FIRST DIVISION
Filed: March 17, 2014

No. 1-12-2958

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 12 CR 5876 (01)
ANTWAN HOWARD,	)	Honorable Nicholas Ford,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the Opinion of the court.
Justice Connors, P.J., and Justice Delort concurred in the judgment.

OPINION

¶ 1 A judge found the defendant, Antwan Howard, guilty of one count of possession of a controlled substance under the Criminal Code of 1961 (Code)(720 ILCS 570/401(c)(2)(West 2010)), and four counts of unlawful use of a weapon by a felon (UUW)(720 ILCS 5/24-1.1(a)(West 2010)). He was sentenced to four concurrent terms of ten years' imprisonment and three years' mandatory supervised release. He now appeals, contending 1) the court exposed him to double jeopardy by finding him not guilty on two counts of UUW, but then rescinding his acquittal of these charges during sentencing and entering a finding of guilty; 2) his sentences on

the UUW offenses were the result of an improper double enhancement, where the same felony conviction was used both to prove an underlying element of UUW and to elevate his sentencing range to Class X; 3) two of his four convictions for UUW must be vacated because they violate the one-act, one-crime doctrine; 4) one of his two UUW convictions must be vacated because the Code does not allow for multiple convictions for a single act of possessing a gun containing ammunition; and 5) certain fees and fines imposed by the trial court must be vacated.

¶ 2 The defendant was charged by indictment with, *inter alia*, one count of possession of a controlled substance with intent to deliver under section 401(c)(2) of the Code, and four counts of UUW, a Class 3 offense, under Code section 24-1.1(a). The UUW charges (counts 4 through 7) were all premised upon the same underlying felony conviction for failure to report an accident. Counts 4 and 6 were based upon the defendant's possession of a firearm, and counts 5 and 7 were based upon his possession of the ammunition inside that firearm. Counts 4 and 5 also contained notice that, pursuant to section 24-1.1(e) of the Code, the State would seek to have the defendant sentenced as a class 2 offender on the basis that, at the time of the offense, he was on parole or mandatory supervised release. 720 ILCS 5/24-1.1(e)(West 2010).

¶ 3 The evidence at trial established that on the night of January 13, 2012, Officer John Wrigley was conducting surveillance when he observed three people sitting in a van about 40 to 50 feet away from him. The occupants of the van were identified as the defendant, his girlfriend, and another man. Officer Wrigley observed as individuals approached the van and gave money to individuals inside the van in exchange for small items, later shown to be narcotics. Officer Wrigley testified that at one point, he saw the defendant exit the van from the passenger's side carrying a small silver handgun in his right hand. The defendant looked in several directions, and then proceeded to wrap the weapon in a black cloth and move quickly across the street,

where he placed the weapon under the front porch of a residence. The defendant then returned to the passenger's side of the van and closed the door. The police later recovered the black cloth from under the porch, and found it to contain the loaded handgun, along with baggies of cocaine and cannabis. The police approached the van and arrested the defendant and the other male occupant.

¶ 4 The State submitted several exhibits into evidence, including a certified copy of the defendant's underlying conviction for failure to report an accident, a Class 1 offense. Following arguments, the court found the defendant guilty of possession of a controlled substance under count 1 of the indictment. As to counts 4 through 7 alleging UUW, the court made the following statement:

> "The Court: I also find him guilty of the four counts which I do find merge, the Class II possession – unlawful use of a weapon by a felon I think on a parolee, I guess that would be a finding of not guilty as parolee. I don't think that was proved beyond a reasonable doubt, but the UUW by a felon is a finding of guilty."

The court found the defendant guilty of counts 6 and 7, but reiterated its finding of not guilty as to counts 4 and 5, on the basis there was "no evidence that the defendant was on parole or mandatory supervised release" at the time of the offense.

At the commencement of the sentencing hearing several weeks thereafter, the State requested that the court "revisit" its acquittal on counts 4 and 5. The State argued that the fact of the defendant's parole status amounted to a sentence "enhancement" under the Code and therefore did not need to be proven at trial. The State pointed out that there was no dispute between the parties that the defendant was on parole at the time of the offense, and defense counsel agreed to stipulate to this fact. The court observed that a finding of guilty on counts 4

and 5 would elevate those convictions from Class 3 to Class 2, but stated that "it's not going to affect the sentencing as far as the numbers." The court then revised its finding to one of guilty on all four counts of UUW, two as Class 3 offenses and two elevated to Class 2 status. The court also found that the defendant was required to be sentenced as a Class X offender (see 730 ILCS 5/5-4.5-95(b)(West 2012)) but that in light of his mitigating factors, it was "not going to give [the defendant] near the maximum." The court then sentenced the defendant to four concurrent terms of 10 years' imprisonment for each count of UUW, followed by three years' mandatory supervised release for the controlled substances conviction. The defendant now appeals.

