2017 IL App (1st) 143762-U
Order filed: May 5, 2017
Modified upon denial of rehearing: June 16, 2017

SIXTH DIVISION

No. 1-14-3762

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY NASH, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 15662 Honorable Stanley Sacks, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: One of defendant's two convictions for possession with intent to deliver heroin is affirmed and one is vacated, where defendant's *Batson* challenge was properly rejected, defendant failed to establish prejudicial error at trial, but, nevertheless, one of defendant's convictions violated the one-act, one-crime doctrine.

¶ 2 Following a jury trial, defendant-appellant, Anthony Nash, was convicted of two counts of possession with intent to deliver heroin and was sentenced to concurrent terms of 10 and 7 years' imprisonment. On appeal, defendant contends that: (1) he made a *prima facie* showing that the State improperly exercised peremptory challenges against prospective jurors in violation of the principles espoused in *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) his jury trial contained multiple instances of preserved error and unpreserved plain error; and (3) one of his convictions

for possession with intent to deliver heroin must be vacated pursuant to the one-act, one-crime doctrine.

¶ 3 For the following reasons, we affirm defendant's conviction for possession with intent to deliver more than 1 but less than 15 grams of heroin and the 10-year sentence imposed with respect thereto, but vacate defendant's conviction and sentence for possession with intent to deliver less than 1 gram of heroin.

¶ 4 I. BACKGROUND

¶ 5 Defendant was charged by indictment with armed violence, being an armed habitual criminal, unlawful possession of a weapon by a felon, and two counts of possession with intent to deliver heroin, one alleging defendant possessed less than 1 gram and one alleging possession of between 1 and 15 grams. The matter proceeded to a jury trial in September 2014.

¶ 6 Prior to trial, defendant—an African-American—raised a *Batson* challenge after the State exercised two preemptory challenges against African-American members of the venire. The trial court rejected this challenge, after concluding that defendant had not established a *prima facie* case of discrimination.

¶ 7 The record reveals that the defendant was arrested at a time the police were executing a search warrant targeting the person and garage of defendant's brother, Jermel Nash. The trial court granted the State's motion *in limine* to preclude "any mention of the target of the search warrant and the contents of the search warrant," finding that such evidence was irrelevant and inadmissible hearsay.

¶ 8 The State's evidence at trial established that on August 3, 2012, Chicago police Officer Steve Hefel was part of a police group tasked with investigating "violent street gangs" and narcotics sales. On that date, he was conducting covert surveillance of a residence located in the

4500 block of South Lavergne Street in Chicago. In the backyard, Officer Hefel observed both defendant and his brother, Jermel. Defendant was wearing cargo pants.

¶ 9 After approximately 45 minutes, Officer Hefel observed a vehicle stop in the alley behind the garage of the residence. Defendant approached and a woman stepped out of the vehicle. After a brief conversation, defendant gave the woman several small plastic bags containing white items in exchange for cash. Defendant then placed the cash and remaining items in his pocket and the woman drove off. Having observed nearly 1,000 drug transactions, Officer Hefel believed defendant was selling narcotics and radioed this information to other police officers.

¶ 10 As other police officers in police vehicles then approached the scene, Officer Hefel heard defendant yell "the cops are coming" and observed him run toward the front yard. While defendant did so, he removed a handgun from his pocket and threw it away. After defendant was subsequently arrested by other officers outside of Officer Hefel's sight, Officer Hefel directed another officer to the handgun, which was then recovered.

¶ 11 Officer Anthony Babicz testified that he responded to Officer Hefel's radio call, and ultimately chased and apprehended defendant. As defendant ran, Officer Babicz observed him drop an item that was recovered by Officer Arletta Kubik. When defendant was apprehended, Officer Babicz recovered $412 in cash and seven small bags from defendant. The bags appeared to be heroin, and were marked with "spade markings" in a manner that suggested they were packaged for sale.

¶ 12 Officer Kubik testified that she also responded to Officer Hefel's radio call and observed defendant running away when she arrived on the scene. Kubik observed defendant drop a bag and she retrieved it. The bag contained six plastic bags with spade markings containing white powder. While she acknowledged that an individual could have purchased six bags for individual

use, Officer Kubik believed they were packaged for sale. At a police station later that evening, defendant was asked if he had sold drugs to the woman in the vehicle. Defendant responded that he had "hit her up," which Officer Kubik testified meant that defendant had sold drugs. Officer Kubik acknowledged that she did not ask defendant to make a written statement to that effect, nor did she herself make a written recording of that statement.

