicted felon, whereas the offense of being an armed habitual criminal

(AHC) requires the State to prove as an element of the offense that the defendant was convicted of at least two specific enumerated offenses. In addition, defendant argues that the UUWF statute includes certain exclusions, whereas the AHC statute does not. Defendant claims in reply that these differences indicate that the AHC statute has a punitive purpose, which distinguishes it from both the UUWF statute’s “regulatory” purpose and *McFadden*’s construction of the UUWF statute. Defendant’s second ground, argued in the alternative, is that we must disregard *McFadden* because it did not address the United States Supreme Court decisions in *Montgomery v. Louisiana*, 577 U.S. —, 136 S. Ct. 718 (2016), and *Ex parte Siebold*, 100 U.S. 371 (1879). Defendant concludes that *Montgomery* and *Siebold* constitute “controlling authority” and “mandate[] that [defendant’s] armed habitual criminal conviction be vacated.”

¶ 35 On August 31, 2016, another division of this court issued its decision in *People v. Perkins*, 2016 IL App (1st) 150889, *appeal denied*, No. 121407 (Nov. 23, 2016). In that case, the court thoroughly examined, and then rejected, precisely the same arguments that defendant makes here.² Upon consideration of the briefs and record filed in this case, as well as the issues presented, we agree with the *Perkins* court’s analysis and disposition.

¶ 36 With respect to defendant’s first argument, we agree with the *Perkins* court that defendant’s argument amounts to a “distinction without a difference.” *Id.* ¶ 7. Both the AHC statute (at issue here and in *Perkins*) and the UUWF statute (at issue in *McFadden*) only require that the State prove the *fact* of a prior conviction of either two or more specified felonies (under the AHC statute) or any one felony (under the UUWF statute). Compare 720 ILCS 5/24-1.7(a) (West 2014) (defining the offense of being an armed habitual criminal as an individual

² We further note that defendant’s second argument is virtually identical to that filed by the defendant-appellant in *Perkins*.

possessing a firearm “after having been convicted” of certain specific offenses) with 720 ILCS 5/24-1.1(a) (West 2014) (prohibiting an individual from possessing a firearm if that individual “has been convicted” or a felony in Illinois or any other jurisdiction). The fact that the UUWF statute sweeps a bit more broadly than the AHC statute does not meaningfully alter the *Perkins* court’s conclusion that, with certain exceptions not relevant here, there is nothing in the AHC statute that requires an examination of the underlying conduct. See *Perkins*, 2016 IL App (1st) 150889, ¶ 7. We thus reject defendant’s contention.

¶ 37 Turning to defendant’s second argument, we note that, as the State points out (both here and in *Perkins*), these arguments were raised both before oral arguments in *McFadden* (*id.* ¶ 9) and also in the *McFadden* defendant’s petition for rehearing. In any event, we agree with the State that *Montgomery* is distinguishable because in this case (as in *Perkins*), defendant never sought to vacate his prior AUUW convictions. *Id.* By contrast, in *Montgomery*, the defendant was challenging his unconstitutional mandatory life sentence. *Montgomery*, 577 U.S. at —, 136 S. Ct. at 726-27. Addressing precisely the same argument, the *Perkins* court agreed with the State that the Supreme Court’s holding in *Lewis v. United States*, 445 U.S. 55, 60-62 (1980), controlled the outcome. *Perkins*, 2016 IL App (1st) 150889, ¶ 9. In *Lewis*, the Court held that, if a defendant failed to vacate a prior felony conviction on grounds that it was unconstitutional, this failure would be “fatal to a challenge to a [subsequent] felon-in-possession conviction.” *Lewis*, 445 U.S. at 60-62. Here, too, at the time of defendant’s AHC conviction, the parties stipulated that he had two prior AUUW convictions. Defendant had not moved to vacate either of those convictions at the time he committed the offense of being an armed habitual criminal, so those convictions were properly considered as predicates for his AHC conviction. Defendant’s alternative argument is thus meritless.

¶ 38 In sum, defendant's arguments are nearly identical to those that the defendant in *Perkins* presented to that court, and defendant provides no persuasive argument that we should disregard the holding in *Perkins*. Accordingly, we reject his claim that his AHC conviction must be vacated pursuant to *Aguilar*.