¶ 5 The defendant first argues that the trial court exposed him to double jeopardy with regard to the convictions under counts 4 and 5, by finding him not guilty at trial based upon the State's failure to prove his parole status and then rescinding this finding at sentencing when the State came forward with such proof. The State has conceded this point, and agrees that we must vacate the convictions under counts 4 and 5 on the basis of double jeopardy. Accordingly, we vacate the defendant's two "convictions" for UUW based upon his status as a parolee, and remand for resentencing on the two remaining Class 3 convictions for UUW.

¶ 6 We now consider whether, during resentencing, double jeopardy must also bar the State from seeking to use the defendant's parole status to enhance his sentences for the remaining two UUW convictions.

¶ 7 As an initial matter, we address the State's assertion that the defendant has forfeited any challenge to his sentence determination because he failed to make an objection before the trial court. It is well-settled that in order to preserve a sentencing challenge for review on appeal, the defendant must both object at the sentencing hearing and raise the issue in a post-sentencing motion. *People v. Powell*, 2012 IL App (1st) 102363, 970 N.E.2d 539, citing *People v. Freeman*,

404 Ill.App.3d 978, 994, 936 N.E.2d 1110 (2010). A sentencing issue that has been forfeited nonetheless may be subject to review where it amounts to a plain error affecting substantial rights. *People v. Henry*, 204 Ill.2d 267, 281, 789 N.E.2d 274 (2003); *People v. Cervantes*, 2013 IL App (2d) 110191, 991 N.E.2d 521. A conviction that violates double jeopardy is a substantial injustice and may be reviewed as plain error. *Cervantes*, 2013 IL App (2d) 110191 ¶ 21, citing *People v. Brown*, 227 Ill.App.3d 795, 797–98, 592 N.E.2d 342 (1992). We will therefore review this issue as a matter involving substantial rights.

¶ 8 Section 24-1.1(a) makes it "unlawful for a person to knowingly possess on or about his person *** any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State***." 720 ILCS 5/24-1.1(a)(West 2010).

¶ 9 Section 24-1.1(e) states:

> "(e). Sentence. **** Violation of this Section by a person who is on parole or mandatory supervised release is a Class 2 felony for which the person, if sentenced to a term of imprisonment, shall be sentenced to not less than 3 years and not more than 14 years." 720 ILCS 4/24-1.1(e) (West 2010).

¶ 10 The State asserts that, under the above sections of the Code, the defendant's parole status was merely a sentence enhancement, and as such, did not need to be proven at trial, but instead could properly have been submitted to the trial court at sentencing. The court's initial acquittal on counts 4 and 5 was based upon its mistaken belief that the State was required to prove the defendant's parole status at trial, and when it recognized its error at sentencing, it correctly revised its finding to guilty. Accordingly, the State contends, while the initial acquittal on counts 4 and 5 must stand, the enhancement under section 24-1.1(e) may be applied to the remaining

convictions because the defendant's parole status was proven beyond a reasonable doubt. We disagree.

¶ 11 Our federal and state constitutions provide that no person shall be put in jeopardy twice for the same criminal offense. U.S. Const., amend. V; Ill. Const.1970, art. I, § 10. The double jeopardy clause provides three categories of protection for a defendant, namely (1) protection against a second prosecution after an acquittal for an offense; (2) protection from a second prosecution after a conviction; and (3) protection against multiple punishments for the same offense. *People v. Gray*, 214 Ill.2d 1, 6, 823 N.E.2d 555 (2005); *People v. Dinelli*, 217 Ill. 2d 387, 403, 841 N.E.2d 968 (2005). It is well-settled that, once attached, double jeopardy precludes re-prosecution following a court-decreed acquittal, even if the acquittal is based upon an erroneous foundation. *Evans v. Michigan*, 568 U.S. _____, _____, 133 S. Ct. 1069, 1074, 185 L. Ed 2d 124 (2013), quoting *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962); *Cervantes*, 2013 IL App (2d) 110191 ¶ 25. Double jeopardy has been found to apply where the acquittal was based upon the court's mistaken understanding of the evidence necessary to sustain a conviction (*Smith v. Massachusetts*, 543 U.S. 462, 473, 125 S. Ct 1129, 160 L. Ed. 2d 2d 914 (2005)), or where the court misconstrues the statute defining the requirements to convict. *Evans*, 568 U.S. at ____, 133 S. Ct. at 1074, quoting *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984).

