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No. 130173

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DESHAWN WALLACE, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-20-0917. There on appeal from the Circuit Court of Cook County, Illinois , No. 19 CR 7197. Honorable Ursula Walowski, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

Deshawn Wallace's 2008 armed robbery offense was not a qualifying predicate conviction under the armed habitual criminal statute because he was 17 years old at the time that the offense was committed, and a 17-year-old would be not tried in adult court for that offense at the time of his 2019 arrest in this case. The State therefore failed to prove him guilty of being an armed habitual criminal beyond a reasonable doubt.

The issue before this Court is whether an armed robbery offense committed when Deshawn Wallace was 17 years old qualifies as a predicate conviction for the armed habitual criminal (AHC) charge. The present tense terms "as defined" and "this Code" in subsection (a)(1), when construed with the other provisions of the AHC statute, establish that courts must look at the current law, which includes the Juvenile Court Act (JCA), to determine if a prior offense, committed when the defendant was a juvenile, is *now* a conviction. This interpretation of the AHC statute does not add the age of a defendant as an element of the offense or treat the 2014 amendment to the JCA as retroactive. (St. Br. 7-9) Rather, it merely requires courts to do a cross-reference analysis. A cross-reference to the JCA at the time of Wallace's arrest shows that an armed robbery committed by a 17-year- old would presumptively remain in juvenile court and thus, would be an adjudication that cannot be a valid predicate for AHC. Nor does this interpretation contradict the AHC statute's legislative purpose because the legislature did not intend for juvenile adjudications to be considered as predicate offenses for AHC. (St. Br. 7-9) Therefore, this Court should reverse the appellate court's decision affirming Wallace's AHC conviction.

A. The present-tense language in the armed habitual criminal statute and society's evolving attitudes towards crime and punishment support a finding that an offense committed when

the defendant was a juvenile does not qualify as a predicate conviction for the present AHC offense.

Fitzsimmons v. Norgle, 104 Ill. 2d 369 (1984), does not support the State's assertion that "it is settled'the plain meaning' of the word 'conviction' includes 'the conviction of [a defendant] while a juvenile in adult court.'" (St. Br. 10 (quoting *Fitzsimmons*, 104 Ill.2d at 372-73). In *Fitzsimmons*, this Court held that a statute precluding defendants with a Class 2 or greater felony conviction within the last ten years from receiving probation, included the defendant's felony conviction obtained while he was a juvenile transferred to adult court. *Fitzsimmons*, 104 Ill. 2d at 372. But *Fitzsimmons* does not address the issue here. At the time of *Fitzsimmons*, there had been no change in the law; the juvenile transferred to the adult court for the predicate offense would still have been a juvenile transferred to the adult court at the time of the subsequent offense. Consequently, if the *Fitzsimmons* defendant had been charged as a14-year-old at the time of his later burglary charge in 1981, he still would have been subject to transfer from juvenile to adult court, and thus faced a criminal conviction. *Id.* at 371-72. By contrast this case does involve a change in the law – the 2014 amendment to the JCA. Wallace was tried as an adult in adult court at the time of the predicate, but would now been adjudicated as a juvenile in juvenile court at the time of the subsequent offense.

Indeed, *Fitzsimmons* was decided in 1984, more than thirty years before the relevant amendment to the JCA. Consequently the amendments to the JCA and "the corresponding indication of the legislature's intent, were not present when *Fitzsimmons* [. . . was] decided. *People v. Williams,* 2020 IL App (1st) 190414, ¶ 20. Because the status of the prior conviction had not changed, this Court did

not have the opportunity to consider whether the predicate offense, if presently charged, would be classified as a juvenile adjudication rather than a criminal conviction and impact his probation eligibility. See *id*.

Moreover, it is essential to stress that interpreting *Fitzsimmons* to suggest that juvenile adjudications are "convictions" is in direct contravention to the more recent determination by this Court in *People v. Taylor*, 221 Ill. 2d 157, 77 (2006), that a juvenile adjudication is *not* a criminal conviction. See also *People v. Wallace*, 331 Ill. App. 3d 822, 837 (5th Dist. 2002); *People v. Rankin*, 297 Ill. App. 3d 818, 824 (4th Dist. 1998). This Court in *Taylor* recognized that "[i]t is readily apparent that the legislature understands the need for specifically defining a juvenile adjudication as a conviction when that is its intention." *Taylor*, 221 Ill. 2d at 178. Here, the AHC statue does not explicitly include juvenile adjudications. The AHC statute is, therefore, limited by its plain language to "convictions." Accordingly, contrary to the State's contention, the language in *Fitzsimmons* is inapplicable to the issue in this case.

The State concedes that the AHC statute uses the present tense and that the use of the present tense indicates that the analysis as to whether a prior offense resulted in a predicate conviction must focus on the current law. (St. Br. 18) Specifically, the State asserts:

> [T]he appellate court has repeatedly recognized that the use of the present tense in the phrase 'a forcible felony as defined in Section 2-8 of the Code' of subparagraph 1 requires a Court to consider whether the prior offense is one of the class of offenses that is statutorily defined as a forcible felony under the *current version* of the Criminal Code, *i.e.*, the Criminal Code in existence *at the time* the defendant is alleged to have committed AHC.
>
> (St. Br. 18 (citing *People v. Hawkins*, 2024 IL App (1st) 220991-U, ¶ 21; *People v. Brown*, 2024 IL App (1st) 220827-U, ¶ 29; *People v. Irrelevant*, 2021 IL App (4th) 200626, ¶¶ 35-36) (emphases added).)

