2018 IL App (1st) 15-2702-U

THIRD DIVISION
September 26, 2018

No. 1-15-2702

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 10 CR 21490
HERIBERTO QUEZADA,	)	
	)	The Honorable
Defendant-Appellant.	)	William G. Lacy,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Ellis and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: There was no plain error in the trial court's sentencing of the 15-year-old defendant to an adult sentence. The defendant was convicted of charged offenses that arose from the same incident as the additionally charged automatic-transfer offenses. Accordingly, the State was not required to file a motion seeking that he be sentenced as an adult before such a sentence could be imposed. 705 ILCS 405/5-130(1) (West 2010).

¶ 2 After a jury trial, the defendant, Heriberto Quezada, was convicted of two counts of attempt murder and two counts of aggravated battery with a firearm. The defendant, who was 15 years old at the time he committed the crime, was sentenced to two consecutive terms of 12 years' imprisonment. The defendant now appeals, contending that: (1) the amendment to the automatic

transfer provision excluding 15-year-olds charged with certain crimes from being automatically tried in adult court (Public Act 99-258 (eff. Jan. 1, 2016) (codified at 705 ILCS 405/5-130 (1)(a)(i) (2016))) applies retroactively to him because his cause of action was "pending" at the time that amendment became effective; and (2) in the alternative, even if that amendment is not retroactive, the cause should be remanded to the juvenile court for resentencing under the Juvenile Court Act because he was not convicted of an offense listed under the original automatic transfer statute (705 ILCS 405/5-103 (1)(c)(ii) (West 2010)). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The defendant was charged in a 15-count indictment for his involvement in the November 15, 2010, shooting of, *inter alia*, two victims, Eric Grijalva (Eric), and Abid Patel (Abid). The State proceeded to trial only on the following four counts: (1) two counts of attempt first degree murder (720 ILCS 5/8-4(a); 720 ILCS 5/9-1(a)(1) (West 2010)), and (2) two counts of aggravated battery with a firearm (720 ILCS 5/12.4.2(a)(1) (West 2010)). The attempt murder charges alleged that the defendant, without lawful justification, and with intent to kill, shot Eric and Abid, while armed with a firearm, which constituted a substantial step toward the commission of first degree murder, and during the commission of which he personally discharged a firearm. The aggravated battery with a firearm charges alleged that the defendant, in committing a battery, knowingly and intentionally caused any injury to Eric and Abid by discharging a firearm, and shooting the victims about the body.

¶ 5 At trial, the following relevant evidence was adduced. Eric's brother, Michael Grijalva (Michael) first testified that shortly after 6:30 p.m. on November 15, 2010, he was standing in front of his residence at 4923 North Drake Avenue, smoking cigarettes with his brother, Eric,

and his friends Abid, Zeidan Abulai (Zeidan) and Mohammed Ahsan (Mohammed). Michael was about to head to work, when he observed two young men riding a bicycle north on Drake Avenue. According to Michael, one of the young men was sitting on the bicycle and driving it, while the other one was standing on the pegs of the back wheel. Michael stated that he could not recognize the driver because he had a ski mask on his face. Michael, however, recognized and identified the young man standing on the pegs as the defendant. He explained that he recognized the defendant from a previous encounter, during which, about two months before the incident, the defendant had approached him in a convenience store on Lawrence Avenue and said "What's up, I'm an SGD, you know, I'm Little Crazy man. You know, you better watch out." Michael had been face-to-face with the defendant in that encounter, heard the defendant's voice, and could see the defendant had a tattoo of a six-point star on his hand. He was therefore able to identify both the defendant's face and voice.

¶ 6 Michael testified that as the bicycle rode down Drake Avenue towards Argyle Street, the defendant yelled, "King killer" and "SGDs," and then also placed a mask over his face. Michael explained that he understood those slogans to mean that the men on the bicycle were "Spanish Gangster Disciples," and that they were going to kill a "Latin King." Michael testified that he was neither affiliated with, nor a member of any gang, and that he tried to convey this to the young men on the bicycle. Together with Eric, he attempted to quickly cross the street to reach Zeidan and Abid, who had been speaking to several other friends on the other side of Drake Avenue, to tell them that they should all leave for work immediately. As Michael was half way across Drake Avenue, however, he heard more gang slogans, and observed the defendant, who was standing on the corner of Argyle Street and Drake Avenue, fire a gun in their direction. Michael ran and hid behind a van. He heard five or six gunshots before he saw the defendant

and his accomplice flee the scene with their bicycle. When he got up from his hiding spot, Michael realized that his brother Eric was shot in the stomach and that his friend Abid was shot in the neck.

