NOTICE
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2017 IL App (4th) 140790-U

NO. 4-14-0790

FILED
March 24, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
DENNIS W. KENDALL,	)	No. 13CF71
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 Held: (1) The trial court did not consider defendant's possession of a weapon as an aggravating factor in sentencing defendant.

(2) Defendant's conviction and sentence for unlawful possession of cannabis with intent to deliver was vacated as a lesser-included offense of armed violence.

¶ 2 Following a July 2014 trial, a jury convicted defendant, Dennis W. Kendall, of armed violence, a Class X felony (720 ILCS 5/33A-2(c), 5/33A-3(b-10) (West 2012)); unlawful possession of a weapon by a felon, a Class 2 felony (720 ILCS 5/24-1.1(a), 5/24-1.1(e) (West 2012)); and unlawful possession of cannabis with intent to deliver, a Class 3 felony (720 ILCS 550/5(d) (West 2012)). Thereafter, the trial court sentenced him to 22 years' imprisonment for armed violence, to be served with concurrent prison sentences of 14 years for unlawful possession of a weapon by a felon and 4 years for unlawful possession of cannabis with intent to deliv-

er. Defendant appeals, arguing (1) the trial court erred when it considered his possession of a firearm as an aggravating factor because firearm possession is an element of both armed violence and unlawful possession of a weapon by a felon; and (2) his conviction and sentence for unlawful possession of cannabis with intent to deliver should be vacated as a lesser-included offense of armed violence. We affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 On January 18, 2014, defendant was charged by information with (1) attempt (first degree murder) of a peace officer (720 ICLS 5/8-4(a), 5/8-4(c)(1)(A), 5/9-1(a)(1) (West 2012)) (count I); (2) armed violence (720 ILCS 5/33A-2, 5/33A-3(b-10) (West 2012)) (count II); (3) unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) (count III); (4) reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2012)) (count IV); (5) unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2012)) (count V); and (6) criminal fortification of a residence or business (720 ILCS 5/19-5(a) (West 2012)) (count VI).

¶ 5 On July 14, 2014, the State dismissed counts IV and VI, and defendant's jury trial commenced on the remaining counts. The evidence showed that the Decatur police obtained a search warrant for defendant's home. On the morning of January 11, 2013, the police went to defendant's home to execute the warrant. When no one answered the door after officers knocked and announced their presence, the police struck the door with a steel ram. Defendant, who was inside the home watching a movie, testified he had not heard any knocks on the door over the loud volume of his television, but he did hear someone "trying to kick in" his door. According to defendant, he thought "somebody was trying to break in to try to kill [him]."

¶ 6 Defendant testified about an earlier incident in order to explain his response to the police at his front door on the morning of January 11, 2013. According to defendant, early one morning in December 2012, he was awakened to a "loud bang." When he investigated the source of the bang, he found three men had forced the front door of his house open. One of the men pointed a gun at defendant's face and told him to sit on the couch. The gunman kept the gun pointed at defendant while the other two men "ransack[ed] the house." The men then tied defendant to a computer chair with an electrical cord and told him "not to get up and not to call the police or they would kill [him]." After the men left, defendant was able to get free and call 9-1-1. Following this event, defendant stated he was "constantly in fear." He reinforced his front door, purchased a firearm that he carried on his person, and exhibited other "paranoid" behaviors. According to defendant's clinical psychologist, who testified at trial, defendant suffered from post-traumatic stress disorder and dysthymia.

¶ 7 Defendant testified that on the morning of January 11, 2013, upon hearing someone "trying to kick in" his door he "panicked," grabbed his gun, and fired a shot at the door to "scare off whoever was out there." Unbeknownst to defendant, the shot he fired struck a police officer. Defendant then called 9-1-1 to report someone was trying to break into his house. At that time, the operator informed defendant that it was the police at his door. Defendant disconnected the call, pried open his door "because the lock was all messed up," and surrendered. The police then searched defendant's home and confiscated a firearm and ammunition, 48.77 grams of cannabis, a digital scale, sandwich bags, a metal grinder, and pipes.

¶ 8 The jury found defendant guilty of armed violence, unlawful possession of a weapon by a felon, and unlawful possession of cannabis with intent to deliver, but not guilty of

attempt (first degree murder) of a peace officer. The jury also found the State failed to prove defendant discharged a firearm that proximately caused great bodily harm to another person.

¶ 9 At the September 4, 2014, sentencing hearing, the State sought prison sentences of 25 years for defendant's armed-violence conviction, a discretionary consecutive sentence of 10 years for unlawful possession of a weapon by a felon, and a concurrent sentence of 10 years for unlawful possession of cannabis with intent to deliver. Defendant sought the mandatory minimum prison sentence of 15 years.