¶ 13 Finally, the State entered a stipulation into the record regarding defendant's prior felony convictions and the fact that the six bags dropped prior to defendant's arrest tested positive for heroin and weighed .2 grams, while the seven bags recovered from defendant's shorts upon his arrest also tested positive for heroin and weighed 1.1 grams.

¶ 14 In response to the State's evidence, defendant presented the testimony of Jennifer Robinson, a family friend, and Aleshia Nash, defendant's daughter, who each testified that they were in the front of the residence at the time of defendant's arrest. Ms. Robinson testified that she observed defendant's arrest, but never heard him yell "the cops are coming" and never saw him drop anything. Ms. Nash also testified that she never saw defendant drop anything prior to his arrest, and she did not see the police recover anything when defendant was searched at the time of his arrest.

¶ 15 In rebuttal, the State presented the testimony of Officer Frank Ramaglia, who stated that he was located at the front of the residence at the time of defendant's arrest. Nobody other than defendant and police officers were nearby until minutes after defendant was arrested and the scene was secured.

¶ 16 Following closing arguments, the jury found defendant guilty of possession with intent to deliver more than 1 but less than 15 grams of heroin and possession with intent to deliver less than 1 gram of heroin. Defendant's posttrial motion for a new trial was denied, and he was

thereafter sentenced to concurrent terms of 10 years' imprisonment for the first conviction and 7 years' imprisonment for the second conviction. Defendant's motion to reconsider his sentence was denied, and he timely appealed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant contends that (1) he made a *prima facie* showing that the State improperly exercised peremptory challenges against prospective jurors in violation of *Batson*; (2) the trial court improperly granted the State's motion *in limine*; (3) he was denied a fair trial due to an improper question asked by the State in its examination of Officer Kubik; (4) there were multiple instances of plain error; and (5) one of his convictions for possession with intent to deliver heroin must be vacated pursuant to the one-act, one-crime doctrine.

¶ 19 A. *Batson*

¶ 20 We first consider defendant's argument that he made a *prima facie* showing of a *Batson* violation, such that this matter should be remanded for a full *Batson* hearing.

¶ 21 In *Batson*, the United States Supreme Court held that, in a criminal case, the fourteenth amendment's equal protection clause prohibits a prosecutor from using a peremptory challenge to exclude a prospective juror solely on the basis of his or her race." *Mack v. Anderson*, 371 Ill. App. 3d 36, 43 (2006) (citing *Batson*, 476 U.S. at 89). In addressing a *Batson* challenge, the trial court must follow a "methodical three-step approach." *People v. Davis*, 233 Ill. 2d 244, 249 (2009) (*Davis II*). Specifically, this court has recognized:

> "First, the moving party must meet his burden of making a *prima facie* showing that the nonmoving party exercised its peremptory challenge on the basis of race. [Citations.] If a *prima facie* case is made, the process moves to the second step, where the burden then shifts to the nonmoving party to articulate a race-neutral explanation for excusing the

> venireperson. [Citations.] Once the nonmoving party articulates its reasons for excusing the venireperson in question, the process moves to the third step, where the trial court must determine whether the moving party has carried his burden of establishing purposeful discrimination. [Citations.] At the third step, the trial court evaluates the reasons provided by the nonmoving party as well as claims by the moving party that the proffered reasons are pretextual. [Citations.]" *Mack*, 371 Ill. App. 3d at 44.

¶ 22 In order to establish a first-step *prima facie* case of purposeful discrimination in the exercise of the State's peremptory challenges, defendant was required to present facts and any other relevant circumstances which raised an inference that the State challenged jurors because they were African-American. *Mack*, 371 Ill. App. 3d at 44 (citing *Batson*, 476 U.S. at 96). However, the racial identity of the various trial participants alone will not establish a *prima facie* case of discrimination. Our supreme court has specifically indicated that "the mere fact of a peremptory challenge of a black venireperson who is the same race as defendant or the mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *Davis II*, 231 Ill. 2d at 361.

