2019 IL App (1st) 162190-U
No. 1-16-2190
Order filed March 4, 2019

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	No. 13 CR 16995
v.	)	
	)	Honorable Neil J. Linehan,
ARIANON TAYLOR,	)	Judge presiding.
	)	
Defendant-Appellant.	)	

JUSTICE GRIFFIN delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for two counts of armed habitual criminal (AHC) are affirmed where his underlying prior conviction for attempt vehicular hijacking constituted a forcible felony. Defendant's convictions for two counts of unlawful use of a weapon by a felon are vacated where they violated the one-act, one-crime doctrine because they were based on the same physical act as his conviction for AHC. The fines, fees, and costs order is modified.

¶ 2 Following a bench trial, defendant Arianon Taylor was convicted of two counts of armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2012)) and two counts of unlawful use of a weapon by a felon (UUWF) (720 ILCS 720 5/24-1.1(a) (West 2012)). He was sentenced to six

years' imprisonment on each AHC count and three years' imprisonment on each of the UUWF counts, with all terms to be served concurrently. On appeal, defendant contends that: (1) he was not proven guilty beyond a reasonable doubt of AHC because the State failed to show that his underlying conviction for attempt vehicular hijacking was a forcible felony; (2) his convictions for UUWF violate the one-act, one-crime rule because they were based on the same physical act of possession of a handgun as his convictions for AHC; and (3) the order assessing fines, fees and costs should be corrected. We affirm in part, vacate in part, and correct the fines, fees, and costs order.

¶ 3 Defendant was charged by information with two counts of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)); two counts of unlawful use of weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)); and one count of possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(1) (West 2012)). The AHC counts alleged that defendant knowingly possessed a .38 caliber revolver (count I) and a .40 caliber handgun (count II) after having been convicted of: manufacture / delivery of a controlled substance under case number 97 CR 2119802 and attempt vehicular hijacking under case number 04 CR 2929401. The UUWF counts alleged that defendant knowingly possessed in his own abode a .38 caliber revolver (count IV) and .40 caliber handgun (count V) after having been previously convicted of the felony offense of attempt vehicular hijacking. Defendant waived his right to a jury trial and the case proceeded to a bench trial.

¶ 4 The facts adduced at trial show that on July 31, 2013, Chicago police officer Thomas O'Brien responded to a call of a burglar alarm at a residence located on east 136th Street. O'Brien described the residence as a single family ranch style home. When O'Brien arrived at

the residence, he observed defendant coming out of the front door. Defendant stated that the home was his girlfriend's and that the alarm was going off and he did not have the code for the alarm. Defendant told O'Brien his name was "Shatavis Heard or something along those lines." Defendant could not produce any identification so O'Brien "secured" him and called for an assist unit. Once the assist unit arrived, O'Brien went into the home to "make sure no one else was inside." When O'Brien entered a bedroom, he noticed an open book bag on the bed containing "what appeared to be drug paraphernalia," including several coffee blenders, several baggies, white powder and bottles of Dormin.

¶ 5 On cross-examination, O'Brien testified that he detained defendant to determine if the name he had given him was correct. When he learned defendant had given him a false name, he called for backup. O'Brien went into the home after the other officers arrived to see if there was a burglary in progress. He did not observe any weapons and could not remember if he saw any men's clothing in the bedroom. O'Brien did not recover proof of residency for defendant.

¶ 6 Officer Timothy Balasz testified that he responded to a call of a burglar alarm and met with O'Brien. Balasz went into the southwest bedroom of the home and saw a clear plastic bag containing a white powder that was next to a book bag. Balasz also observed the butt of a handgun protruding from under the mattress. Balasz lifted the mattress and saw a Diamondback .38 caliber revolver loaded with five rounds. Next to the revolver was a .40 caliber Sig Sauer semiautomatic handgun. Balasz opened the book bag and recovered a box of tinfoil, several surgical masks, a roll of tape, a toothbrush, a bottle of Dormin, a scale, empty narcotic packaging baggies, cups, spoons, sifters, a press machine and a mixer. Balasz explained that Dormin was a cutting agent for diluting narcotics and a press machine was used to assist in the cutting

procedure. Balasz also recovered a clear plastic bag containing a brown substance he believed to be heroin. Balasz recovered a set of keys from defendant's pocket that matched the front door. Defendant told Balasz that he had been "staying" at the house with his girlfriend for the past two months. Balasz asked defendant about the firearms and defendant replied that "they keep them because they're afraid of the ex-boyfriend."