¶ 10 In sentencing defendant, the trial court noted it considered the evidence in aggravation and mitigation, defendant's statement in allocution, the arguments and recommendations of counsel, and the statutory factors in mitigation and aggravation. In mitigation, the court noted claimant's gainful employment throughout his life and the support of his family. In aggravation, the court pointed to defendant's prior history of adjudications and convictions, including a juvenile adjudication for residential burglary, a 1998 felony-burglary conviction, a 2005 felony conviction for driving under the influence (DUI), and "[a] smattering of misdemeanor offenses." Although two of defendant's convictions were probationable, the court opined that due to defendant's prior criminal history, a sentence of probation on either of those counts "would deprecate the serious nature of the offense and be inconsistent with the ends of justice." The court also stated as follows:

> "The other aggravating factor that the court believes exists here was touched upon by counsel for the State. It is illegal for a felon to possess a firearm under any circumstance. There's two ways of look at [this]. In this particular case, perhaps the firearm was obtained because of the prior traumatic incident.

That's probably true. But there may be a dual purpose here. I think the firearm was also obtained in order to protect the enterprise that the defendant was engaged in, which the jury found to be possessing cannabis with intent to deliver.

So, there's really two purposes to having a gun. The point is this, it is illegal for a felon to possess a gun under any circumstances. The point is well-taken not only was the gun possessed, it was discharged by a convicted felon.

This makes this very serious in the court's view. The court believes under this circumstance the sentence must reflect the fact that there is a deterrent component to all of this with regard to other felons who might be likewise inclined to possess weapons illegally, let alone discharge them."

Thereafter, the court sentenced defendant to 22 years' imprisonment for armed violence; a concurrent sentence of 14 years' imprisonment for unlawful possession of a weapon by a felon (the maximum sentence for the offense); and a concurrent sentence of 4 years' imprisonment for unlawful possession of cannabis with intent to deliver.

¶ 11 Defendant did not file a motion to reconsider the sentence.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues (1) the trial court erred by considering his possession of a firearm as an aggravating factor when firearm possession is an element of armed violence and unlawful possession of a weapon by a felon; and (2) his conviction and sentence for unlawful possession of cannabis with intent to deliver should be vacated as a lesser-included offense of armed violence.

¶ 15 A. Possession of a Firearm as an Aggravating Factor

¶ 16 As noted, defendant first asserts the trial court erred by considering his possession of a firearm as an aggravating factor because firearm possession is an element of both armed violence and unlawful possession of a weapon by a felon. He acknowledges this issue has not been preserved for review because he did not file a motion to reconsider the sentence. See *People v. Blair*, 2015 IL App (4th) 130307, ¶ 38, 44 N.E.3d 1073 (the failure to raise a claim in a motion to reconsider the sentence results in its forfeiture). Nonetheless, defendant asserts we may review the issue for plain error.

¶ 17 "The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider '[p]lain errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court.' " *People v. Eppinger*, 2013 IL 114121, ¶ 18, 984 N.E.2d 475 (quoting Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). "Plain-error review is appropriate under either of two circumstances: (1) when '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) when '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.' " *Id*. (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

¶ 18 "The first step in our analysis is to determine whether an error occurred." *Id.*¶ 19. Only if error occurred will we then consider whether either of the two prongs of the plain-error doctrine has been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 189-90, 940 N.E.2d 1045, 1059 (2010). " 'In both instances, the burden of persuasion remains with the defendant.' " *Piatkowski*,

225 Ill. 2d at 565, 870 N.E.2d at 410. "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010).

¶ 19 "There is a general prohibition against the use of a single factor both as an element of a defendant's crime *and* as an aggravating factor justifying the imposition of a harsher sentence than might otherwise have been imposed." (Emphasis in original.) *People v. Gonzalez*, 151 Ill. 2d 79, 83-84, 600 N.E.2d 1189, 1191 (1992). This is so because it is presumed that the legislature considered the factors inherent in an offense in prescribing the sentencing range for the offense. *Id.* at 84, 600 N.E.2d at 1191. While a trial court may not consider a factor inherent in the offense as a basis for imposing a harsher penalty, it "is not required to refrain from any mention of the factors which constitute elements of an offense, and the mere reference to the existence of such a factor is not reversible error." *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15, 2 N.E.3d 1137; see also *People v. Ward*, 113 Ill. 2d 516, 526-27, 499 N.E.2d 422, 426 (1986).

¶ 20 "Whether a trial court considered an improper factor when sentencing a defendant is a question of law, which we review *de novo*." *People v. Winchester*, 2016 IL App (4th) 140781, ¶ 72, 66 N.E.3d 601. However, "[t]here is a strong presumption the trial court based its sentencing judgment on proper legal reasoning." *Id.* In considering whether a sentence is properly imposed, a reviewing court "should not focus on a few words or sentences of the trial court, but should consider the record as a whole." *Andrews*, 2013 IL App (1st) 121623, ¶ 15, 2 N.E.3d 1137.

¶ 21 As an initial matter, we note that not every mention by a sentencing judge of an element of the offense which is also identified as a factor in aggravation is error. In *People v. Saldivar*, 113 Ill. 2d 256, 268-69, 497 N.E.2d 1138, 1142-43 (1986), our supreme court addressed this issue, stating, in part:

> "[T]his court did not intend a rigid application of the rule, thereby restricting the function of a sentencing judge by forcing him to ignore factors relevant to the imposition of sentence. The Illinois Constitution provides that '[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.' (Ill. Const. 1970, art. I, sec. 11.) A reasoned judgment as to the proper penalty to be imposed must therefore be based upon the particular circumstances of each individual case. [Citations.] Such a judgment depends upon many *relevant* factors, including the defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment [citations], as well as ' "the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant" ' [citations]." (Emphasis in original.)