¶ 12 In *Evans*, the Court held retrial was barred after the trial court granted an acquittal based upon the State's failure to prove an "element" of the offense which, in actuality, it did not have to prove. The Court held that, while the acquittal was clearly predicated upon the trial court's misunderstanding of the law, it was an acquittal nonetheless. An "acquittal" includes any ruling that the State's evidence is insufficient to convict, or "any other" ruling that "'relate[s] to the

ultimate question of guilt or innocence.'" *Evans*, 568 U.S. at ——, 133 S.Ct. at 1075, quoting *United States v. Scott*, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978); see also *Cervantes*, 2013 IL App (2d) 110191, 991 N.E.2d 521. The Court concluded that, as the trial court's ruling resolved the ultimate question of guilt or innocence, the error bore only upon the accuracy of the determination to acquit but not its essential character. *Id.*, at 1076.

¶ 13 In this case, there is no dispute that the convictions under counts 4 and 5 were the product of a "second prosecution after an acquittal," so as to be barred by double jeopardy. In initially acquitting the defendant, trial court apparently believed either that his parole status was an element of the UUW offense or that it otherwise had to be proven at trial. Regardless of the basis for the court's decision, or the accuracy of that basis, the court ruled that the State failed to prove the offense of Class 2 UUW beyond a reasonable doubt. The State is therefore precluded under *Evans* from using the defendant's parole status on remand to re-establish Class 2 UUW, as this would amount to a second prosecution for the same offense of which he was already acquitted. We point out that, in rendering this decision, we make no judgment as to whether or not parole status constitutes and "element" of UWW or whether it must be proven at trial beyond a reasonable doubt under section 24-1.1(e). Based upon this determination, we find it unnecessary reach the defendant's alternate arguments, that his concurrent convictions under both Class 2 and Class 3 UUW by a felon violate the "one act, one crime" doctrine, or that his sentencing as a Class X felon relied upon an improper double enhancement.

¶ 14 We next address the defendant's argument that one of his two remaining convictions for UUW must be vacated, where the language of section 24-1.1 does not authorize multiple convictions based upon the possession of a single, loaded firearm. We disagree.

¶ 15 As stated above, section 24-1(a) of the Code precludes a person from knowingly possessing "any firearm or any firearm ammunition" if such person has been convicted of a felony. 720 ILCS 4/24-1.1(a) (West 2010). Section 24-1.1(e) renders the "possession of each firearm or firearm ammunition" under this section to be a "single and separate violation" of the section. In *People v. Anthony*, 2011 IL App (1st) 091528-B, 960 N.E.2d 1124, we were presented with the same argument the defendant raises here, that these sections permit prosecution for possession of a weapon and separate ammunition, but not a weapon loaded with ammunition. We rejected the argument, construing section 24-1.1(e) as clearly and unambiguously allowing for multiple convictions based upon the single act of possessing a firearm containing ammunition. *Id.* We noted that a review of the statute reveals no exception for situations where the ammunition is loaded into the handgun, and refrained from reading such an exception into it. *Anthony*, 2011 IL App (1st) 091528-B, 960 N.E.2d 1124, citing *People v. Carter*, 213 Ill. 2d 295, 301, 821 N.E.2d 233 (2004).

¶ 16 The defendant urges that we decline to follow *Anthony*, and instead refers us to the supreme court's decision in *Carter*, 213 Ill. 2d 295, and the legislative history of section 24-1.1(e). We are not persuaded by the defendant's argument. Section 24-1.1(e) was amended in 2005, in response to *Carter*, in order to alleviate an ambiguity in the statute as found by that court. The amendment added the sentence that possession of "each firearm or firearm ammunition" would constitute a "single and separate violation" under the section. We are persuaded by the reasoning in *Anthony*, that the amendment expressly authorized multiple convictions for a defendant possessing a gun containing ammunition. See *Anthony*, 2011 IL App (1st) 091528 at ¶ 17. The defendant's interpretation of the legislative intent would produce an absurd result by leading to "greater punishment for a felon who possessed an unloaded firearm

and separately possessed firearm ammunition than would result for a felon who possessed a loaded firearm." *Id.*, 2011 IL App (1st) 091528, ¶ 16. Accordingly, we do not disturb the defendant's remaining two convictions for UUW.