¶ 7 On cross-examination, Balasz testified that O'Brien was in the room with him the whole time. Balasz observed the handgun butt protruding from the bottom left corner of the mattress. He did not memorialize defendant's statements into writing nor did he have defendant sign a statement. Balasz did not recover any proof that defendant lived in the house.

¶ 8 The State presented two certified statements of conviction for defendant. The first was a Class 2 conviction from May 24, 2005, for attempt vehicular hijacking under case number 04 CR 29294. The second was a Class 2 conviction from January 8, 1998, for manufacture/delivery of a controlled substance under case number 97 CR 21198. The parties entered into a stipulation that the contents of one of the plastic bags recovered from the house tested positive for 4.6 grams of heroin while a second bag did not test positive for a controlled substance.

¶ 9 The court found defendant guilty of both counts of AHC and UUWF and not guilty of possession of a controlled substance with intent to deliver. The court sentenced defendant to six years' imprisonment on each AHC count (I and II) and three years' imprisonment on each of the UUWF counts (IV and V), with all terms to be served concurrently.

¶ 10 On appeal defendant first challenges the sufficiency of the evidence to sustain his AHC conviction. Specifically, he argues that the State did not prove beyond a reasonable doubt that his underlying conviction for attempt vehicular hijacking was a forcible felony for purposes of the

AHC statute arguing that the State was required to present evidence of the facts surrounding his underlying attempt vehicular hijacking to show that it involved the use or threat of physical force. He maintains that because the State failed to present such evidence, it did not prove beyond a reasonable doubt that his underlying conviction constituted a forcible felony for purposes of the AHC statute. The State responds that attempt vehicular hijacking includes the possibility of the threat of physical force or violence sufficient to qualify it as a forcible felony.

¶ 11 In setting forth his argument, defendant argues that we should apply a *de novo* standard of review because he is not questioning whether the uncontested facts were sufficient to convict but whether the State proved a statutory element of the offense beyond a reasonable doubt. We have previously rejected this argument holding that *de novo* review is for determining matters of statutory construction while the *Jackson* standard of review is to determine whether the State presented sufficient evidence to satisfy the elements of the crime charged. *People v. Zaibak,* 2014 IL App (1st) 123332; *Jackson v. Virginia*, 443 U.S. 307, 313 (1979).

¶ 12 When considering a challenge to the sufficiency of the evidence to sustain a conviction, Illinois courts have adopted the *Jackson* standard of review. Under that standard, the question for a reviewing court to determine is 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. *People v. Wheeler,* 226 Ill. 2d 92, 114 (2007). This standard is applicable in all criminal cases regardless whether the evidence is direct or circumstantial. *People v. Herring,* 324 Ill.App.3d 458, 460 (2001); *People v. Campbell,* 146 Ill. 2d 363, 374-75 (1992). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Hutchinson,* 2013 IL

App (1st) 102332 ¶ 27; *People v. Ortiz,* 196 Ill. 2d 236, 259 (2001). When considering the sufficiency of the evidence, it is not the reviewing court's duty to retry the defendant. *People v. Beauchamp,* 241 Ill. 2d 1, 8 (2011); *People v. Collins,* 106 Ill. 2d 237, 261 (1985). A reviewing court will only reverse a criminal conviction when the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *Beauchamp,* 241 Ill. 2d at 8; *People v. Collins,* 214 Ill. 2d 206, 217 (2005). Due process requires the State to prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito,* 235 Ill. 2d 213, 224 (2009). But the State is not required to prove every fact supporting a fact finder's inference beyond a reasonable doubt. *Wheeler*, 226 Ill. 2d at 117.

¶ 13 In this case, defendant was found guilty of AHC. As relevant here, to establish that defendant committed AHC, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed a firearm after having been convicted two or more times of any combination of the following offenses:

> "(1) a forcible felony as defined in Section 2-8 of this code;
>
> (2) unlawful use of a weapon by a felon, aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 14-4.3 or subdivision (b)(1) of Section 12-3.05; intimidation; aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3) or (e)(4) of Section 12-3.05; or
>
> (3) any violation of the Illinois Controlled Substance Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher."