¶ 23 Thus, Illinois courts have recognized a general, nonexclusive list of factors relevant to determine whether a *prima facie* case of discrimination against African-American jurors has been established. These factors include: (1) the racial identity between the moving party and the excluded venireperson; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race

as their only common characteristic; and (7) the race of the various parties and the witnesses. *People v. Allen*, 401 Ill. App. 3d 840, 848 (2010). The trial court may also utilize what is known as a "comparative juror analysis," whereby the striking party's questions to prospective jurors and the responses to those questions are evaluated, to see whether otherwise similar prospective jurors were treated differently because of their membership in a particular race. *People v. Davis*, 231 Ill. 2d 349, 361 (2008) (*Davis I*).

¶ 24 In sum, the trial court should consider the " 'totality of the relevant facts' " and " 'all relevant circumstances' " surrounding the peremptory strike to see if they give rise to an inference of a discriminatory purpose. *Id*. at 360 (quoting *Batson*, 476 U.S. at 93-94). "[T]he party asserting a *Batson* claim has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against that party." *Davis II*, 233 Ill. 2d at 262. Moreover, only if a *prima facie* case of purposeful racial discrimination has been demonstrated does the analysis continue to the next step. *People v Rivera*, 221 Ill. 2d 481, 501-02 (2006). We apply a clearly erroneous standard of review to a trial court's determination of whether a *prima facie* case is demonstrated at the first step of the *Batson* analysis. *Davis II*, 233 Ill. 2d at 262; *People v. Allen*, 401 Ill. App. 3d 840, 848 (2010).[1]

¶ 25 The record reflects that the jury in this matter was selected in panels of 14 potential jurors. Among the first panel were three African-Americans, one of whom was dismissed for cause and one of whom was dismissed pursuant to a preemptory challenge raised by the State.

[1] We subscribe to our supreme court's most recent declaration of the appropriate standard of review applicable to the trial court's determination of whether a *prima facie* case has been demonstrated, while also noting that it previously indicated that a "manifest weight of the evidence" standard applied to this issue. See *Rivera*, 221 Ill. 2d at 502. See also, *People v. Chambers*, 2016 IL 117911, ¶ 76 (noting that "[d]ue to the trial court's 'pivotal role in the evaluation process,' its ultimate conclusion on a claim of racial bias in jury selection under [*Batson*] will not be overturned unless it is clearly erroneous"). We do note, however, that our resolution of this issue would be the same under either standard.

The second panel included a single African-American, who was dismissed pursuant to a preemptory challenge raised by the State. At that time, counsel for defendant (who was an African-American), asked for a "race neutral explanation on that one." In support of that request, defense counsel noted only that there were "very few" African-Americans in the jury pool, and only one African-American would sit on the jury in light of the removal of one African-American member of the venire for cause and two more pursuant to the State's preemptory challenges.

¶ 26 After noting that defendant had to first make out a *prima facie* case of discrimination before a race-neutral explanation would be required, the trial court and defense counsel engaged in a discussion *solely* focused on the number of African-Americans in the panels and peremptorily challenged by the State. In the end, the trial court rejected defendant's *Batson* challenge, concluding: "I don't think it shows a *prima facie* case of discrimination at all, so I'm not going to get into requesting an explanation."

¶ 27 After trial, defendant stood on the written content of his posttrial motion, which with respect to this issue stated only that "[t]he Court erred in overruling Defendant's *Batson* objection during jury selection."

¶ 28 In *Allen*, 401 Ill. App. 3d at 848-50, this court rejected a defendant's appeal from the trial court's denial of a *Batson* challenge at the first stage, and we did so without conducting an analysis of each of the above factors in light of the limited nature of the objections raised below. After noting that, in the trial court, the defendant's *Batson* challenge consisted solely of a complaint that all of the African-American members of the venire were stricken, we concluded that "[t]he bare-bones motion did not contain any specific facts to support the allegation of discrimination. To make it beyond stage one, defendant must produce evidence sufficient to

permit the trial court to draw an inference that discrimination had occurred. Defendant's motion was inadequate to make a *prima facie* showing of discrimination." *Id*. at 849. Further describing the defendant's objection in the trial court as falling "woefully short," this court concluded that "the trial court properly found that defendant did not present a *prima facie* case of a *Batson* violation and thus the trial court's analysis properly ended at the first stage." *Id*. at 850.