¶ 17 Last, the defendant seeks an adjustment of the fines and fees imposed by the trial court. Specifically, he contends that the court erred in imposing a $5 electronic citation fee under section 27.3(e) of the Clerks of Courts Act (705 ILCS 105/27.3(e) (West 2012)), and in failing to offset his fees in the amount of $80 reflecting credit for time served in pre-sentence custody as mandated under section 110-14(a) of the Code (725 ILCS 5/110-14(a) (West 2012)). The State has conceded these issues, and accordingly, the circuit court is directed to reduce the defendant's assessed fees by $85 to correct these errors.

¶ 18 The defendant also contends that court improperly assessed a $25 court services fee under 55 ILCS 5/5-1103 (West 2012), because the offenses of which he was convicted do not fall within those enumerated under the statute. We disagree. Construing the plain language of the section as a whole, it is clear that the court must assess the court services fee in criminal cases resulting in conviction. *People v. Williams*, 2011 IL App (1st) 091667–B, ¶ 18. In this case, judgments of conviction were entered against the defendant making him eligible for the court services fee.

¶ 19 For the foregoing reasons, we reverse the judgments of conviction and vacate the sentences for two counts of Class 2 UUW under section 24-1.1(e), and affirm the defendant's remaining convictions. We remand this case for resentencing and for readjustment of the fees and costs in accordance with this Opinion.

¶ 20 Affirmed in part, reversed and vacated in part, and remanded with directions.

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¶ 32 Next, we must resolve the question of whether, on remand for resentencing, the court may consider his parole status at the time of the offense as a basis to enhance the defendant's sentence under section 24-1.1(e). The defendant argues that the court may no longer consider his parolee status in light of its determination that the State failed to prove his status beyond a reasonable doubt, regardless of any error in the court's statements

¶ 33 The section of the Code defining UUW states as follows:

> "Unlawful Use or Possession of Weapons by Felons****.
>
> (a) It is unlawful for a person to knowingly possess on or about his person *** any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State***. 720 ILCS 5/24-1.1(a)(West 2010).

Section 24-1.1(e) states:

> "(e). Sentence. **** Violation of the Section by a person who is on parole or mandatory supervised release *is a Class 2 felony* for which the person, if sentenced to a

term of imprisonment, *shall be sentenced* to not less than 3 years and not more than 14 years." 720 ILCS 4/24-1.1(e) (West 2010)(Emphasis added).

¶ 34 The defendant argues that the on parole operated to elevate his conviction from a Class 3 to a Class 2 felony (operated to raise his sentencing range). He contends that the State was therefore required to prove his status as a parolee beyond a reasonable doubt, and because it failed to do this, he cannot be sentenced on that basis. In response, the State first asserts that the defendant has forfeited any challenge to his sentencing by failing to raise any objection at the sentencing hearing. The State alternatively contends that, despite the vacatur of his conviction, there was no error in sentencing because the UUW by a parolee was not an offense itself, but merely a sentencing enhancement which could be proven at the sentencing hearing.

¶ 35 In *Apprendi,* the defendant pleaded guilty to second degree possession of a firearm for an unlawful purpose after firing shots at a neighbor's house. At sentencing, the State sought and obtained an enhanced sentence under the State's hate crime statute by proving by a preponderance of the evidence that the shooting was motivated by racial bias. The Court vacated the sentence, finding that, where the State seeks to prove a fact that would impose a higher sentence or otherwise increase the punishment for the offense charged, the State must affirmatively charge that offense in the indictment and prove it beyond a reasonable doubt at trial. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 2350, 147 L. Ed. 2d 435 (2000).