720 ILCS 5/24-1.7(West 2012); *People v. Reese*, 2017 IL 120011, ¶ 31.

¶ 14 Defendant does not dispute that he was in possession of a firearm. Rather, he argues that one of his underlying convictions, attempt vehicular hijacking, does not constitute a forcible felony under the AHC statute and thus the evidence was insufficient to sustain his conviction. A

person commits vehicular hijacking when he takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/18-3(a)(West 2012). To prove attempt vehicular hijacking, the State was required to show that with the intent to commit a vehicular hijacking, defendant took a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2012).

¶ 15 Since attempt vehicular hijacking is not "expressly enumerated in subsection (2) or (3) of the armed habitual criminal statute, it must constitute a forcible felony under subsection (1) in order to be a qualifying felony under the statute." *People v. White*, 2015 IL App (1st) 131111, ¶ 29. Under section 2-8, a forcible felony is defined as:

> "Treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2012).

¶ 16 Attempt vehicular hijacking is also not specifically enumerated in section 2-8, so we must look to the residual clause of section 2-8. *People v. Brown*, 2017 IL App. (1st) 150146, ¶ 18; *People v. Sanderson*, 2016 IL App (1st) 141381, ¶ 5. "Pursuant to section 2-8's residual clause, an offense constitutes a forcible felony where the defendant contemplates that force or violence against an individual might be involved and the defendant has implied he was willing to use force or violence against an individual." *White*, 2015 IL App (1st) 13111, ¶ 30.

¶ 17 A crime can fall under the residual clause of section 2-8 where: (1) a crime has as one of its elements the intent to carry out an act of physical force against an individual, every instance of that crime necessarily qualifies as a forcible felony (*People v. Thomas*, 407 Ill. App. 3d 136, 140 (2011)); or (2) by presenting evidence under the particular facts of a case, defendant

contemplated the use of physical force against the individual and was willing to use it (*People v. Belk*, 203 Ill.2d 187, 195-96 (2003)).

¶ 18 In *People v. Wooden*, 2014 IL App (1st) 130907, this court found that vehicular hijacking constitutes a forcible felony for purposes of sentencing. In doing so, we reasoned that "the act of taking a motor vehicle from a person by the use of force or by threatening the imminent use of force involves the contemplation that violence might be necessary to carry out the crime. Moreover, defendant has not suggested, nor can we conceive of a situation in which a defendant could commit vehicular hijacking without using or threatening the use of physical force or violence." *Wooden*, 2014 IL App (1st) 130907, ¶ 20.

¶ 19 Here, defendant was previously convicted of attempt vehicular hijacking in that he took a substantial step toward the taking of a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/18-3(a) (West 2012). Therefore, since vehicular hijacking requires the use or threatening the use of physical force or violence, and defendant took a substantial step towards doing so, he necessarily demonstrated the requisite contemplation or willingness to use force. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 21 (the offense of attempt armed robbery qualifies as an inherently forcible felony for the purposes of the AHC statute because by virtue of his conviction of that offense the defendant necessarily demonstrated the requisite contemplation or willingness to use force where he was armed with a firearm or other dangerous weapon, and took a substantial step to deprive another person of property by threat or use of force). After carefully reviewing the record we find that a rational trier of fact could conclude that attempt vehicular hijacking constitutes a forcible felony under the residual clause of section

2-8. Stated differently, defendant's underlying conviction for attempt vehicular hijacking has as one of its elements the intent to carry out an act of force against an individual and thus shows that, in committing the offense, defendant contemplated the use of physical force or violence against an individual. Accordingly, the evidence was sufficient to sustain defendant's conviction for AHC.

¶ 20 Defendant next contends that his mittimus should be corrected to reflect only his two convictions for AHC since his two convictions for UUWF were based on the same physical act—possession of the firearms—as his convictions for AHC. The State concedes that the convictions for AHC and UUWF involve the same physical act and therefore, his convictions for UUWF should be vacated.