Nevertheless, the State looks solely as to how the Criminal Code defined a forcible felony at the time the AHC offense was committed. (St. Br. 12-14) Wallace does not dispute that armed robbery qualified as a forcible felony. The question is whether such *a felony would result in a conviction*. The State's position is unsupported by the plain language of the statute. (Def, Br. 10-11) Here, the AHC statute is written in the present tense, indicating that whether something is a qualifying conviction is defined by its treatment at the time of the current offense, not at the time of the predicate offense. *See*, *e.g.*, *Goodman v. Ward*, 241 Ill. 2d 398, 408 (2011) (finding that "[t]he word 'is' indicates present tense, indicative mood[,]" and so the legislature's use of the phrase "is qualified for the office specified" means candidates must be qualified at the time they submit their statements of candidacy). Similarly, the use of the term "as defined" in subsection 1 of the statute without the additional qualification of "at the time of the offense" indicates that the offense should be evaluated as it is defined in the Illinois Criminal Code as it *is* written, not as it *was* written, and that JCA must be cross-referenced to determine where the prior offense is now an adjudication, not a conviction. See *People v. Dawson*, 2022 IL App (1st) 190422, ¶¶ 22, 47.

The State, however, mischaracterizes Wallace's position to require this Court to read the additional element of age into the AHC statute. (St. Br. 12-14). To the contrary, Wallace's position is that his 2008 armed robbery offense would not *now* result in a conviction, and therefore, is not a qualifying conviction for purposes of the AHC, because a prior conviction only qualifies if the prior conduct would have resulted in a *conviction at the time of the current AHC charge*. (Def. Br. 10-23) If an armed robbery committed by a juvenile is not now classified as

a forcible felony *conviction*, then the State cannot use the offense as a predicate offense for the AHC charge.

In arguing that Wallace's position injects an age element into the AHC statute, the State adopts the appellate court's misinterpretation of the statute. (St. Br. 12, 14 citing *People v. Wallace*, 2023 IL App (1st) 200917, ¶¶ 34-38) The *Wallace* court failed to account for the present-tense language in the AHC statute requiring prior conduct that resulted in a conviction to qualify as conduct that would currently result in a conviction. In doing so, the *Wallace* court found that courts should solely look to how the Criminal Code defined a forcible felony at the time the AHC offense was committed, not whether such a felony would result in a conviction. (St. Br. 19); *Wallace*, 2023 IL App (1st) 200917, ¶¶ 34-35. However, the *Wallace* court failed to account for the simple requirement of a statutory cross-reference to the JCA and incorrectly interpreted Wallace's argument to require the State to prove an age element as well as one about retroactivity. (St. Br. 13-21); *Wallace*, 2023 IL App (1st) 200917, ¶¶ 34, 37-38.

The appellate court's analysis directly contravenes how judges and attorneys cross-reference the Criminal Code, the Vehicle Code, and the JCA in their daily practice. See *People v. M.R.*, 2018 IL App (2d) 170342, ¶¶ 6-10 (cross-referenced the Vehicle Code and Criminal Code and found that juveniles, who were charged with possession of a stolen motor vehicle, could not be prosecuted as adults under section 5-125 of the JCA). For instance, courts routinely cross-reference the Illinois Vehicle Code to determine whether a traffic stop had been unreasonably prolonged. *People v. Williams*, 2020 IL App (3d) 180024, ¶ 35 (finding that the officer was not justified in requesting defendant's driver's license, after the initial reason

for the stop dissipated, because he had a valid Iowa temporary registration sticker in his rear window and therefore, did not violate the Illinois Vehicle Code for not having a functioning rear registration plate light). To reiterate, Wallace's argument does not require this Court to apply the JCA retroactively and it does not require this Court to read the element of age into the AHC statute. Instead, this Court need only account for the present-tense meaning of the language in the AHC statute and conduct a simple cross-reference to the version of the JCA in effect at the time of Wallace's AHC arrest to determine whether the armed robbery he committed as a 17-year-old would result in a conviction in 2019.

The State further argues that this Court should not adopt the reasoning of *People v. Dawson*, 2022 IL App (1st) 190422, which Wallace cites in support of his position that subsection (a)(1) of the AHC statute must be interpreted by looking at the law at the time of his AHC arrest; the State argues both that it was wrongly decided and has no legal effect since the opinion was vacated. (St. Br. 20-21) Wallace acknowledged in his opening brief that this Court denied the State's petition for leave to appeal in *Dawson*, vacated the decision and remanded for reconsideration in light of *People v. Gray*, 2024 IL 127815. See *Dawson*, No. 1-19-0422 (order entered July 18, 2024). In *Gray* this Court found that the defendant waived any challenge to the use of his juvenile conviction as a predicate offense because he stipulated that he had "two prior qualifying felony convictions for the purposes of sustaining the charge of armed habitual criminal." *Gray*, 2024 IL 127815, ¶¶ 17-27. This Court did not reach the issue raised in *Dawson*: whether defense counsel is ineffective for stipulating that a defendant's two prior armed robbery offenses committed when he was 17 years old were qualifying convictions for AHC.

Therefore, this Court neither considered nor rejected the First District's construction of subsection(a)(1) of the AHC statute in *Dawson* when it issued its remand order.

The State insists that this Court should follow the Fourth District's analysis in *People v. Irrelevant*, 2021 IL App (4th) 200626. (St. Br. 13, 15-16, 18) Wallace maintains that the court's reasoning in *Irrelevant* is unpersuasive because it ignores the legislature's use of the present-tense phrases. The court held that there is "no support under the plain and unambiguous language of the armed habitual criminal statute" to consider whether an offense would be tried in juvenile or adult court. *Irrelevant*, 2021 IL App (4th) 200626, ¶37. However, the statute here says the prior offense must result in a "conviction" under "*this Code*." 720 ILCS 5/24-1.7(a)(2019) (emphasis added). If an offense is tried in juvenile court, it does not result in a conviction. Therefore, the only way to determine if a prior offense would result in a "conviction" "as defined" under "this Code" is to consider which court the offense would be tried in had it happened at the same time as the current offense. Thus, despite the court's ruling in *Irrelevant*, the plain language of the statute supports considering whether the predicate offense would not be tried in juvenile court. Nor do *People v. Brown*, 2024 IL App (1st) 220827-U, ¶¶ 27-30, *People v. Hawkins*, 2024 IL App (1st) 220991-U, ¶¶ 17-20, and *People v. Herrion*, 2024 IL App (1st) 221951-U, ¶¶ 15-20, support the State's position because they adopted *Irrelevant*'s misinterpretation of the present-tense language in the AHC statute. (St. Br. 13, 15-16, 18, 21)