¶ 39 Sufficiency of the Evidence

¶ 40 Defendant next contends that the State failed to prove him guilty beyond reasonable doubt of possession of a stolen firearm and possession of cannabis with intent to deliver. Specifically, defendant argues that there was insufficient evidence as to his constructive possession of either the assault rifle or the shoebox full of cannabis. Defendant also challenges his conviction for possession of a stolen firearm on two additional grounds, namely that the State failed to produce sufficient evidence that: (i) the recovered .223-caliber rifle was the same as the .226-caliber rifle the complainant testified had been stolen from complainant's home; and (ii) defendant was not entitled to possession of the weapon.

¶ 41 When presented with a challenge to the sufficiency of the evidence, this court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *People v. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not the function of this court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* at 211. It is not necessary that a trier of fact be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; rather, it is sufficient if all of the evidence taken together satisfies the trier of fact beyond a

reasonable doubt of the accused's guilt. *People v. Jones*, 105 Ill. 2d 342, 350 (1985). Moreover, a trier of fact may believe as much, or as little, of any witness's testimony as it sees fit. *People v. Tabb*, 374 Ill. App. 3d 680, 692 (2007). A trier of fact's credibility determinations are entitled to great deference, but those determinations are nevertheless not binding upon a reviewing court. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). In essence, this court will not reverse a conviction unless the evidence is "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Evans*, 209 Ill. 2d at 209.

¶ 42 Defendant challenges his convictions for possession of a stolen firearm and possession of cannabis with intent to deliver. A person commits the offense of possession of a stolen firearm when he, "not being entitled to the possession of a firearm, possesses *** the firearm, knowing it to have been stolen ***." 720 ILCS 5/16-16(a) (West 2010). Section 5 of the Cannabis Control Act provides in relevant part that it is unlawful for a person to knowingly "possess with intent to deliver *** cannabis." 720 ILCS 550/5 (West 2010). Thus, in either case the State must prove beyond a reasonable doubt that defendant had knowledge of the presence of the contraband and that he had immediate and exclusive possession or control of it. See *People v. Woods*, 214 Ill. 2d 455, 466 (2005). Possession may be either actual or constructive. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Constructive possession, which is at issue here, may exist where there is no physical possession, if the defendant has an intent and capacity to maintain control and dominion over the contraband. *People v. Drake*, 288 Ill. App. 3d 963, 969 (1997). Although proof that a defendant had control over the premises where the contraband was located can help resolve this issue because it gives rise to an inference of knowledge and possession of the contraband, it is not a "prerequisite" for conviction. *People v. Adams*, 161 Ill. 2d 333, 345 (1994). "Indeed, not only does a defendant not need to control the premises, he does not even need to have actual,

personal, present dominion over the [contraband itself].” *Id.* To the contrary, constructive possession may exist even where the defendant no longer has physical control of the contraband, provided that he once had physical control of the contraband with the intent to exercise control in his own behalf, and he has not abandoned it and no other person has obtained possession. *Id.*

¶ 43 Here, there was abundant evidence supporting defendant’s constructive possession. The officers testified at trial that defendant ran through the kitchen into a storage room in the house, which Devries said was “pitch black” inside and where both officers heard “banging” from inside. Following defendant’s apprehension, Devries searched the storage room where defendant had fled and found the assault rifle taped behind the water heater, and Schulz found the shoebox full of cannabis in one of the bedrooms. Defendant’s mother testified that defendant did not live at the house, but she agreed that defendant visited several times a week. On the day of the incident, defendant’s mother also noted that defendant had arrived at her house at 8 or 9 a.m., whereas the incident took place at around 3 p.m. In addition, Officer Bennett testified that, while defendant was seated in his squad car, officers gave him, *inter alia*, the shoebox full of cannabis that was recovered in the house, and which Bennett placed in the rear cargo area of the car. When the search of the house was complete, Schulz stated that, while he was speaking to defendant’s mother, defendant called him over to the car and admitted that “all” of the drugs and “guns” (plural) in the house were defendant’s. When defendant was returned to police custody that evening after being treated at a hospital for being tased, defendant again admitted that the assault rifle was his, explaining that he took the rifle after finding it on top of a cabinet in a house where he was working as a mover. Although defendant makes much of the testimony that he did not live at his mother’s house, he need not live in the premises to have possession of the rifle or drugs—indeed, he need not even have physical control of the contraband, provided that he once

had physical control of the contraband with the intent to exercise control in his own behalf, and he has not abandoned it and no other person has obtained possession. *Id.* Viewing this evidence and any reasonable inferences in the light most favorable of the State, there was abundant evidence to support defendant's convictions for possession of a stolen firearm and possession of cannabis with intent to deliver.