¶ 21 Defendant acknowledges that he did not raise this issue at trial or in his motion for a new trial, but claims we should review for plain error. The plain error doctrine allows a reviewing court to address unpreserved error when (1) 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) the 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). Our supreme court has held that 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 (2004). Our review of defendant's argument is *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 22 The one-act, one-crime principle prohibits a defendant from being convicted of multiple offenses based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). An "act" has been defined as "any overt or outward manifestation that will support a separate conviction." *King*, 66 Ill. 2d at 566. "To sustain multiple convictions, the charging instrument must indicate that the State intends to treat the defendant's conduct as separate and multiple acts." *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

¶ 23 Here, defendant was charged and convicted of two counts of AHC and two counts of UUWF based on his possession of two weapons: a .38 caliber revolver and a .40 caliber handgun. A person commits the offense of AHC if he possesses any firearm after being convicted two or more times of enumerated offenses, including a forcible felony or a violation of the Illinois Controlled Substances Act. 720 ILCS 5/24-1.7 (West 2014). A person is guilty of UUWF if he possesses any firearm or firearm ammunition and he has previously been convicted of a felony. 720 ILCS 5/24-1.1 (a) (e) (West 2014). The record shows that the trial court found defendant guilty of two counts of AHC and two counts of UUWF, and the Criminal Disposition Sheets also reflect findings and a sentence for both offenses.

¶ 24 We agree with the parties that defendant's convictions for AHC and UUWF violate the one-act, one-crime rule. Defendant's convictions were based on the same physical act—his possession of the .38 caliber revolver and .40 caliber handgun. Our supreme court has instructed that when a defendant is convicted of more than one offense and arising from the same physical act, "sentence should be imposed on the more serious offense and the less serious offense should be vacated." *People v. Artis*, 232 Ill. 2d 156, 170 (2009). When evaluating which offense is more serious, this court is "instructed to consider the plain language of the statutes, as common sense

dictates that the legislature would prescribe greater punishment for the offense it deems the more serious." *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009). Here, AHC is a Class X felony (720 ILCS 5/24-1.7(b) (West 2014)) and therefore, a more serious offense than UUWF, a Class 2 felony (720 ILCS 5/24-1.1(e) (West 2014)). Accordingly, we vacate defendant's convictions and sentence for UUWF. See *People v. Bailey,* 396 Ill. App. 3d 459, 465 (2009) and *People v. Quinones,* 362 Ill. App. 3d 385, 397 (2005). Pursuant to our authority under Supreme Court Rule 615(b) we order the clerk of the circuit court to correct the mittimus accordingly.

¶ 25 Lastly, defendant contends his fines, fees, and costs order must be amended. Defendant argues that the summation of his total amount assessed was improperly calculated and that one assessment must be vacated because it was erroneously assessed. In addition, defendant argues he is entitled to apply his presentence monetary credit against two assessments that were labeled as fees but are actually fines.

¶ 26 Defendant acknowledges that he did not preserve these issues for appeal because he did not challenge the assessments in the trial court. See *People v. Hillier,* 237 Ill. 2d 539, 544 (2010). Nevertheless, he urges this court to review his assessments under the plain error doctrine. The State acknowledges the forfeiture, but asserts that defendant's claims may be considered under the plain error doctrine (*People v Lewis,* 234 Ill. 2d 32, 48 (2009)).

¶ 27 Defendant's request for the *per diem* monetary credit is not merely requesting credit that is due against his fines but, rather, is raising a substantive issue regarding whether the assessments labeled as fees are fines and therefore, is subject to forfeiture. See *People v. Brown,* 2017 IL App (1st) 150203, ¶ 40-41. Defendant's challenges are not reviewable under the plain error doctrine. *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted,*

No. 122549 (Nov. 22, 2017). Nor can they be reviewed as a claim of ineffective assistance of counsel. *People v. Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 8 (failure to object to fines and fees is not an error of constitutional magnitude that will support a claim of ineffectiveness). *Pet for leave to appeal granted,* No. 123052 (Mar, 21, 2018).

¶ 28 However, since the State has responded that defendant's claims regarding fines and fees are properly reviewed as plain error, the State has waived any forfeiture argument. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 25; *People v. Smith*, 2018 IL App (1st) 151402, ¶ 7. As such, we will address defendant's claims. Our review of the propriety of the trial court's imposition of fines and fees is *de novo*. *Brown*, 2018 IL App (1st) 160924, ¶ 25, *Smith*, 2018 IL App (1st) 151402, ¶ 7.

¶ 29 Defendant correctly asserts that the total fines and fees was incorrectly assessed at $587 and should be $567. A careful analysis of defendant's fine and fees order show that the final total should have been $567. We instruct the clerk of the circuit court to correct defendant's fees and fines order accordingly.