Next, the State contends that the AHC statute does not contemplate looking at the current law, including the JCA, because not all subsections are written in the present-tense. (St. Br. 14-15, 21-22) The State asserts that the present-tense

phrase "as described" in subsection (a)(2) "applies to only two offenses: aggravated battery of a child and aggravated battery with a firearm." (St. Br. 22) In doing so, the State ignores generally accepted canons of statutory interpretation. All the enumerated offenses in subsection (a)(2) are in the present tense because "[w]ords in a list are generally known by the company they keep." *Johnson v. Dep't of State Police*, 2020 IL 124213, ¶ 39 (quoting *Logan v. United States*, 552 U.S. 23, 31 (2007)). Furthermore, this Court should read the statute as a whole, construing its meaning in light of other relevant provisions. *People v. Gutman*, 2011 IL 110338, ¶ 12. Subsection (a)(2) is written in the present tense because, plainly, the AHC statute as a whole is written in present tense. Consequently, where "as defined" and "is punishable" in section (a)(1) and section (a)(3) indicate the present tense, which the State concedes, (St. Br. 18), and the same present tense language exists with section (a)(2)'s use of "as described," the legislature intended the same result—that the applicable time period for the predicate offenses is what they would be classified as at the time of the current conviction.

Contrary to the State's assertions (St. Br. 7-8, 30), the plain language of the statute requiring offenses to qualify under the current law comports with the legislature's purpose in enacting the AHC statute. *People v. Baskerville*, 2012 IL 111056, ¶ 18. The State ignores the fact that the AHC statute can have more than one purpose. Wallace acknowledges that one of the statute's purposes is to curb gun violence by repeat offenders. *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 27; (St. Br. 30) However, as noted in Wallace's opening brief, courts have repeatedly held that the legislature's intent in creating this offense was to punish an offender, not for his past crimes, but for his current offense, and according to his *current* level of dangerousness. (Def. Br. 18 (citing *People v. Davis*, 408 Ill.

App. 3d 747, 751-52 (1st Dist. 2011)). It follows that gun violence can only be curbed if the defendant is actually dangerous. And the law now recognizes that a prior offense committed by a 17 year old juvenile , is not a reliable indicator of his current level of dangerousness as an adult. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (finding that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."). This is especially true here where the conduct that led to Wallace's AHC arrest was that he was merely found in possession of a firearm during a traffic stop.[1] Consequently, Wallace's current level of dangerousness should be determined by how the armed robbery offense would be resolved in 2019 when he was arrested for the AHC offense.

The State also attempts to distinguish *People v. Stewart*, 2022 IL 126116, on its facts. (St. Br. 31-34) Wallace readily admits that *Stewart* interpreted the Class X sentencing statute, not the AHC statute. (Def. Br. 19-21) This Court held that the legislature did not intend for a prior conviction to be a qualifying conviction, for purposes of the Class X sentencing statute, if the conviction would have resulted in a juvenile adjudication at the time of the present offense. *Stewart*, 2022 IL 126116, ¶¶ 18-22. Although addressing a different statute, *Stewart*'s holding supports the notion that the legislature's aim is to punish defendants for their current conduct and dangerousness, not their past. This is consistent with the appellate court's now-vacated reasoning in *Dawson* and *Gray* as to the legislature's intent for the AHC offense. See *Davis*, 408 Ill. App. 3d at 751-52.

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[1]Wallace's only other criminal conviction is for unlawful use of a weapon by a felon in case number 15 CR 5613, which was a also possessory offense and elevated to a Class 3 offense based on the 2008 armed robbery offense he committed when he was 17 years old. (St. Exs. 4-5)

Moreover, the State's argument that the lack of an amendment to the AHC statue, as opposed to the Class X statute, "is strong evidence" that the legislature did not intend to exclude prior convictions of juvenile offenders in adult court as predicates for the offense of AHC, is without merit. (St. Br. 17-18, 31) Critically, at the time it amended the Class X recidivism sentencing statute on February 22, 2021, the split between *Gray*, 2021 IL App (1st) 190186, ¶ 18, and *Irrelevant*, 2021 IL App (4th) 200626,did not yet exist—*Gray* was issued on October 12, 2021, and *Irrelevant* was issued on December 8, 2021. (Def. Br. 20-21) Thus the legislature was not aware of a need to clarify the statute. The lack of an amendment does not preclude applying the plain language of the AHC.

Contrary to the State's assertion, (St. Br. 28-34), if this Court should find the AHC statute is ambiguous because two different interpretations are possible, then it should apply the rule of lenity and construe the statute in favor of Wallace. *People v. Brooks*, 158 Ill. 2d 260, 264 (1994). Again, *Stewart* is instructive here because the Class X sentencing provision was also silent as to whether the legislature intended a prior felony conviction to be a qualifying offense for Class X sentencing if the same offense would have resulted in a juvenile adjudication had it been committed on the date of the present offense. *Stewart,* 2022 IL 126116, ¶ 16; (Def. Br. 20-21). And just as a split existed prior to this Court's ruling in *Stewart*, a split in the appellate court exists as to whether a prior offense committed that would now be heard in juvenile court qualifies as a predicate conviction for the AHC charge since this Court never considered or rejected *Dawson*'s interpretation. *Id.*, ¶ 22. See *People v. Collins*, 2023 IL App (1st) 221328-U*,* ¶ 21 (adopting *Dawson*'s statutory interpretation and finding that defendant's possession of a controlled substance offense, which he committed when he was 17 years old,

was not a qualifying conviction for AHC); *People v. Johnson,* 2022 IL App (1st) 201034-U, ¶¶ 23-24 (holding that home invasion offense defendant committed when he was 15 years old was not a qualifying conviction for AHC).[2] Moreover, the parties' disagreement as to whether Wallace's 2008 armed robbery offense should be treated as a juvenile adjudication or an adult conviction demonstrates that the statutory language might be considered ambiguous.