¶ 29 We come to a similar conclusion here. Below, defendant's *Batson* objection *solely* focused on the number of African-Americans in the venire, the number peremptorily challenged by the State, and the number that ultimately seated on the jury. Of course, and as we have already indicated, "the mere fact of a peremptory challenge of a black venireperson who is the same race as defendant or the mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *Davis II*, 231 Ill. 2d at 361. Moreover, we note that the "unchallenged presence of jurors from the protected class on the seated jury is a factor properly considered [citation] and tends to weaken the basis for a *prima facie* case of discrimination [citation]." *Rivera II*, 227 Ill. 2d at 14. Here, an unchallenged African-American sat on the jury that convicted defendant. These were the only relevant facts discussed below with respect to defendant's first-step *prima facie* case of purposeful discrimination, and they are insufficient for us to find that the trial court's conclusion that a *prima facie* case was not made was clearly erroneous.

¶ 30 We reiterate that to establish a first-step *prima facie* case of purposeful discrimination, *defendant* was required to present facts and any other relevant circumstances which raised an inference that the State challenged jurors because they were African-American. *Mack*, 371 Ill. App. 3d at 44 (citing *Batson*, 476 U.S. at 96). More specifically, it was defendant's burden to present such evidence *below* so as allow the *trial court* to draw such an inference. *Johnson v.*

California, 545 U.S. 162, 170 (2005) ("[A] defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit *the trial judge* to draw an inference that discrimination has occurred.") (Emphasis added.). Defendant failed to do so, and we therefore reject his argument that he made a *prima facie* showing of a *Batson* violation, such that this matter should be remanded for a full *Batson* hearing.

¶ 31 Indeed, it is only now on appeal that defendant contends, for the first time, that an analysis of the record and *all of the above relevant factors* establishes an inference of purposeful racial discrimination such that he is entitled to a full *Batson* hearing. This is simply improper, as under all of the above authority it is evident that defendant was required to present the facts and any other relevant circumstances raising an inference of purposeful racial discrimination to the *trial court*.

¶ 32 More generally, "[i]t is well settled that arguments raised for the first time in this court are forfeited." *People v. Cherry*, 2016 IL 118728, ¶ 30. This rule applies equally to errors of constitutional dimension. *People v. Bock*, 242 Ill. App. 3d 1056, 1071 (1993) (citing *People v. Pickett*, 54 Ill.2d 280, 282 (1973)). In light of our discussion above and defendant's failure to timely raise any arguments with respect to the additional relevant factors, we decline defendant's request to consider these additional arguments.

¶ 33 In so ruling, we do not minimize the importance of the constitutional issues implicated in a *Batson* challenge, nor do we discount any concerns regarding the nature of the burden required to demonstrate racial discrimination. See *In re A.S.*, 2017 IL App (1st) 161259-B, ¶¶ 31-41 (Neville, J., specially concurring). However, the fact remains that it was defendant's burden to establish a *prima facie* showing of a *Batson* violation below, we do not review this issue *de novo*, and as our supreme court has explained:

> "By declining or failing to raise these claims below, defendant deprived the State of the opportunity to challenge them with evidence of its own, he deprived the trial court of the opportunity to decide the issue on those bases, and he deprived the appellate court of an adequate record to make these determinations. To consider such claims preserved would also multiply litigation by motivating parties to address at trial all conceivable arguments that might later be made and by forcing the trial court to consider not only the arguments made by counsel, but all arguments counsel might have made." *People v. Hughes*, 2015 IL 117242, ¶¶ 46-47.

¶ 34 For the foregoing reasons, we reject defendant's argument that he made a *prima facie* showing of a *Batson* violation, such that this matter should be remanded for a full *Batson* hearing.

¶ 35 B. Evidence of Warrant

¶ 36 Defendant next claims that he was denied his constitutional right to present a complete defense when, on the grounds that such evidence was irrelevant and inadmissible hearsay, the trial court granted the State's motion *in limine* and prevented defendant from presenting evidence that the search warrant targeted defendant's brother.