¶ 36 Apprendi drew an exception, however, for statutes in which prior offense is used as a basis of enhancing the sentence, or "recidivism statutes," The Court stated that "New Jersey's reliance on Almendarez-Torres is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism “does not relate to the commission of the offense” itself, 523 U.S., at 230, 244, 118

S.Ct. 1219, New Jersey's biased purpose inquiry goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." Apprendi v. New Jersey, 530 U.S. 466, 496, 120 S. Ct. 2348, 2366, 147 L. Ed. 2d 435 (2000)

¶ 37 Section 24-1.1(e) does not constitute a separate offense as contemplated under *Apprendi*. Rather, it manifests the legislature's clear intent to elevate the class of the UUW felony and the resulting penalty, where the offender has committed the offense while on parole. See Phelps, 211 Ill. 2d at 15, 809 N.E.2d 1214.People v. Powell, 2012 IL App (1st) 102363, 970 N.E.2d 539,

¶ 38 "Section 111–3(c) sets forth the procedure that must be followed where the State seeks a more severe sentence due to a defendant's prior convictions." People v. Lucas, 231 Ill. 2d 169, 180, 897 N.E.2d 778, 785 (2008). "Section 111–3(c) applies where the State seeks an enhanced sentence due to a prior conviction. "Enhanced sentence" means a sentence that is increased by a prior conviction from one classification of offense to another higher classification of offense. 725 ILCS 5/111–3(c) (West 2004). Section 111–3(c) prohibits the use at trial of the fact of the prior conviction or the State's intent to seek an enhanced sentence. They are not elements of the offense and may not be disclosed to the jury. The existence of the prior conviction is used after a defendant's conviction to increase the classification of the crime at sentencing. People v. DiPace, 354 Ill.App.3d 104, 114, 288 Ill.Dec. 839, 818 N.E.2d 774 (2004)." People v. Lucas, 231 Ill. 2d 169, 181, 897 N.E.2d 778, 785 (2008)

¶ 39 The indictment clearly notified the defendant that the State would seek, based upon his status as a parolee, to enhance his sentence to that set forth for parolees, as within the enhanced Class 2 range as set forth for recidivists who commit the offense.

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¶ 41 "If a fact is by law the basis for imposing or increasing punishment-for establishing or increasing the prosecution's entitlement-it is an element. (To put the point differently, I am aware of no historical basis for treating as a non element a fact that by law sets or increases punishment.)"

¶ 42 Apprendi v. New Jersey, 530 U.S. 466, 521, 120 S. Ct. 2348, 2379, 147 L. Ed. 2d 435 (2000) CONCURRENCE; USE TO SET OUT DEF'S ARG.

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¶ 44 Apprendi held that, where the State seeks to prove a fact that would impose a higher sentence or otherwise increase the punishment for the offense charged, the State must affirmatively charge that offense in the indictment and prove it at trial beyond a reasonable doubts. Apprendi did not extend, however, to cases in which a prior offense is used as a basis of enhancing the sentence. The Court stated that "New Jersey's reliance on Almendarez-Torres is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, 523 U.S., at 230, 244, 118 S.Ct. 1219, New Jersey's biased purpose inquiry goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the

right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."

¶ 45 Apprendi v. New Jersey, 530 U.S. 466, 496, 120 S. Ct. 2348, 2366, 147 L. Ed. 2d 435 (2000)

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¶ 47 Illinois courts have interpreted the plain meaning of section 113-1(c), where the prior offense is not a statutory element of the offense of which the defendant has been convicted, but is a separate factor used to increase the classification of the offense of which he was convicted, the State is barred from proving the predicate offense at trial. See People v. Zimmerman, 239 Ill. 2d 491, 942 N.E.2d (2010); People v. Lucas,

¶ 48 The argument goes that because the court found him not guilty of this offense, "he can *never* be convicted of Class 2 UUW," and allowing such consideration would amount to convicting and sentencing the defendant to an offense for which he was already acquitted. Does not matter that the State wasn't required to prove it at trial. Distinguish that case he cites, Evans v. Michigan.

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¶ 52 It is well settled that a factor implicit in the offense for which the defendant was convicted cannot also be used as a basis upon which to impose a harsher sentence that might otherwise have been imposed. *People v. Phelps*, 211 Ill.2d 1, 11–12, 809 N.E.2d 1214 (2004); *People v. Ferguson*, 132 Ill. 2d 86, 97 (1989).

¶ 53

¶ 54 People v. Powell, 2012 IL App (1st) 102363, 970 N.E.2d 539, 541 appeal denied, 979 N.E.2d 886 (Ill. 2012) In this case, the defendant was sentenced to four counts of UUW based upon one prior conviction for failure to report an accident.