The State, however, argues that the rule of lenity should not be applied and reasserts that "the legislature's intent with the AHC Act is clear: to protect the public from the threat created by repeat felons carrying guns." (St. Br. 35) The State, however, overlooks that the legislature did not contemplate for the AHC to consider juvenile adjudications in light of the 2014 amendment to the JCA. Rather, an armed robbery committed by a 17 year old after 2014 would presumptively result in an adjudication and could not now be used as a predicate for an AHC offense. This is consistent with the legislature's intent for the AHC statute to punish offenders based on their current level of dangerousness, not for his prior offenses. See, *e.g.*, *Davis*, 408 Ill. App. 3d at 751-52. Further, the legislature's lack of an amendment to the AHC statute, given the lack of an appellate split at the time, offers no signal as to whether the legislature intended to exclude convictions of juveniles that would now be heard in juvenile courts. The rule of lenity is therefore applicable because the rule "applies only to statutes containing 'grievous ambiguities' that are so unclear that courts are 'unable to do more than merely 'guess' the legislature's intent." (St. Br. at 35 (quoting *People v. Fiveash*, 2015 IL 117669, ¶ 34)). That is the case here.

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[2] The non-precedential Rule 23 orders cited in this brief are attached to this brief's appendix.

B. Wallace's 2008 offense does not qualify as a predicate forcible felony conviction because in 2019, armed robbery committed by a 17-year old would not be automatically tried in the adult criminal courts, and any question of a discretionary transfer is unlikely and speculative.

Wallace maintains that his 2008 armed robbery offense does not qualify as a predicate conviction for the AHC charge because he would have been tried and adjudicated as a juvenile under current law. (Def. Br. 23-26) Wallace committed the 2008 armed robbery offense when he was 17 years old. (C. 15; Sec. C. 4,6; St. Ex. 5) But at the time of Wallace's AHC offense, in 2019, the JCA provided that the juvenile court had exclusive jurisdiction over all individuals who violated the law before they turned 18. 705 ILCS 405/5-120 (2019). Furthermore, in 2019, armed robbery was not one of the enumerated offenses that were automatically transferred to adult court. 705 ILCS 405/5-130(1)(a)(2019). Because armed robbery does not have a statutory definition that would place it outside of the exclusive jurisdiction of the JCA, it could not be a conviction in an adult court, and therefore does not qualify as a predicate conviction of the AHC charge. The analysis could stop here since no fact finding is required in determining whether a charge could be brought in adult court.

Nor would Wallace's position lead to unjust results by treating the subsections differently. (St Br. 22-23) Although this appeal concerns subsection (a)(1) of the AHC statute, Wallace's interpretation could be applied to subsections (a)(2) and (a)(3). If so, then none of the offenses listed in subsections (a)(2) and (a)(3) would qualify as a predicate conviction for AHC if they were committed by a defendant under the age of 18 unless they were offenses subject to the automatic transfer statute.

The State is also incorrect that Wallace's position adds a complicated,

multifaceted jurisdictional element that requires the State to prove the age of the defendant. (St. Br. 14-15, 27-28) Age and jurisdiction may be components of this consideration, but they are not elements that the State must prove beyond a reasonable doubt.

Jurisdiction is not an element of the offense because "[w]hether a person is to be tried in juvenile or criminal court is *procedural rather than jurisdictional*. [citations omitted]. The juvenile court is merely a division of the circuit court system, and it is the circuit court which is vested with jurisdiction over all criminal defendants." *People v. Arnold*, 323 Ill. App. 3d 102, 108 (1st Dist. 2001) (emphasis added). Transferring a case between juvenile and criminal court is therefore a procedural matter. *Id.* Additionally, pursuant to section 5-130(1)(c)(iii) of the JCA, a juvenile who is automatically transferred to criminal court, but is not convicted of a transfer offense, is sentenced as a juvenile unless the State files a written motion within 10 days following the return of a verdict seeking to have him sentenced as an adult. 705 ILCS 405/5-130(1)(c)(ii) (2018). Jurisdiction is therefore only relevant insofar as it determines where a case originates. Because cases against 17-year-olds charged with armed robbery would originate in juvenile court by default, the default disposition would be an adjudication, not a conviction. 705 ILCS 405/5-120 (2019).

To determine whether an offense would result in an adjudication, a court will neither have to "pretend that [Wallace] committed the armed robbery in 2019 or was juvenile in 2019" nor "deem his 2008 armed robbery conviction in adult court a juvenile delinquency adjudication[.]" (St. Br.27). Like jurisdiction, age is not an element of the offense. See *In re Greene*, 76 Ill. 2d 204, 212 (1979) (age "is merely the factor which authorizes the application of the juvenile system.")

It is only relevant insofar as it informs the mechanism for charging a defendant—*e.g.,* a 17-year-old should be charged with a juvenile offense. Moreover, Wallace never argued that his age is an element of the offense, or that his 2008 conviction should be vacated and an adjudication instated.

Wallace's interpretation is also not unworkable when applied to presumptive and discretionary transfers. (St. Br. 24-26) The court in *Irrelevant* was also concerned that the defendant's argument rested on a "faulty assumption" that he would not be discretionarily transferred out of juvenile court. *Irrelevant*, 2021 IL App (4th) 200626, ¶ 38. However, the lower court's "concern" about a "faulty assumption" is unwarranted as very few juveniles are discretionarily transferred to adult court as shown by statistical data gathered by the Illinois Juvenile Justice Commission cited by Wallace in his opening brief. (Def. Br. 25-26) The data from 2018 showed that statewide, only *two* armed robbery cases were subject to §5-805 motion transfers to adult court. Ill. Juvenile Justice Comm'n, *Trial and Sentencing of Youth as Adults in the Illinois Justice System: Transfer Data Report* at 32, 34 (IJJC Report 2021). The State raised these same concerns of discretionary transfers and mini-trials in *Stewart*. Compare (St. Br. 25-26) with (*Stewart*, Rep. Br. 8, 12-16). But this Court was not persuaded by the State's argument in *Stewart*.