¶ 30 Turning to the disputed fines and fees, the parties agree and we concur that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) must be vacated as that fee only applies to traffic, misdemeanor, municipal ordinance and conservation violations, and does not apply to defendant's felony conviction for AHC. *Smith*, 2018 IL App (1st) 151402, ¶ 12. Thus, we vacate the $5 electronic citation fee and direct the clerk of the circuit court to amend the fines, fee and costs order accordingly.

¶ 31 Next, defendant argues that the $15 State Police Operations fee (705 ILCS 105/27.3a-1.5 (West 2014)), the $2 State's Attorney Records Automation fee (55 ILCS 5/4-2002.1(c) (West

2014)), the $190 Felony Complaint Filing fee (705 ILCS 105/27.2(w)(1)(A) (West 2014)), the $25 Automation fee (705 ILCS 105/27.3a(1) (West 2014)), the $25 Document Storage fee (705 ILCS 105/27.3c(a) (West 2014)), and the $50 Court Systems fee (55 ILCS 5/5-1101(c)(1) (West 2014)) are all fines and therefore, are subject to the $5-per-day presentence incarceration credit.

¶ 32 A defendant incarcerated on a bailable offense who does not supply bail, and against whom a fine is levied, is allowed a credit of $5 for each day spent in presentence custody. 725 ILCS 5/110-14(a) (West 2014). Here, defendant received credit for 472 days in custody prior to sentencing and is therefore entitled up to $2360 (472 multiplied by $5) of monetary credit.

¶ 33 Defendant argues that he is entitled to use this credit to offset the applicable fines assessed against him. See *People v. Jones*, 223 Ill. 2d 569, 599 (2006) ("[T]he credit for presentence incarceration can only reduce fines, not fees."). "Broadly speaking, a 'fine' is a part of the punishment for a conviction, whereas a 'fee' or 'cost' seeks to recoup expenses incurred by the State." *Id.* at 582. A "fine" is punitive in nature and is imposed as part of a sentence on a person convicted of a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A "fee" is a charge that seeks to recoup expenses incurred by the State in prosecuting the defendant. *Id*. The legislature's label for a charge is strong evidence of whether the charge is a fee or a fine, but the most important factor is whether the charge seeks to compensate the State for any cost incurred as a result of prosecuting the defendant. *Id*.

¶ 34 The State concedes that the $15 State Police Operations fee and the $50 Court System fee are all fines subject to be offset. See *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006) (holding the State Police Operations Assistance fee does constitutes a fine that can be offset by defendant's presentencing incarceration credit); *People v. Brown*, 2017 IL App (1st) 150146, ¶ 37 (defendant

may apply his presentence incarceration credit toward the $50 Court System fee). We agree with the parties that these two charges, totaling $65, should be offset by defendant's presentence incarceration credit.

¶ 35 As to the remaining assessments, defendant argues that a portion of his presentence custody credit should be applied to the $190 Felony Complaint Filing fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), the $15 Automation fee (705 ILCS 105/27.3a(1) (West 2014)), and the $25 Document Storage fee (705 ILCS 105/27.3c(a) (West 2014). However, our supreme court has recently held that theses three assessments are fees, not fines and therefore, not subject to presentence credit. *People v. Clark*, 2018 IL 122495, ¶¶ 34, 41, 49. Therefore, we find that these fees are not entitled to be offset by defendant's presentence credit.

¶ 36 Lastly, defendant argues that he is entitled to credit for the $2 State's Attorney Records Automation fee because this assessment is a fine, not a fee, where it does not reimburse the State's Attorney's Office for costs incurred in prosecuting a particular defendant. 55 ILCS 5/4-2002.1(c) (West 2014). However, in *Clark*, the court also held that the State's Attorney's Office is necessarily involved in every prosecution and as such, generates records that have to be automated. *Id*. ¶¶ 22, 27. The court held that the $2 State's Attorney records automation fee is a compensatory fee and not a fine and not subject to be offset by defendant's *per diem* credit. *Id*.

¶ 37 In sum, we affirm defendant's conviction for two counts of AHC; vacate his two convictions for UUWF; vacate the $5 Electronic Citation fee; and the $50 Court System fee and the $15 State Police Operations fee are offset by defendant's presentence custody credit. Defendant's amended total amount due should be reduced by $70 for a total of $497. We direct

the clerk of the circuit court to modify the mittimus and the fines, fees and costs order accordingly.

¶ 38 Affirmed in part; vacated in part; fines, fees and costs order modified.