¶ 22 Defendant cites *People v. Dowding*, 388 Ill. App. 3d 936, 904 N.E.2d 1022 (2009), in support of his contention that the trial court improperly considered his possession of a firearm as an aggravating factor. In *Dowding*, the defendant was convicted of aggravated DUI, an offense that required a finding the defendant's conduct caused the death of another. *Id*. at 941, 904 N.E.2d at 1027. At the defendant's sentencing hearing, the State requested the maximum

sentence of 14 years in prison and stated five times the defendant had " 'killed someone' " or " 'caused the death of someone.' " *Id.* at 943, 904 N.E.2d at 1029. The trial court then noted, " 'The factors in aggravation that I do find apply in this case are, Number 1, that the defendant's conduct caused or threatened serious harm. No question, this defendant's conduct in this offense caused the greatest harm there could be, that is the death of another person.' " *Id.* On review, the Second District noted the trial court was "within its bounds to mention the victim's death in its discussion concerning defendant's failure to accept sufficient responsibility for a serious offense." *Id.* at 944, 9040 N.E.2d at 1029. However, it found the trial court improperly considered the victim's death as an aggravating factor, as evidenced by the trial court's express statement "that causing the victim's death was an aggravating factor upon which the sentence was based." *Id.*

¶ 23 We find *Dowding* distinguishable. As noted, in *Dowding*, the trial court specifically stated it was relying on a factor inherent in the offense as an aggravating factor during sentencing. However, the trial court's comments in this case, when read in context, reveal the court did not mention defendant's possession of a firearm as an aggravating factor to justify a harsher sentence than might have otherwise been imposed.

¶ 24 While the trial court clearly referenced defendant's possession of a firearm, a proper reading of the court's oral pronouncement reveals that it did so partially to demonstrate its opinion that a significant sentence was necessary to deter other felons from possessing firearms under any circumstances, regardless of whether the firearm was possessed for personal protection or to protect a criminal enterprise. The need for deterrence is an appropriate factor in aggravation. Further, we find the trial court's references to defendant's possession of a firearm are also

akin to a consideration of the "nature and circumstances" of the offense, as discussed in *Saldivar*. Thus, we find the trial court did not err in its consideration of defendant's possession of a firearm. Because we find no error, there can be no plain error. See *People v. Naylor*, 229 Ill. 2d 584, 602, 893 N.E.2d 653, 665 (2008) ("[a]bsent reversible error, there can be no plain error").

¶ 25 B. One-Act, One-Crime Doctrine

¶ 26 Defendant next asserts that his conviction and sentence for unlawful possession of cannabis with intent to deliver must be vacated as a lesser-included offense of armed violence. Initially, we note that defendant did not file a posttrial motion raising this issue. However, "an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule." *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004). The State concedes that defendant's conviction and sentence for this offense should be vacated because it is a lesser-included offense.

¶ 27 Under the one-act, one-crime rule, multiple convictions and sentences for offenses carved from the same physical act are prohibited. *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010). An "act" is defined as " 'any overt or outward manifestation which will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306 (1996) (quoting *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844-45 (1977)). An analysis under the one-act, one-crime rule involves the following two-step process:

> "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved

> multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *Miller*, 238 Ill. 2d at 165, 938 N.E.2d at 501.

Whether a violation of the one-act, one-crime rule has occurred is subject to *de novo* review. *People v. Gillespie*, 2014 IL App (4th) 121146, ¶ 10, 23 N.E.3d 641.

¶ 28 Here, as presented to the jury, the underlying felony offense for the charge of armed violence included defendant's possession of cannabis in excess of 30 grams *or* his possession of cannabis in excess of 30 grams with intent to deliver. Similarly, the jury was presented with alternative propositions to support a finding of possession of cannabis, including that defendant possessed cannabis in excess of 30 grams *or* possessed cannabis in excess of 30 grams with intent to deliver. Ultimately, the jury found defendant guilty of unlawful possession of cannabis in excess of 30 grams with intent to deliver. This finding then constituted the predicate offense to support his conviction for armed violence. Under these facts, defendant's convictions for unlawful possession of cannabis with intent to deliver and armed violence were based on the same act of defendant's possession of cannabis with intent to deliver. Accordingly, defendant's conviction and sentence for unlawful possession of cannabis with intent to deliver is a lesser-included offense of armed violence and must be vacated. See *People v. Donaldson*, 91 Ill. 2d 164, 170, 435 N.E.2d 477, 479 (1982) ("multiple convictions for both armed violence and the underlying felony cannot stand where a single physical act is the basis for both charges").

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we vacate defendant's conviction and sentence for unlaw-

ful possession of cannabis with intent to deliver. We otherwise affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 31 Affirmed in part and vacated in part.