¶ 37 "A criminal defendant is constitutionally guaranteed a meaningful opportunity to present a complete defense." *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 43. When a party claims he was denied his constitutional right to present a complete defense due to an improper evidentiary ruling, the standard of review is abuse of discretion. See *People v. McCullough*, 2015 IL App (2d) 121364, ¶ 104.

¶ 38 Typically, evidentiary rulings are within the trial court's sound discretion and will not be disturbed on review unless the court has abused that discretion. *People v. Becker*, 239 Ill. 2d 215,

234 (2010). This standard applies to motions *in limine* (*People v. Harvey*, 211 Ill. 2d 368, 392 (2004)), and to questions regarding the admissibility of hearsay (*People v. Caffey*, 205 Ill. 2d 52, 89, (2001)). "An abuse of discretion occurs when no reasonable person would take the view adopted by the court." *Trettenero v. Police Pension Fund*, 333 Ill. App. 3d 792, 801 (2002) (citing *In re Marriage of Blunda*, 299 Ill. App. 3d 855, 865 (1998)).

¶ 39 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Rogers*, 81 Ill. 2d 571, 577 (1980). Thus, evidence of the mere existence of a search warrant can be properly admitted for the limited purpose of explaining the conduct of police officers. *People v. Rivera*, 182 Ill. App. 3d 33, 38-39 (1989). However, evidence of the *contents* of a search warrant is generally not permitted where the evidence is inadmissible hearsay. *People v. Janis*, 240 Ill. App. 3d 805, 811 (1992).

¶ 40 Here, the State's motion *in limine* did not seek to bar the introduction of *any* evidence with respect to the search warrant. Rather, the written motion sought only to preclude "any mention of the target of the search warrant and the contents of the search warrant." In discussing this motion prior to trial, defense counsel specifically took exception to this particular aspect of the State's request, clearly indicating that the defense wished to enter into evidence the fact that the search warrant was for defendant's brother, Jermel, and authorized a search of Jermel's garage. As defense counsel explained:

> "Our theory of defense revolves critically around the fact that the police come to execute a search warrant on property that is not [defendant's]." In granting the State's motion *in limine*, that trial court concluded that the fact that the search warrant was for Jermel and his garage was both hearsay and irrelevant, and stated that "[a] theory of the case has to be based on properly admitted evidence."

¶ 41 Later, in discussing a challenge to this ruling contained in defendant's posttrial motion, defense counsel indicated that the relevance of the evidence regarding the target of the search warrant was to show that "the drugs that were found on the ground and on the property and [sic] were not Anthony Nash's, but in fact Jermel Nash's." In rejecting this contention, the trial court asked defense counsel: "If they had a search warrant that said Anthony Nash on it, you'd be jumping up and down all over the place saying, you can't use evidence on a warrant, that's hearsay. Correct?" Defense counsel answered: "Correct."

¶ 42 In *People v. Virgin*, 302 Ill. App. 3d 438, 446 (1998), a description contained in a search warrant was "used by the prosecution to prove that the defendant was the person who was in illegal possession of the cocaine because he fit the description of the offender described in the search warrant." In finding this improper, we found that "the admission of the contents of the warrant, specifically the description, was used by the State to prove defendant was the possessor of the illegal drugs. Such use goes beyond an explanation of the investigatory procedure in this case." *Id*. We further explained that the "description contained in the search warrant was inadmissible hearsay used by the prosecution for the truth of the matter asserted, to prove defendant was the person who was in illegal possession of the cocaine because he matched the offender described in the search warrant." *Id*. at 447.

¶ 43 This factual situation here is different, in that it is the *defendant* that sought to introduce the contents of a search warrant and defendant did so to *disprove* he was the person who was in illegal possession of heroin because he did *not match* the person described in the search warrant. The legal effect is the same however; such evidence was inadmissible hearsay because defendant was attempting to use it for the truth of the matter asserted.

¶ 44 In sum, we conclude that defendant was not denied his constitutional right to present a complete defense, as the trial court did no abuse its discretion in granting the State's motion *in limine* and preventing defendant from presenting evidence that the search warrant targeted defendant's brother and his garage on the grounds that such evidence was inadmissible hearsay.