¶ 7 Michael called the police and once they arrived at the scene, he described the defendant to them. The police showed him a photo array from which he picked out the defendant. Later that same night, Michael identified the defendant from a physical line-up.

¶ 8 On cross-examination, Michael admitted that he only saw two flashes of gunfire before hiding behind the van and therefore did not see who fired each shot. He also admitted that of the six individuals he viewed in the physical line-up, only the defendant was short (between 5'1" and 5'3").

¶ 9 Zeidan, Eric and Abid next testified consistently with Michal about the events that transpired on November 15, 2010.

¶ 10 Zeidan stated that right before 7 p.m. on that evening, he was smoking cigarettes with Eric, Abid, Mohammed, and Michael in front of Michael's house, when Abid noticed a few friends across the street. As Zeidan followed Abid across the road, two young men on a single bicycle drove past them yelling "SGD nation," and "King Killer." Zeidan identified the young man standing on the bicycle's back wheel pegs as the defendant. Zeidan and Abid ignored the men and crossed the road to speak to Abid's friends. Because Abid's friends spoke Spanish and Zeidan did not, Zeidan turned to watch the young men on the bicycle. He stated that they drove up and down the block "harassing Michael and Eric," and then stopped at the corner of Argyle Street and Drake Avenue.

¶ 11 Once Abid finished his conversation and was about to cross the street back to Michael, Eric,

and Mohammed, Zeidan observed the defendant descend the bicycle, walk towards them down the center of Drake Avenue, and pull something out of his waistband. Zeidan called out to Abid to stop him from crossing the street, when he heard gunshots and dropped to the ground. After the gunshots ceased he looked up and realized that Eric and Abid were lying injured on the ground.

¶ 12 Zeidan spoke to the police that evening and identified the defendant as their assailant from a line-up several days later.

¶ 13 Eric's testimony was substantially similar to that of Michael and Zeidan. In addition, like his brother, Eric averred that he recognized the defendant as the individual standing on the bicycle pegs and yelling gang slogans, because he had previously encountered him in the neighborhood. Specifically, Eric recalled that sometime in the summer of 2010, the defendant approached him in the neighborhood and asked him whether he was a gang member. When Eric responded that he was not, the defendant stated his name was "Little Crazy" and that he was an "SGD." Eric averred that although on November 15, 2010, the defendant was initially wearing a bandana on the lower part of his face, near his chin, he pulled down the bandana as he rode by yelling gang slogans at them, so that Eric could see his face. Eric also testified that although he did not see the defendant actually shoot him, before he was shot he saw the defendant standing in the middle of Drake Avenue and the driver of the bicycle "somewhere to the side."

¶ 14 Eric further testified that as a result of the shooting, he was in a coma for eight days and spent 22 days in the hospital. Eric also had a bullet lodged in his spine that was not removed, and nerve damage to his lower leg.

¶ 15 Abid next testified similarly to Eric, Michael and Zeidan. Although he could not identify

either of the men on the bicycle because they were wearing black masks over their faces, he stated that after crossing Drake Avenue with Zeidan, he observed the young man riding on the pegs of the bicycle, descend the bicycle at the corner of Drake Avenue and Argyle Streets. He stated that the same young man then walked down Drake Avenue looking right and left, and staring at Eric, Michael and Mohammed before running back to the intersection where the driver remained on the bicycle. Abid testified that he was shot in the neck moments later, as he was crossing the street back to Eric. While Abid could not tell which of the attackers shot him because it was too dark, he recalled that there was only one shooter.