¶ 44 Moreover, defendant's reliance upon *People v. Jackson*, 23 Ill. 2d 360 (1961), *People v. Brown*, 277 Ill. App. 3d 989 (1996), and *People v. Wolski*, 27 Ill. App. 3d 526 (1975), is misplaced. In each of those cases, the defendant either did not admit to ownership of the contraband or affirmatively denied ownership. See *Jackson*, 23 Ill. 2d at 363; *Brown*, 277 Ill. App. 3d at 992-93; and *Wolski*, 27 Ill. App. 3d at 527. Here, by contrast, defendant freely admitted (twice in the case of the assault rifle) that all of the drugs and guns in the house were his. Although defendant claims that his admissions were fabricated to prevent his mother from being taken to jail, the jury was free to reject that inference in favor of an inference that his admissions were *truthful* for the same reason. *People v. Herrett*, 137 Ill. 2d 195, 206 (1990) ("The jury in this case was not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt.").

¶ 45 We further reject defendant's additional claim that the State failed to produce sufficient evidence both that the recovered .223-caliber rifle was the same as the .226-caliber rifle the complainant testified had been stolen from complainant's home and also that defendant was not entitled to possession of the weapon. With respect to the discrepancy in the caliber description of the rifle, this point was presented to, and then rejected by, the jury. It is within the province of the jury to resolve inconsistencies in the testimony, and this court may not reweigh the evidence or retry defendant. *Evans*, 209 Ill. 2d at 209. As to the State's purported failure to provide

evidence that defendant was not entitled to possession of the rifle, defendant admitted that he “took” the rifle from the top of a cabinet while working as a mover at the victim’s house under the belief that the owner was incarcerated at the time of the theft. Although defendant argues that there are many shades of meaning to the word “took,” we reiterate that it is the trier of fact that must resolve this testimony. *Id.* Again, we must view the evidence (and any reasonable inferences therefrom) in the light most favorable to the State. *De Filippo*, 235 Ill. 2d at 384-85. As such, we cannot hold that the evidence was “so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant’s guilt,” so we may not reverse defendant’s conviction *Evans*, 209 Ill. 2d at 209. Consequently, defendant’s claim of error necessarily fails.

¶ 46 In addition, our decision is unaffected by defendant’s citation to *People v. Milka*, 211 Ill. 2d 150 (2004), which defendant claims stands for the proposition that the State must provide “proof of each link in the inferential chain.” To the contrary, our supreme court held in *Milka* that, “ ‘The trier of fact need *not* *** be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant’s guilt.’ ” (Emphasis added.) *Id.* at 178 (quoting *People v. Hall*, 194 Ill. 2d 305, 330 (2000)). In this case, all of the evidence—taken together—supports a reasonable inference that defendant had possession of both the rifle and the shoebox full of cannabis. Since we cannot hold that no rational jury could have found the essential elements of the crime beyond a reasonable doubt, we must reject defendant’s challenge to the sufficiency of the evidence. Defendant’s contention of error is therefore unavailing.

¶ 47 The Jury Instruction for Possession of a Stolen Firearm

¶ 48 The defendant also contends that he was denied a fair trial because the trial court erred in failing to instruct the jury that the State must prove beyond a reasonable doubt that he was not

entitled to possession of the assault rifle in the “issues” instruction. He asserts that, because of the trial court’s error, the jury “could very well have found [defendant] guilty of possession of a stolen firearm if it found only that he possessed the firearm and that he knew it had been stolen,” and therefore, his conviction should be reversed and the matter should be remanded for a new trial. Defendant acknowledges that he failed to object to the alleged error at trial or raise it in his post-trial motion, both of which are required to preserve an issue for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988), but asks that we review his argument under the plain error rule.

¶ 49 At the outset, however, defendant has forfeited this error. It is well established that, “where *** a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby.” *People v. Schmitt*, 131 Ill. 2d 128, 137 (1989), (citing *People v. Kelley*, 23 Ill. 2d 193 (1961); *People v. Watson*, 394 Ill. 177 (1946)); see also *People v. Parker*, 223 Ill. 2d 494, 507 (2006) (“Moreover, the record indicates defendant waived any jury instruction issues by affirmatively agreeing to all instructions as submitted to the jury.”). Here, defendant only questioned why the term “knowingly” was not included in the proffered instruction. The trial court suggested a change, but defendant stated it wasn’t necessary and replied, “[T]hat’s fine.” Since defendant acquiesced in the proffered instruction that he now challenges on appeal, defendant’s claim is forfeited, and we may affirm on this basis alone.