In addition, Illinois case law already contemplates looking to the details of a prior offense to determine whether it qualifies as a predicate. See *People v. Carter*, 2021 IL 125954, ¶¶ 37, 43 (reversing AHC conviction predicated on a prior aggravated battery conviction, where the State did not "introduce into evidence any other details" to establish that the offense resulted in great bodily harm or permanent disability or disfiguration); *People v. McGhee*, 2020 IL App (3d) 180349, ¶¶ 54-55 (reversing AHC conviction because the evidence was insufficient to show

that the defendant's Iowa burglary amounted to a forcible felony as required under the statute); *People v. Ephraim*, 2018 IL App (1st) 161009, ¶ 14 (reversing defendant's conviction where the court found that his prior "conviction for aggravated battery to a peace officer without proof that the underlying battery resulted in great bodily harm or permanent disability or disfigurement [did] not qualify as a forcible felony[,]" as required by the AHC statute).

Determining whether an offense qualifies as an adjudication under current law is not complicated. In this case, it merely requires a court to determine whether Wallace's 2008 offense is "a forcible felony as defined in Section 2-8 of this Code" under current law by considering whether he would have been adjudicated or convicted under current law. And in this case, Wallace's 2008 armed robbery offense would have resulted in an adjudication under the law in effect in 2019.

C. Alternatively, if this Court should find that trial counsel stipulated to the sufficiency of Wallace's 2008 offense as a predicate felony under the armed habitual criminal statute, this Court should reach the issue as a claim of ineffective assistance of counsel.

The State agrees with Wallace "that [trial counsel's] stipulation at trial that [Wallace] had previously been convicted of armed robbery and unlawful use of a weapon by a felon does not foreclose his sufficiency claim because the stipulation did not expressly state that those convictions constituted prior qualifying offenses under the AHC Act." (St. Br. 36 n. 4) Accordingly, Wallace stands on his opening brief with regard to this issue. (Def. Br.26-29)

The State is wrong that Wallace's claim fails because it is based on evidence that was not presented at trial, namely, the pre-sentence investigation report. (St. Br. 36-43) Wallace did in fact present evidence of his age and the 2008 armed robbery offense at his stipulated bench trial. The State read into evidence a

stipulation that the ISP certified abstracts established that Wallace had a birth date of June 10, 1991. (R. 77; St. Ex. 2-3) The ISP certified abstracts pertaining to FOID and CCL records were also admitted into evidence. (R. 77) The State also admitted into evidence a certified copy of disposition for case number 08 CR 12591, which for the armed robbery offense with an arrest date of June 20, 2008. (R. 77; St Ex 4-5) Accordingly, the trial evidence established that Wallace was 17 years old when he committed the 2008 armed robbery. While Wallace did point to the criminal history portion of his presentence investigation (PSI) report in his opening brief, he did so only as confirmation that he was indeed 17 years old when he was arrested for his 2008 offense. (Sec. C. 4, 6; Def. Br. 23-24) The State's cite to *People v. Cline*, 2022 IL 126383, is also unavailing since Wallace, unlike the *Cline* defendant, did present evidence at trial in support of his sufficiency claim. Therefore, the State's argument that Wallace's claim is improperly based on new evidence not admitted at trial has no merit.

Moreover, the State's position here shifts the burden of proof. (St. Br. 39-43) It was the State's burden to prove that Wallace had two prior qualifying convictions under the AHC statute. Wallace does not have to prove that his 2008 offense is not qualifying – the State has to prove that it is. See *People v. Carter*, 2021 IL 125954, ¶ 40 ("It was the State's burden to prove defendant's guilt [of being an armed habitual criminal], not defendant's burden to prove his innocence."); see also *People v. Brown*, 2013 IL 114196, ¶ 52 ("the State bears the burden of proving beyond a reasonable doubt each element of a charged offense and the defendant's guilt.") The record on appeal shows that the State failed to do so.

Finally, in his opening brief Wallace asked that this Court, in the alternative reduce his conviction to the lesser included offense of unlawful use of a weapon

by a felon. (Def. Br. 29) The State agrees that this is a lesser included offense and that this Court has the authority to reduce the conviction. (St. Br. 43-44) Accordingly, Wallace stands on his opening brief with regard to this request for alternative relief.

D. Conclusion

In 2019, a case involving a 17-year-old charged with armed robbery would not be heard in adult court but in juvenile court, and the minor therefore would not be convicted, but adjudicated delinquent. The AHC statute requires two prior convictions that qualify as predicates under the current law. Wallace's 2008 armed robbery offense is not a qualifying conviction because it would have resulted in a juvenile adjudication at the time of his arrest for the current offense. As such, the State failed to prove beyond a reasonable doubt that Wallace was guilty of being an armed habitual criminal. Accordingly, this Court should vacate the appellate court's decision and either reverse Wallace's AHC conviction, remand based on a claim of ineffective assistance of counsel, or in the alternative, reduce the conviction to the lesser-included offense of unlawful use of a weapon by a felon.

CONCLUSION

For the foregoing reasons, Deshawn Wallace, defendant-appellant, respectfully requests that this Court vacate the appellate court's order and either reverse Wallace's armed habitual criminal conviction outright, remand based on a claim of ineffective assistance of counsel, or, in the alternative, reduce it to the lesser-included offense of unlawful use of a weapon by a felon.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 18 pages.

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APPENDIX TO THE REPLY BRIEF

People v. Collins, 2023 IL App (1st) 221328-U

People v. Johnson, 2022 IL App (1st) 201034-U

2023 IL App (1st) 221328-U

Appellate Court of Illinois, First District,
Fifth Division.