HOW TO GET RID OF THE CLASS X ENHANCEMENT: The defendant is not, however, be appropriately sentenced as a Class X offender.

The anti recidivism statute states as follows:

¶ 1 (b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b)

USE THIS TO VACATE THE CONVICTION FOR UUW FELON

¶ 2 "The sentencing court may not use a single factor both as an element of the defendant's crime and as an aggravating factor for imposing “a harsher sentence than might otherwise have been imposed.” People v. Gonzalez, 151 Ill.2d 79, 83–84, 600 N.E.2d 1189, 1191 (1992). This prohibition on double enhancement is because the legislature “necessarily took into account the factors inherent in the offense” when it prescribed the appropriate sentencing range for the offense. Id. at 84, 600 N.E.2d at 1191."

People v. Watson, 2012 IL App (4th) 110424-U

Here, the trial court used the defendant's prior conviction for failure to report an accident to sentence him on two counts of UUW and two counts of UUW by a felon on parole. He then received a sentence for one count of UUW based upon the weapon itself, one count based upon

the ammunition in the weapon, and two additional sentences for UUW because he was a parolee. This constituted a double enhancement on two counts. We must now vacate the convictions and remand for resentencing.

¶ 3 USE TO JUSTIFY VACATUR AND REMAND EVEN THO SENTENCE FELL W/IN RANGE: "As this court has previously observed, “even if a sentence imposed under a wrong sentencing range fits within a correct sentencing range, the sentence must be vacated due to the trial court's reliance on the wrong sentencing range in imposing the sentence.” People v. Owens, 377 Ill.App.3d 302, 305–06, 316 Ill.Dec. 165, 878 N.E.2d 1189 (2007). Similarly, in Carmichael, we held: “where we are unable to determine whether the trial court's mistaken belief that the Class 2 sentencing range of 3 to 14 years, rather than the Class 3 sentencing range of 2 to 10 years, applied affected the sentence it imposed, the appropriate course of action will generally be to vacate the defendant's sentence and remand for resentencing.” Carmichael, 343 Ill.App.3d at 862, 278 Ill.Dec. 683, 799 N.E.2d 401." People v. Pryor, 2013 IL App (1st) 121792

¶ 4 “Enhanced sentence” means a sentence that is increased by a prior conviction from one classification of offense to another higher classification of offense. 725 ILCS 5/111–3(c) (West 2004). Section 111–3(c) prohibits the use at trial of the fact of the prior conviction or the State's intent to seek an enhanced sentence. They are not elements of the offense and may not be disclosed to the jury. The existence of the prior conviction is used after a defendant's conviction to increase the classification of the crime at sentencing. People v. DiPace, 354 Ill.App.3d 104, 114, 288 Ill.Dec. 839, 818 N.E.2d 774 (2004)." People v. Lucas, 231 Ill. 2d 169, 181, 897 N.E.2d 778, 785 (2008)

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¶ 65 In the direct appeal of his first-degree murder convictions, defendant, Scott Smith, raises two issues. The first is whether the police, when they persisted in questioning him after he asked to be taken to a cell and complained that his head hurt, violated his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966). The second is whether his dual murder convictions for one killing violate one-act, one-crime principles. We hold that the dual convictions violate one-act, one-crime principles.

¶ 66 I. BACKGROUND

¶ 67 A grand jury indicted defendant on two counts of first-degree felony murder (720 ILCS 5/9-1(a)(3) (West 2004)).

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¶ 68 Later amendments to both counts removed both firearm references, making the two identical. The grand jury also indicted defendant on one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)).

¶ 69 II. ANALYSIS

¶ 70 We start by considering the admissibility of defendant's statements. Under bifurcated review of the admissibility of an incriminating statement, the reviewing court should "accord great deference to the trial court's factual findings, and *** reverse those findings only if they are

against the manifest weight of the evidence," but should "review *de novo* the ultimate question of whether the confession was voluntary." *In re G.O.*, 191 Ill. 2d 37, 50 (2000).

¶ 71 III. CONCLUSION

¶ 72 For the reasons stated, we affirm one of defendant's murder convictions and vacate the other and its associated sentence under the one-act, one-crime doctrine.[1]

¶ 73 Affirmed in part and vacated in part.

[1] This is an example of a footnote. An explanatory note or comment at the bottom of a page, referring to a specific part of the text on the page. Also, a minor or tangential comment added or subordinated to a main.