¶ 50 Moreover, defendant’s claim, even when reviewed under the plain error doctrine, is meritless. The plain error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 185-87 (2005). In the first instance, the defendant must prove “prejudicial error.” *Id.* at 187. By contrast, in the second instance, prejudice to the defendant is

presumed because of the importance of the right involved, regardless of the strength of the evidence. *Id.* In the latter situation, the defendant must prove that “there was plain error and that the error was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process.” *Id.*

¶ 51 Although the evidence here was not closely balanced, we do agree that the alleged error was a fundamental one. See *People v. Durr*, 215 Ill. 2d 283, 296-97 (2005) (jury instructions are recognized as implicating substantial rights). Nonetheless, a defendant must still show that the alleged instructional error “create[d] a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.” *Id.* at 298-99. In other words, defendant in this case must show that there was a serious risk that the jurors convicted him because they did not understand that he had to be *not* entitled to possess the firearm. *Id.*

¶ 52 In this case, there was no such risk. The evidence adduced at trial established that defendant admitted that the rifle was his and that he took it from a house where he had been working as a mover under the belief that the owner of the weapon was incarcerated. There is nothing in the record to contradict Washburn’s (the owner’s) testimony that he did *not* give defendant permission to possess his rifle.

¶ 53 Nonetheless, defendant replies that the effect of agreeing with State’s argument would be to “discount the issues instruction as superfluous and meaningless” and to “diminish the entire purpose of jury instructions.” We disagree. We are required to review the jury instructions as a whole and not, as defendant implies, in isolation. *Parker*, 223 Ill. 2d at 501. It is indisputable that the definitional instructions contained the language noting that the accused must not be otherwise entitled to possession of the stolen firearm. Viewing the jury instructions as a whole,

we do not find that there was any appreciable risk that the jury convicted defendant despite believing that defendant was entitled to possessing the assault rifle that he admitted he “took” from the victim while working as a mover at the victim’s residence and which the victim testified defendant was not permitted to possess. Defendant’s contention must therefore be rejected.

¶ 54 Moreover, any purported error was harmless beyond a reasonable doubt. See *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003) (“An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed.”). Again, defendant freely admitted that, not only was he in possession of the stolen firearm, but also that he was the person who took the weapon, and the victim confirmed that he did not give defendant permission to possess the rifle. Under these facts, we cannot hold that, had the language also been included in the issues instruction, the jury would have rendered a different verdict because the evidence of defendant’s guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt. See *id.* at 210. Defendant’s claim of error is therefore without merit.

¶ 55 Effective Assistance of Counsel

¶ 56 In addition, defendant claims that he received ineffective assistance of trial counsel due to her failure to object to the officers’ testimony that a concerned citizen informed them that an individual known as J.D. was selling narcotics from a house around the corner. Defendant alleges that this testimony, which revealed the substance of the conversation with the concerned citizen was inadmissible hearsay and “went to the very essence of the State’s case against [defendant] as to the charged offenses of possession with intent to deliver cannabis and cocaine. Defendant concludes that he is entitled to a new trial on these charges.

¶ 57 Claims of ineffective assistance of counsel are governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish ineffective assistance, a defendant must show both that (i) counsel’s performance was deficient and (ii) the deficient performance prejudiced the defendant. *Id.* (citing *Strickland*, 466 U.S. at 687). Deficient performance is performance that is objectively unreasonable under prevailing professional norms, and prejudice is found where there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 496-97; *Strickland*, 466 U.S. at 690, 694. The failure to establish either prong of the *Strickland* test is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (citing *Strickland*, 466 U.S. at 697). Whether a defendant received ineffective assistance of counsel presents is a mixed question of fact and law. *Strickland*, 466 U.S. at 698. We thus defer to any findings of fact, but review *de novo* the ultimate legal issue of whether counsel’s purported omission supports an ineffective assistance claim. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). Here, however, the facts surrounding this issue are undisputed, so the issue becomes a question of law subject to *de novo* review. *People v. Berrier*, 362 Ill. App. 3d 1153, 1167 (2006).