The PEOPLE of the State of Illinois, Respondent-Appellee,
v.
Toriano COLLINS, Petitioner-Appellant.

No. 1-22-1328
|
Order Filed August 22, 2023

Appeal from the Circuit Court of Cook County. No. 2017 CR 02675, Honorable James Michael Obbish, Judge Presiding.

ORDER

PRESIDING JUSTICE DELORT delivered the judgment of the court.

1** ¶ 1 ***Held: We reverse defendant's armed habitual criminal conviction because a conviction for an offense he committed when he was a minor does not qualify as a predicate offense. We reduce the conviction to unlawful possession of a weapon by a felon and remand for resentencing.

¶ 2 BACKGROUND

¶ 3 Defendant Toriano Collins was charged with unlawful possession of a weapon by a felon (UUWF), which was elevated to the more serious crime of armed habitual criminal (AHC) because, when he committed the UUWF, he had already been convicted of two qualifying predicate offenses: a 2013 drug crime and a 2015 gun offense. He now argues that, due to a legislative amendment, his 2013 conviction did not qualify as a predicate offense, and therefore the AHC conviction cannot stand because there was only one qualifying predicate offense. We reverse the AHC conviction, reduce it to UUWF, and remand for resentencing.

¶ 4 FACTS

¶ 5 In 2013, Collins was convicted of delivery of a controlled substance in case number 13 CR 12839. Collins was 17 years old when he committed that offense. In 2015, he was convicted of UUWF in case number 15 CR 00095. In this third prosecution, Collins was charged with UUWF and convicted of AHC on the basis of his two prior convictions. In defendant's first appeal, we affirmed his 10-year AHC sentence over his contention that the circuit court improperly relied on evidence not presented at trial in aggravation in imposing the sentence. Further details regarding the procedural and factual history are set forth in that decision. *People v. Collins*, 2021 IL App (1st) 182399-U.

¶ 6 On January 19, 2022, Collins filed a petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401) (West 2020)). In support of the petition, Collins argued that one of the two prior offenses—the 2013 controlled substance conviction—did not qualify as a predicate offense because he was only 17 years old when he committed that offense. At that time, 17-year-old defendants were prosecuted as adults for such offenses. However, under the 2014 amendment to the Juvenile Court Act (Act), such defendants would now be prosecuted in juvenile court, and juvenile offenses do not qualify as predicate offenses under the AHC statute. Collins contended that the 2014 amendment applied retroactively. Therefore, Collins argued, his controlled substance conviction did not qualify as a predicate offense, and his AHC conviction must be reduced to UUWF.

¶ 7 The circuit court issued a written opinion dismissing Collins' petition. The court held that the amendment to the Act did not apply retroactively. This appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, Collins makes the same argument as he did in his section 2-1401 petition: because his 2013 conviction did not qualify as a predicate offense under the new law, which applies retroactively, his AHC conviction must be reversed.

¶ 10 We first address two threshold matter raised by the State. The State urges us to dismiss this appeal because

Collins' section 2-1401 petition was untimely filed. It is true that petitions brought under section 2-1401 must generally be filed within two years after entry of judgment. 735 ILCS 5/2-1401(c), (f) (West 2022); *People v. Thompson*, 2015 IL 118151, ¶¶ 28-29. However, timeliness is an affirmative defense that must be raised in the circuit court; otherwise, it is forfeited. *People v. Cathey*, 2019 IL App (1st) 153118, ¶¶ 14-19. The record does not indicate that the State ever raised this argument in the circuit court. As the State has forfeited its timeliness argument, we will honor its forfeiture and decline to dismiss Collins' petition on that ground.

**2 ¶ 11 The State also argues that it "appears" that it did not receive proper service of Collins' section 2-1401 petition. This argument is unpersuasive. " 'The object of process is to notify a party of pending litigation in order to secure his appearance.' " *People v. Ocon*, 2014 IL App (1st) 120912, ¶ 23 (quoting *Professional Therapy Services, Inc. v. Signature Corp.*, 223 Ill. App. 3d 902, 910 (1992)). In considering whether a party provided sufficient notice, courts focus not on formalities, but whether the "object and intent of the law were substantially attained thereby." (Internal quotation marks omitted.) *Ocon*, 2014 IL App (1st) 120912, ¶ 23 (quoting *Professional Therapy Services*, 223 Ill. App. 3d at 910–11 (quoting *In re Marriage of Wilson*, 150 Ill. App. 3d (1986)), quoting *Fienhold v. Babcock*, 275 Ill. 282, 289–90 (1916)). Here, the State concedes that an assistant state's attorney appeared in a status call during which the petition was discussed. The record contains no indication that the State objected to service in the court below. As the State appeared, the object and intent of the law were attained. By appearing in court, the State waived any challenge it may have had regarding service. Accordingly, we decline to dismiss the petition on that ground.

¶ 12 That brings us to the merits. Ultimately, this case revolves around an issue of statutory interpretation. We review the construction of statutory language *de novo*. *People v. Jones*, 2023 IL 127810, ¶ 22 (citing *People v. Gonzalez*, 239 Ill. 2d 471, 479 (2011)).

¶ 13 Section 24-1.7 of the Criminal Code provides, in relevant part, as follows:

> "A person commits the offense of being an armed habitual criminal if he ***possesses*** any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:
>
> ***
>
> *** unlawful use of a weapon by a felon***
>
> *** [and] any violation of the Illinois Controlled Substances Act *** that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7 (West 2016).

¶ 14 This case involves the interplay of the Criminal Code and the Act. Until the end of 2013, minors could be charged under the Criminal Code as adults for certain crimes. A 2014 amendment to the Act changed that practice. As of January 1, 2014, with a few exceptions not relevant here, "no minor who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State." 705 ILCS 405/5-120 (West 2016). The question before us is thus whether the 2014 amendment to the Act require us to reverse Collins' AHC conviction and remand his case to the circuit court for resentencing.

¶ 15 Our research has revealed five recent, similar cases—one from our supreme court and the others from our appellate courts—that interpreted the effect of the amendment at issue. We look to these for guidance in resolving the appeal before us.