¶ 16 The State next called an occurrence witness, Miguel Pinzon (Pinzon). Pinzon testified that a little before 7 p.m. on November 15, 2010, he was walking east on Argyle Street when he observed two individuals on a single bicycle at the intersection with Drake Avenue. Pinzon stated that the defendant was standing on the bicycle's back wheel pegs, and that he could see his face because the streetlights were on, and they were only about four or five cars away from each other. Pinzon recognized the defendant from the neighborhood. Pinzon stated that he observed the defendant yell gang slogans in the direction of someone standing south on Drake Avenue, but could not see at whom. According to Pinzon, the defendant then jumped off the bicycle pegs, covered the bottom of his face with a bandana, pulled out a handgun and began to fire in the same direction. Pinzon stated that he ran into the nearest alley to get away from the shooting. He subsequently learned that his friends, Eric and Abid were shot in the encounter. Pinzon spoke to the police on the following day, and viewed a lineup from which he identified the defendant as the shooter.

¶ 17 Chicago Police Officer Billy Gonzalez next testified that at about 7 p.m. on November 15,

2010, together with his partner, Officer Katie Moreno, he responded to a call of a person shot at 4923 North Drake Avenue. Once at the scene, Officer Gonzales spoke to Michael, where he learned that an individual by the nickname "Little Crazy" had been involved in the shooting. Officer Gonzalez stated that he recognized the nickname because he had spoken to someone in the neighborhood with that name before. Officer Gonzalez took Michael to the police station where he showed him a photo array including a photograph of "Little Crazy." Michael immediately picked out "Little Crazy" from the photo array as the person who shot his brother. Officer Gonzalez testified that the photograph Michael picked out was that of the defendant.

¶ 18 Chicago Police Officer German Gomez next testified that after responding to calls of a shooting, he proceeded to the scene of the crime where he spoke to other officers and learned that the shooter was known as "Little Crazy." Officer Gomez also learned "Little Crazy's" identity and his address. Accordingly, he relocated to 3728 West Eastwood Avenue, which was about four or five blocks from the scene. Officer Gomez waited to hear from police headquarters that a photo array with "Little Crazy's" photograph had been conducted. Upon receiving that call, at about 8:30 p.m., he entered the residence and arrested the defendant.

¶ 19 Chicago Police Detective Vidas Nemickas next testified that on November 15, 2010, he was assigned to investigate the shooting of Eric and Abid. Detective Nemickas proceeded to 4923 Drake Avenue where he spoke to several officers. Near the corner of Drake Avenue and Argyle Streets, Detective Nemickas found two fired shell casings. He also observed a car parked on Ainslie Street just west of Drake Avenue, which appeared to have been damaged by gunfire.

¶ 20 Detective Nemickas also testified that as part of his investigation he conducted the lineups viewed by Michael, Pinzon and Zeidan. He averred that all three witnesses positively identified the defendant from lineups.

¶ 21 After the State's case-in-chief, the defense proceeded by calling the defendants' parents to the stand. The defendant's mother, Socorro Quezada (Socorro), first testified that on November 15, 2010, she was at home all day babysitting seven children. She stated that the defendant arrived home to have dinner at about 5:30 p.m., after which he went into the living room to watch television. She averred that the defendant did not leave the house for the remainder of the evening, but sat with her in the living room watching television, until the police arrived to arrest him.

¶ 22 On cross-examination, Socorro acknowledged that her son was in a gang. She also admitted that she never told the police that the defendant had an alibi.

¶ 23 The defendant's father, Faustino Quezada, testified consistently with his wife that on the day of the shooting, the defendant arrived home after 5 p.m., and remained in the house until 6:30 p.m., when Faustino left to take a nephew to Catechism class. Faustino averred that when he left the house at 6:30 p.m., the defendant remained inside watching television and talking with his mother.

¶ 24 After the defense rested, in rebuttal, the State recalled Officer Gomez. The officer testified that when he arrested the defendant in his home at about 8:50 p.m. on November 15, 2010, he subsequently spoke to Faustino at the police station. Officer Gomez testified that he was translating for Faustino because he spoke fluent Spanish, and recalled that Faustino told him that on the evening in question, the defendant had gone out "for a bit" before returning home.