¶ 58 Matters of trial strategy, however, are generally immune from claims of ineffective assistance of counsel except where the trial strategy results in no meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 432-33 (1999). Even if trial counsel makes a mistake in trial strategy or tactics or an error in judgment, this will not render representation constitutionally defective. *Id.* In other words, the effective assistance of counsel merely refers to “competent, not perfect,” representation. *People v. Stewart*, 104 Ill. 2d 463, 491-92 (1984). In addition, “decisions regarding ‘what matters to object to and when to object’ are matters of trial strategy.”

People v. Perry, 224 Ill. 2d 312, 344 (2007) (quoting *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997)). In essence, a reviewing court must be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from her perspective at the time, and not "through the lens of hindsight." *Id.*

¶ 59 Defendant's claim here centers on his trial counsel's failure to object to the officers' testimony that a concerned citizen stated that an individual known as J.D. was selling drugs out of a nearby house, which defendant characterizes as inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Banks*, 237 Ill. 2d 154, 180 (2010). A police officer, however, may testify about statements made by others where the statements are not offered to prove the truth of the matter asserted, but instead are offered merely to show the investigative steps taken by the officer leading to the defendant's arrest. *Id.* at 181. The testimony, however, should be limited to: (i) the *fact* that there was a conversation (without disclosing its content), and (ii) what the police *did* after the conversation. *People v. Sample*, 326 Ill. App. 3d 914, 921 (2001).

¶ 60 Here, in light of our requirement to be highly deferential to trial counsel on matters of trial strategy, viewing counsel's performance from her perspective at the time and not "through the lens of hindsight," as we must (see *Perry*, 224 Ill. 2d at 344), counsel's failure to object to the officers' testimony could have been part of a trial strategy. First, trial counsel could have refrained from objecting to deflect attention from this statement. In addition, trial counsel may have sought to avoid having the testimony stricken because trial counsel wanted to use the testimony strategically. Here, trial counsel relied upon the concerned citizen's statement to highlight the discrepancies between the officers' testimony. As such, trial counsel's failure to object could be considered trial strategy, and since the strategy, even if misguided, did *not* result

in “no meaningful adversarial testing,” it is immune from any claim of ineffective assistance of counsel. See *West*, 187 Ill. 2d at 432-33.

¶ 61 Moreover, even assuming, *arguendo*, that defendant’s performance was objectively unreasonable, defendant cannot meet the prejudice prong of *Strickland*. As noted above, after defendant’s arrest and subsequent search of the house, officers recovered cannabis and cocaine in the brown paper bag defendant was holding and cannabis in a shoebox inside the house. Defendant also had a .38-caliber revolver in his hand and \$285 in cash, and in the house the officers recovered an additional \$5,300 in cash. In addition, police recovered no drug paraphernalia or other evidence that defendant was using the cocaine or cannabis for his own personal use. The unmistakable inference from these factors is that defendant possessed the 32.9 grams of cannabis and 2.7 grams of cocaine with the intent to deliver it. See *People v. Robinson*, 167 Ill.2d 397, 408 (1995) (enumerating nonexhaustive factors permitting an inference of possession with intent to deliver, including possession of a weapon or large amounts of cash, and the absence of drug paraphernalia); see also *People v. White*, 221 Ill. 2d 1, 7 (2006) (holding that possession of 1.1 grams of a substance containing cocaine base sufficient to support conviction for possession with intent to deliver), *abrogated in part on other grounds by People v. Luedemann*, 222 Ill. 2d 530 (2006). Consequently, there is no reasonable probability that, had counsel successfully lodged an objection, the result of defendant’s trial would have been different. Therefore, defendant cannot show prejudice under *Strickland* and his claim fails. See *Clendenin*, 238 Ill. 2d at 317-18 (citing *Strickland*, 466 U.S. at 697).

¶ 62 The One-Act, One-Crime Rule and Defendant’s Mitimus

¶ 63 Next, defendant contends, and the State agrees, that his conviction for possession of cannabis with intent to deliver that was based upon the cannabis found in a brown paper bag

should be vacated under the one-act, one-crime doctrine because that conviction was carved from the same physical act as his armed violence conviction. The State also agrees with defendant's contention that his mittimus should be corrected to reflect his eligibility for day-for-day good conduct credit with respect to his convictions for aggravated battery of a police officer and possession of cannabis with intent to deliver.