¶ 16 In *People v. Stewart*, 2022 IL 126116, our supreme court considered whether the defendant's felony burglary conviction at age 17 was a qualifying offense for purposes of Class X sentencing as a recidivist. In that case, the appellate court had held that Stewart's 2013 felony offense, committed at age 17, was not a qualifying offense for Class X sentencing. *Id.* ¶ 1. The supreme court agreed. It noted an appellate court split on the issue of whether the amendment required the circuit court to consider the defendant's age at the time of the offense. *Id.* ¶ 21. It further found that the existence of these conflicting interpretations negated the presumption that the legislature intended to change existing law when it amended the statute to require qualifying offense to be committed when the person was 21 years of age or older. *Id.* ¶ 22. Therefore, "the split in the appellate court, when considered with the silence in the previous version of the statute on this issue, le[d] [it] to conclude that [the statute] was intended to resolve

the conflict in the appellate court and clarify the meaning of the original statute." *Id.* Accordingly, it held that Stewart's 2013 conviction was not a qualifying offense for Class X sentencing. *Id.*

***3** ¶ 17 In *People v. Gray*, 2021 IL App (1st) 191086, a jury found the defendant guilty of being an armed habitual criminal. *Id.* ¶ 6. One of the two predicate offenses that formed the basis for that conviction was a narcotics crime that Gray committed in 2002 when he was 17 years old. *Id.* Gray appealed the AHC conviction, arguing that the narcotics conviction could not support the AHC charge because he was a juvenile at the time of the narcotics offense, and under the statutes now in effect, his offense would be tried in juvenile court, outside the jurisdiction of the criminal courts. *Id.* ¶ 9. We reversed his AHC conviction, reasoning that because at the time of the AHC charge in 2016, Gray could not have been convicted of the narcotics crime he was found guilty of in 2002; he would have been prosecuted in juvenile court for that offense. Therefore, it did not qualify as a predicate offense necessary for an AHC conviction. *Id.* ¶ 16. We note that on November 30, 2022, our supreme court granted a petition for leave to appeal in *People v. Gray* (Ill., Nov. 30, 2022).

¶ 18 In *People v. Dawson*, 2022 IL App (1st) 190422, a jury found the defendant guilty of being an armed habitual criminal. *Id.* ¶ 1. Both of the predicate offenses were armed robberies that Dawson committed in 2013 at the age of 17. *Id.* ¶ 11. Dawson appealed the AHC conviction, arguing that neither robbery conviction could support the AHC charge because he was a juvenile at the time of both offenses. *Id.* ¶ 15. We reduced Dawson's AHC conviction to the lesser included offense of aggravated unlawful use of a weapon. *Id.* ¶ 67. We concluded that the State had not met its burden of proof —beyond a reasonable doubt—in showing that Dawson had two qualifying adult convictions under the law in effect at the time of his AHC charge. *Id.* ¶ 48. That is, though Dawson did have two adult convictions prior to the 2014 amendment, the State did not prove that those convictions would still be classified as adult convictions after the amendment came into force. Accordingly, the AHC conviction could not stand.

¶ 19 *People v. Williams*, 2020 IL App (1st) 190414, did not deal with an AHC conviction, but, similar to the *People v. Stewart* case discussed above, it considered whether a crime convicted by a 17-year-old could qualify as a predicate offense to qualify him for Class X sentencing. *Id.* ¶¶ 1, 13. Therefore, we find the decision instructive. In that case, defendant was convicted of robbery in 2018, and the State advised the court of the defendant's mandatory Class X sentencing based on two prior convictions: a 2014 robbery and a 2013 burglary, the latter having been committed when he was 17 years old. *Id.* ¶ 11. We vacated Williams' Class X sentencing and remanded his case for resentencing. *Id.* ¶ 24. We reasoned that, had Wiliams committed the 2013 burglary at the time of the 2018 robbery, he would have been adjudicated as a juvenile, and that offense would not have qualified as a predicate offense for Class X sentencing. *Id.* ¶ 21.

¶ 20 However, the court in *People v. Irrelevant*, 2021 IL App (4th) 200626, reached a different conclusion. In that case, the defendant committed a burglary in 1983 when he was 17 years old, and argued that could not qualify as a predicate offense for his AHC conviction. *Id.* ¶ 20. The court disagreed, stating that it would be "speculative to assume defendant would not have been subject to a discretionary transfer had he committed his 1983 offense in 2016 at the age of 17." *Id.* ¶ 38.

¶ 21 We find the statutory interpretation and analyses of the decisions in *Gray*, *Dawson*, and *Williams* persuasive, we adopt their reasoning as our own, and we use them to resolve this appeal. Here, as in those cases, the defendant was 17 years old when he committed an offense that qualified as a predicate offense that led to his armed habitual criminal conviction. However, shortly after he was convicted of the predicate offense, an amendment to the Juvenile Court Act removed minors, with a few exceptions not relevant here, from the jurisdiction of the adult criminal courts. Thus, under the amendment, Collins could not have been convicted of the controlled substance crime as that would have been adjudicated in juvenile court. Because Collins was a minor at the time of one of the prior offenses, it did not qualify as a predicate offense sufficient for the AHC conviction to stand.

¶ 22 CONCLUSION

***4** ¶ 23 For these reasons, we reduce Collins' AHC conviction to the lesser included offense of UUWF and remand for resentencing. See, *e.g.*, *People v. Dawson*, 2022 IL App (1st) 190422, ¶ 67.

¶ 24 Reversed and remanded.

Justice Lyle concurred in the judgment.

Justice Mitchell dissented.