¶ 45 C. Right to an Attorney

¶ 46 Next, we consider defendant's assertion that he was denied a fair trial due to an improper question asked by the State in its examination of Officer Kubik, in which it indicated that defendant had exercised his right to speak to an attorney during police questioning.

¶ 47 At trial, the following colloquy occurred with respect to a question the State asked Officer Kubik regarding what occurred at the police station following defendant's admission that he has sold drugs to the woman in the alley:

> "[ASSISTANT STATE'S ATTORNEY]: After the defendant said that he wanted a lawyer, what happened?"
>
> [DEFENSE COUNSEL]: Objection. May we approach?
>
> THE COURT: Just a moment. Disregard that last comment about wanting a lawyer. It is improper.
>
> [DEFENSE COUNSEL]: I make a motion for mistrial.
>
> THE COURT: Denied. Go on, State.
>
> [ASSISTANT STATE'S ATTORNEY]: That was it.
>
> THE COURT: Okay. Go ahead, Ms. Prusak."

Defense counsel then conducted her cross-examination of Officer Kubik.

¶ 48 Then, in denying defendant's motion for a new trial on the basis of this question, the trial court stated:

> "THE COURT: *** I agree that the question about him asking for a lawyer was improper. However, I told the jurors to disregard it. I can assume the jurors disregarded it. So while it was improper to ask the question, he didn't ask for a lawyer, which is clearly improper, I told them to disregard the question and answer, if they heard one. So that is not an issue."

¶ 49 On this record, we fail to see any reversible error. First, while the State's question was improper, the record discloses that no answer provided by defendant was recorded at trial. Moreover, defense counsel immediately objected and the trial court immediately sustained the objection and instructed the jury to "[d]isregard that last comment about wanting a lawyer. It is improper." " 'Generally, the prompt sustaining of an objection by a trial judge is sufficient to cure any error in a question or answer before the jury.' " *People v. Jacobs*, 405 Ill. App. 3d 210, 220 (2010) (quoting *People v. Alvine*, 173 Ill. 2d 273, 295 (1996)). This general rule has repeatedly been applied by our supreme court in finding a lack of reversible error, including in a situation very similar to the one presented here. *People v. Frieberg*, 147 Ill. 2d 326, 354 (1992); *People v. Redd*, 173 Ill. 2d 1, 29 (1996); *People v. Hall*, 194 Ill. 2d 305, 342 (2000). We do the same here, and conclude that any error was cured by the swift actions of defense counsel and the trial court.

¶ 50 D. Plain Error

¶ 51 Next, we address defendant's contentions that the State improperly: (1) presented irrelevant and prejudicial evidence suggesting that defendant was in a gang; (2) argued that dealing drugs was defendant's "job," without any evidence suggesting defendant sold drugs on a regular basis; and (3) aligned itself with the jury during closing arguments by repeatedly asserting what "we know" with respect to the evidence.

¶ 52 However, and as defendant himself acknowledges, the record reflects that defendant never objected with respect to these issues at trial, nor did he challenge them in his posttrial motion. Therefore, defendant has not preserved these issues for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion).

¶ 53 Defendant thus asks this court to review these arguments for plain error. The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In either circumstance, the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 182.

¶ 54 On appeal, defendant only asserts plain error on the basis that the evidence was so closely balanced that these purported errors alone threatened to tip the scales of justice against him. *Piatkowski*, 225 Ill. 2d at 565. However, even if we agreed with defendant that the issues he raises amount to clear or obvious error, the evidence in this case was not closely balanced. In arguing to the contrary, defendant asserts that "the evidence was closely balanced as it pitted police testimony against two defense witnesses, with no extrinsic evidence corroborating either side, and after the jury had already rejected [Officer] Hefle's account, as it acquitted [defendant] of gun possession."