¶ 25 After closing arguments, the jury was instructed on the theory of accountability for all charges. The jury was also instructed that the State had the burden to prove that the defendant personally discharged a firearm during the commission of the attempt murders, as charged in the indictment.

¶ 26 After deliberations, the jury found the defendant guilty of two counts of attempt murder and two counts of aggravated battery with a firearm. However, the jury found that "the allegation was not proven that during the offense of first degree murder the defendant personally discharged a firearm" at either victim.

¶ 27 After the trial court denied the defendant's motion for a new trial, the parties proceeded with sentencing. At sentencing, the State argued that the defendant's attempt murder convictions were subject to the 15-year firearm enhancement because the defendant possessed a firearm during the commission of the attempt murders. The trial court disagreed, explaining that the question of whether the defendant possessed a weapon during the commission of the offenses was never submitted to the jury. Instead, the court noted, the only question submitted to the jury was whether the defendant had actually discharged a firearm during the commission of the offenses, and the jury explicitly found that he had not. Accordingly, the trial court declined the State's invitation to impose any firearm enchantment. Instead, the court merged the aggravated battery with a firearm counts with the attempt murder counts and sentenced the defendant to two consecutive 12-year terms on the attempt murder convictions. The defendant now appeals.

¶ 28 II. ANALYSIS

¶ 29 On appeal, the defendant initially argued that the amendment to the automatic transfer provision excluding15-year-olds charged with certain crimes from being automatically tried in adult court (Public Act 99-258 (eff. Jan. 1, 2016) (codified at 705 ILCS 405/5-130 (1)(a)(i) (2016))) applied retroactively to him because his cause of action was "pending" in the appellate court at the time that amendment became effective. However, in his reply brief, the defendant concedes that this issue was recently resolved against him by our supreme court's decision in

People v. Hunter, 2017 IL 121306, which held that the amendment to the automatic transfer provision does not apply retroactively to proceedings on direct appeal.

¶ 30 Accordingly, the defendant proceeds only with his second argument, contending that regardless of the retroactivity of that amendment, his cause must nonetheless be remanded to the juvenile court for sentencing because even under the old automatic transfer statute he was not convicted of an offense listed under section 5-130(1)(a) of the Juvenile Court Act (705 ILCS 405/5-130(1)(a) (West 2010)).

¶ 31 In making this argument, the defendant concedes that he has forfeited this issue by failing to raise it before the trial court, both through an objection at his sentencing hearing and in a written posttrial motion. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Bannister*, 232 Ill. 2d 52, 76 (2008) (It is axiomatic that to preserve a sentencing claim for appeal, a defendant must make a contemporaneous objection at the sentencing hearing and raise the issue in a posttrial motion). Nonetheless, he urges us to consider his argument under the second prong of the plain error doctrine.

¶ 32 The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (citing *People v. Averett*, 237 Ill. 2d 1, 18 (2010)); see also *People v. Fort*, 2017 IL 118966, ¶ 18 (citing *People v. Herron*, 215 Ill. 2d 167, 186-87) (2005). The plain error doctrine permits "a reviewing court to consider unpreserved error when (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) (citing *Herron*, 215 Ill. 2d at 186-87); see also *Thompson*, 238 Ill. 2d at 613; see also *People v. Adams*, 2012 IL 111168, ¶ 21. In the sentencing context, this means that a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *People v. Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 33 Because "[t]here can be no plain error if there was no error at all," (*People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010)), the first step in plain-error review is to "determine whether any error occurred" at all. *Lewis*, 234 Ill. 2d at 43; *Thompson*, 238 Ill. 2d at 613. This requires "a substantive look" at the issue raised. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). We will therefore first review the defendant's claim to determine if there was any error before considering it under plain error.

¶ 34 Turning to the merits, we begin by noting that the Juvenile Court Act, as it existed at the time of the defendant's offense, provided the juvenile court with exclusive jurisdiction over any minor under 17 years of age who was charged with violating any federal or State law or municipal or county ordinance. 705 ILCS 405/5-120 (West 2010). Section 5-120 of the Act specifically provided that "no minor who is under 17 years of age at the time of the alleged offense" could be prosecuted "under the criminal laws of this State." *Id*.