¶ 64 Under one-act, one-crime principles, a defendant cannot be convicted of multiple offenses "carved from the same physical act," where "act" is defined as "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977). Notably, a defendant cannot be convicted of both armed violence and the underlying felony. *People v. Payne*, 98 Ill. 2d 45, 54 (1983); *People v. Donaldson*, 91 Ill. 2d 164, 168-70 (1982). One-act, one-crime challenges are subject to *de novo* review. *People v. Artis*, 232 Ill. 2d 156, 161 (2009). Finally, a violation of one-act, one-crime principles challenges the integrity of the judicial process and therefore passes the second prong of plain error analysis. *In re Samantha V.*, 234 Ill. 2d 359, 378 (2009).

¶ 65 We agree with the parties. Armed violence is simply the commission of any felony defined by Illinois law while armed with a dangerous weapon. 730 ILCS 5/33A-2(a) (West 2012). The armed violence count alleged that defendant, while armed with a .38 caliber handgun committed the felony of possession with the intent to deliver more than 30 grams but less than 500 grams of cannabis. The State further charged defendant with two counts of possession of more than 30 but less than 500 grams of cannabis with the intent to deliver, one of which related to the cannabis found in the paper bag that defendant dropped during the chase and while he was armed with the .38 caliber handgun. Under the facts of this case, the count related to the cannabis found in the paper bag that defendant had been carrying while armed with a firearm

was the underlying felony in the armed violence count. As such, defendant's conviction for possession of cannabis with intent to deliver cannot stand because it was the predicate felony in his armed violence conviction. *Payne*, 98 Ill. 2d at 54.

¶ 66 In addition, defendant's mittimus must also be corrected to reflect his eligibility to receive day-for-day good conduct credit against his convictions for aggravated battery of a police officer and possession of cannabis with intent to deliver. Except for certain specifically enumerated offenses, a prisoner serving a term of imprisonment "shall receive one day of sentence credit for each day of his or her sentence of imprisonment." 730 ILCS 5/3-6-3(a)(2.1) (West 2012). Neither aggravated battery of a police officer nor possession of cannabis with intent to deliver are excluded from this scheme. See 730 ILCS 5/3-6-3(a)(2) (West 2012). Finally, we note the trial court stated in court that the convictions at issue were eligible for day-for-day good conduct credit, and where there is a conflict between the mittimus and the trial court's oral pronouncement, the oral pronouncement controls. *People v. Magee*, 374 Ill. App. 3d 1024, 1035 (2007) (citing *People v. Peeples*, 155 Ill. 2d 422, 496 (1993)).

¶ 67 Therefore, pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967)), we direct the circuit clerk to: (1) vacate one of defendant's convictions for possession of cannabis with intent to deliver, and (2) correct defendant's mittimus to reflect eligibility to receive day-for-day good conduct credit against his convictions for aggravated battery of a police officer and possession of cannabis with intent to deliver. See also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) (holding that remand is unnecessary because the court may directly order the clerk to correct the mittimus).

¶ 68

CONCLUSION

¶ 69 For the foregoing reasons, defendant's armed habitual criminal conviction should not be vacated under *Aguilar*. In addition, the evidence as to constructive possession was sufficient to support defendant's convictions for possession of a stolen firearm and possession of cannabis with intent to deliver. The evidence as to defendant's not being entitled to possession of the weapon was also sufficient to support defendant's convictions for possession of a stolen firearm. Furthermore, defendant's claim that the trial court erred in giving a non-pattern jury instruction on the possession of a stolen firearm offense is unavailing, and we also reject his claim that trial counsel was ineffective for failing to object to the admission of hearsay evidence alleging defendant being involved in multiple narcotics transactions. Finally, defendant's conviction for possession of cannabis with intent to deliver should be vacated under the one-act, one-crime rule, and his mittimus should be corrected to reflect his eligibility for day-for-day good conduct credit with respect to his convictions for aggravated battery of a police officer and possession of cannabis with intent to deliver. Accordingly, we (1) affirm defendant's conviction under the armed habitual criminal statute; (2) vacate his conviction for possession of cannabis with intent to deliver; (3) order the circuit clerk to correct defendant's mittimus to reflect his eligibility for day-for-day good conduct credit for his convictions for aggravated battery of a police officer and possession of cannabis with intent to deliver; and (5) affirm the judgment of the trial court in all other respects.

¶ 70 Affirmed in part and vacated in part; mittimus corrected.