¶ 55 However, it is generally understood that "a positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction." *Id*. at 566. This general rule is applicable to determining whether evidence was closely balanced. See *In re M.W.*, 232 Ill. 2d 408, 435 (2009). Here, the State introduced evidence Officer Hefel observed defendant engage in a suspected drug sale, while Officers Kubik and Babicz testified that they observed both defendant drop the six packets and defendant's apprehension while he was in possession of the other seven packets in his pocket, all of which appeared to be packaged for sale. This evidence was corroborated by the forensic evidence indicating that the contents of the packets defendant dropped, as well as those recovered from his shorts upon arrest, tested positive for heroin. See *People v. Caffey*, 205 Ill. 2d 52, 104 (2001) (finding no plain error where eyewitness testimony corroborated by forensic evidence). The jury was also presented with evidence that defendant confessed to selling drugs. It is well recognized that confessions are one of the most probative types of evidence that can be admitted against a defendant. *People v. Primm*, 319 Ill. App. 3d 411, 424 (2000). Thus, defendant's specific contentions regarding the closeness of the evidence are supported by neither the facts nor the law.

¶ 56 To the extent that defendant also attempts to rely upon any credibility issues or inconsistencies with respect to the testimony presented at trial by the State and defense witnesses, we note that the jury was in the best position to determine the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony, to draw reasonable inferences from all of the evidence, and reiterate that the record as a whole here does not reflect evidence that was closely balanced. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 76 (coming to similar conclusion under similar circumstances).

¶ 57 E. One Act, One Crime

¶ 58 Defendant lastly argues that one of his convictions for possession with intent to deliver heroin must be vacated pursuant to the one-act, one-crime doctrine, because "simultaneous possession of two bags of a single substance is a single act, and abandoning one bag does not create a second drug possession." The State concedes this issue on appeal, and we agree.

¶ 59 Under the one-act, one-crime doctrine, a defendant may not be convicted of multiple offenses based on the same act, and he may not be convicted of multiple offenses based on multiple acts if some of the offenses are lesser-included ones. *People v. Miller*, 238 Ill. 2d 161, 165 (2010) (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). In order to determine whether a defendant's convictions may stand, we employ a two-step analysis. *Id*. First, we must determine whether the defendant's conduct constituted a single act or multiple acts. *Id*. If his conduct involved only one act, multiple convictions are improper. *Id*. Second, if his conduct involved multiple acts, we must determine whether any of the convictions were lesser-included offenses. *Id*. If the defendant was convicted of lesser-included offenses, those convictions are improper. *Id*.

¶ 60 Here, the evidence at trial established that the six bags dropped prior to defendant's arrest tested positive for heroin and weighed .2 grams, while the seven bags recovered from defendant's shorts upon his arrest also tested positive for heroin and weighed 1.1 grams. As a number of Illinois decisions have recognized, however, such circumstances constitute the single act of possessing multiple packets of a single controlled substance, supporting at most a single conviction. See *People v. Manning*, 71 Ill. 2d 132, 137 (1978); *People v. Carter*, 213 Ill. 2d 295, 303-4 (2004); *People v. Pittman*, 2014 IL App (1st) 123499, ¶¶ 29-39 (2004). As such, defendant's two separate convictions do not comport with the one act, one crime doctrine.

¶ 61 Where there is a violation of the one-act, one-crime doctrine, a court should impose a sentence on the more serious offense and vacate the less serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). In order to determine whether one offense is more serious than another, we first look to the possible punishments for the two offenses and, if necessary, then to which offense has the more culpable mental state. *Id*. at 170-71.

¶ 62 Possession with intent to deliver more than 1 but less than 15 grams of heroin is a Class 1 felony (720 ILCS 570/401(c)(1) (West 2012)), punishable by a term of 4 to 15 years' imprisonment (730 ILCS 5/5-4.5-30(a) (West 2012)), while possession with intent to deliver less than 1 gram of heroin is a Class 2 felony (720 ILCS 570/401(d)(1) (West 2012)), punishable by a term of only 3 to 7 years' imprisonment (730 ILCS 5/5-4.5-35(a) (West 2012)). Pursuant to the principles of the one-act, one-crime doctrine, we therefore vacate defendant's conviction for the less serious offense of possession with intent to deliver less than 1 gram of heroin.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, we affirm defendant's conviction for possession with intent to deliver more than 1 but less than 15 grams of heroin and the 10-year sentence imposed for that conviction, but vacate his conviction for possession with intent to deliver less than 1 gram heroin and the 7-year sentence imposed for that conviction.

¶ 65 Affirmed in part; vacated in part.