¶ 35 The automatic transfer provision in section 5-130 of the Act, however, provided an exception to the juvenile court's exclusive jurisdiction over minors charged with a crime. 705 ILCS 405/5-130 (West 2010). That section provided in pertinent part:

" (1)(a) The definition of delinquent minor under Section 5–120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, (iii) *aggravated battery with a firearm where the minor personally discharged a firearm as defined in Section 2–15.5 of the Criminal Code of 1961*,[1] (iv) armed robbery when the armed robbery was committed with a firearm, or (v) aggravated vehicular hijacking when the hijacking was committed with a firearm.

These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State."

Accordingly under section 5-130(a), a minor who, like the defendant, was at least 15 years old at the time of the offense and who was charged with one of the offenses listed in the statute was excluded from the juvenile court's jurisdiction. 705 ILCS 405/5-130(1)(a) (West 2010)). The listed offenses included aggravated battery with a firearm while personally discharging a firearm, but not aggravated battery with a firearm without personally discharging it, and not attempt murder.

¶ 36 Further, section 5-130(1)(c) of the Act discussed the sentencing of minors subject to the automatic transfer statute. 705 ILCS 405/5-130(1)(c) (West 2010)). That section provided in pertinent part:

[1] Section 2-15.5 provides in pertinent part: "A person is considered to have 'personally discharged a firearm' when he or she, while armed with a firearm, knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm." 720 ILCS 5/2-15.5 (West 2010).

"(c)(i) If after trial or plea the minor is convicted of any offense covered by paragraph (a) of this subsection (1), then, in sentencing the minor, the court shall have available any or all dispositions prescribed for that offense under Chapter V of the Unified Code of Corrections.

(ii) *If after trial or plea the court finds that the minor committed an offense not covered by paragraph (a) of this subsection (1), that finding shall not invalidate the verdict or the prosecution of the minor under the criminal laws of the State; however, unless the State requests a hearing for the purpose of sentencing the minor under Chapter V of the Unified Code of Corrections, the Court must proceed under Sections 5–705 and 5–710 of this Article*. To request a hearing, the State must file a written motion within 10 days following the entry of a finding or the return of a verdict. Reasonable notice of the motion shall be given to the minor or his or her counsel. If the motion is made by the State, the court shall conduct a hearing to determine if the minor should be sentenced under Chapter V of the Unified Code of Corrections. In making its determination, the court shall consider among other matters: (a) whether there is evidence that the offense was committed in an aggressive and premeditated manner; (b) the age of the minor; (c) the previous history of the minor; (d) whether there are facilities particularly available to the Juvenile Court or the Department of Juvenile Justice for the treatment and rehabilitation of the minor; (e) whether the security of the public requires sentencing under Chapter V of the Unified Code of Corrections; and (f) whether the minor possessed a deadly weapon when committing the offense. The rules of evidence shall be the same as if at trial. If after the hearing the court finds that the minor should be sentenced under Chapter V of the Unified Code of Corrections, then the court shall sentence the minor accordingly having available to it any or all dispositions so prescribed." (Emphases added.) 705 ILCS 405/5–130(1)(c) (West 2010).

Accordingly, under section 5-130(1)(c) if a minor was convicted of "any offense covered by" section 5-130(1)(a), the trial court had to sentence him as an adult. 705 ILCS 405/5-130(1)(c) (West 2010). Conversely, if the minor was convicted of "an offense not covered by" section 5-130(1)(a), the trial court had to sentence him as a juvenile unless the Sate filed a written motion, within 10 days after the verdict, requesting adult sentencing. *Id*.

¶ 37 On appeal, the defendant contends that his adult sentence was imposed in violation of the aforementioned statute because he was convicted of an offense not covered by section 5-130(1)(a) of the Act (705 ILCS 405/5-150(1)(a) (West 2010). In that respect, he points out that because he was not convicted of the charged automatic transfer offense of aggravated battery with a firearm while personally discharging the firearm, both offenses for which he was convicted, namely attempt murder and aggravated battery (without personally discharging a firearm) were non-automatic transfer offenses, which required the State to seek adult sentencing before he could be sentenced as an adult. He therefore argues that pursuant to section 5-130(1)(c)(ii) of the Act, he should have been sentenced as a juvenile. 705 ILCS 405/5-130 (1)(c)(ii) (West 2010)).

¶ 38 The State concedes that the defendant was convicted of attempt murder and aggravated battery without personally discharging a firearm, neither of which was a charged offense specified in section 5-130(1)(a) as permitting automatic transfer to adult court. Nonetheless, the State argues that the offenses for which the defendant was convicted were "covered by" section 5-130(1)(a) because they were offenses that "arose out of the same incident" as the offenses for which he was charged, thereby permitting adult sentencing without necessitating a prior motion from the State. 705 ILCS 405/5-130 (1)(a), (c) (West 2010)). For the reasons that follow, we agree.

¶ 39 In interpreting the language of section 5-130(1) of the Act, our supreme court has repeatedly held that a conviction for an offense "covered by" section 5-130(1)(a), as set forth in section 5-130(1)(c)(i), includes both charges "specified in" section 5-130(1)(a), as well as "all other charges arising out of the same incident." *People v. Fort*, 2017 IL 118966, ¶ 37 (citing *People v. King*, 241 Ill. 2d 374, 385 (2011); see also 705 ILCS 405/5-130 (1)(a), (c) (West 2010).

¶ 40 In the present case, while the defendant was not convicted of the "specific" charge of aggravated battery with a firearm while personally discharging the firearm, listed in section 5-130(1)(a), he was convicted of attempt murder, a crime that "arose out of" the "same incident" as that aggravated battery charge. 705 ILCS 405/5-130 (1)(a) (West 2010)). There can be no doubt, nor does the defendant attempt to argue, that there was but *one* incident here. Namely, that the defendant, after riding on the back of a bicycle driven by his accomplice, yelled gang slogans threatening to harm the victims, after which he descended that bicycle and partook in the shooting. Since the defendant was convicted of attempt murder, a charged crime "arising out of" the "same incident" as the specified and charged automatic transfer crime (aggravated battery with a firearm while personally discharging the firearm), his conviction was "covered by" section 5-130(1)(a) as set forth in section 5-130(1)(c), and the State was not required to file a motion requesting adult sentencing before the defendant could be sentenced as an adult. See *King*, 241 Ill. 2d at 385; see also 705 ILCS 405/5-130 (1)(a), (c) (West 2010)). Accordingly, the imposition of the adult sentence was proper.

¶ 41 In coming to this decision, we find the defendant's reliance on the decision in *Fort* misplaced. In that case, the defendant was charged with first degree murder, an offense specified in section 5-130(1)(a) of the Act, but was convicted of second degree murder, a crime for which he was never charged. *Fort*, 2017 IL 118966, ¶ 31. The *Fort* court held that because second degree

murder is a separate offense from first degree murder, and the State chose not to charge the defendant with second degree murder, the second degree murder charge could not have "arisen out" of the "same incident" as the charged offense. *Fort*, 2017 IL 118966, ¶ 31. Accordingly, the court held that because the defendant was convicted on an "uncharged, non-automatic transfer offense," the State was required to move for adult sentencing before an adult sentence was imposed. *Fort*, 2017 IL 118966, ¶ 30.

¶ 42 In the present case, unlike in *Fort*, the defendant was not convicted of an uncharged offense. Rather, the State chose to charge, and the defendant was convicted of, the *charged* offense of attempt murder. That offense directly "arose from" the "same incident" as the charged automatic-transfer offense of aggravated battery with a firearm while personally discharging a firearm. The fact that the defendant was not convicted of the charged automatic-transfer offense has no impact on whether the charged attempt murder offense arose from the same incident as that charged, but not-convicted, automatic transfer offense. Accordingly, *Fort* is inapplicable to the facts of this case.

¶ 43 Since we find that the trial court committed no error in sentencing the defendant as an adult under section 5-130(1) of the Act (705 ILCS 405/5-130(1) (West 2010)), we need not determine whether that error arose to the level of plain error, so as to permit our review. See *Wilson*, 404 Ill. App. 3d at 247 ("There can be no plain error if there was no error at all.").

¶ 44 III. CONCLUSION

¶ 45 Accordingly, for all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 46 Affirmed.