¶ 25 JUSTICE MITCHELL, dissenting:

¶ 26 The majority opinion does what the General Assembly specifically declined to do: it makes retroactive the 2014 amendment to the Juvenile Court Act raising the age limit for prosecution in adult criminal court from 17 to 18. That amendment is prospective only and applies to "violations or attempted violations *committed on or after* [January 1, 2014,] the effective date of this amendatory Act." (Emphasis added.) 705 ILCS 405/5-120 (West 2014). As such, the 2014 amendment can have no application to our defendant Toriano Collins's 2013 felony conviction for delivery of a controlled substance. Having been convicted of two qualifying predicate felonies (from 2013 and 2015), Collins stands properly convicted of armed habitual criminal.

¶ 27 For this reason, I respectfully dissent. I would affirm Collins's conviction and sentence.

All Citations

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2022 IL App (1st) 201034-U

Appellate Court of Illinois, First District,
FIRST DIVISION.

PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Deandre JOHNSON, Defendant-Appellant.

No. 1-20-1034
|
August 29, 2022

Appeal from the Circuit Court of Cook County, Illinois, No. 19 CR 01647, The Honorable Dennis J. Porter, Judge Presiding.

ORDER

JUSTICE WALKER delivered the judgment of the court.

***1** ¶ 1 ***Held*:** A conviction of a juvenile for home invasion does not qualify as a predicate offense for a charge of being an armed habitual criminal. A court errs by giving written jury instructions that differ significantly from the oral instructions, unless the court explains the difference to the jury. This court must reverse a conviction obtained after the trial court committed an error in instructions concerning credibility in a case where the prosecution relied on the credibility of a single well-impeached witness.

¶ 2 Following a jury trial, defendant Deandre Johnson was found guilty of violating the armed habitual criminal provision of the Criminal Code. 720 ILCS 5/24-1.7(a) (West 2018). He was sentenced to 7 years in the Illinois Department of Corrections. On appeal, Johnson argues: (1) his prior conviction as a juvenile for home invasion should not count as a predicate offense for the armed habitual criminal conviction; (2) the jury should not have believed the State's key witness; (3) the trial court gave erroneous and confusing instructions; and (4) his counsel provided ineffective assistance. We find the evidence sufficient to support the conviction, but the trial court erred by sending the jury written instructions that differed significantly from the oral instructions without explaining the difference. Because the error concerned the jury's assessment of the key witness's credibility, in a case where the conviction rested entirely on the credibility of a single witness, we find the error prejudiced Johnson. We reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 At approximately 1 a.m. on January 3, 2019, Johnson called Melinda Perry and asked her to pick him up from an address on the south side of Chicago. After Johnson entered the vehicle, police pulled her over and arrested Johnson. Prosecutors charged Johnson with violating the armed habitual criminal provision of the Criminal Code.

¶ 5 At the jury trial, Officer Jonathan Dibiase of the Chicago Police Department testified that as he patrolled in his car with his partner, he saw Perry's car speeding. Officers in a separate police car helped him force Perry to stop. He went to the driver's side, and there he saw the handle of a gun and a cup with an amber-colored liquid in the car's center console. He pulled Perry out of the car, cuffed her, and took her behind her car. The other officers went to the passenger side of the car to get Johnson out of the car. Dibiase returned to the driver's side, and he saw Johnson shoving the gun toward the car's floorboard, wedging it between the passenger seat and the center console. Dibiase slapped Johnson to stun him. The other officers extracted Johnson from the car and cuffed him. No officer tested Perry for alcohol impairment.

¶ 6 Dibiase testified that he read Johnson his rights at the police station, but he did not record the interview. According to Dibiase, Johnson said "he was not trying to hurt anybody, what did we expect him to do when he had a gun in the car and he didn't want to be locked up."

***2** ¶ 7 The trial court permitted defense counsel to use Dibiase's grand jury testimony for impeachment. Dibiase admitted that to the grand jury, he testified as follows:

> " 'Question: While removing him from the vehicle did officers observe a black handle of a pistol wedged between the passenger's seat and the center console?'
>
> 'Answer: Yes.' "

¶ 8 Dibiase did not tell the grand jury that he first saw the gun before he removed Perry from the car, well before he helped

remove Johnson from the car. The other officers partially corroborated Dibiase's account of the arrest, but none of them saw a gun, and none of them heard Johnson confess.

¶ 9 Perry admitted she had four prior felony convictions, including convictions for credit card fraud and identity theft. Perry testified that Johnson was drunk when she picked him up on January 3, 2019. Johnson immediately fell asleep in the car. A police car stopped at an angle in front of her, forcing her to stop, while a second police car drove up behind her car. When Dibiase walked up to the driver's side of the car, she handed him her license and proof of insurance. He slapped them out of her hand. When Dibiase ordered her out of the car, she said, "I ain't got to do shit." But she got out of the car. Perry testified that there was no gun in the car.

¶ 10 Dibiase testified Perry did not offer her license and proof of insurance, and he did not slap anything out of her hand. Dibiase admitted that when he ordered Perry out of the car, she said, "I don't have to do shit."

¶ 11 Defense counsel stipulated Johnson had two prior qualifying convictions for purposes of the armed habitual criminal statute. Defense counsel asked the judge to instruct the jury on the use of prior inconsistent statements as substantive evidence. The judge instructed the jury instead only on the use of prior inconsistent statements for impeachment, as he told the jury: "The believability of a witness may be challenged by evidence on some form or occasion he made a statement that was not consistent with his testimony in this case." After the jury retired to the jury room, the judge said he found no inconsistency between Dibiase's grand jury testimony and his testimony at trial. The judge decided not to send the written instructions on prior inconsistent statements to the jury, and the judge did not mention or explain to the jury the difference between the oral instructions and the written instructions.

¶ 12 The jury found Johnson guilty of violating the armed habitual criminal statute. The trial court sentenced Johnson to seven years in prison. Johnson now appeals.

¶ 13 ANALYSIS

¶ 14 On appeal, Johnson argues: (1) the evidence did not prove him guilty because (a) one of the predicate convictions penalized Johnson for conduct committed when Johnson was a minor, and (b) no reasonable trier of fact could find Dibiase credible; (2) the trial court committed reversible error when it (a) gave the jury written instructions that confusingly differed from the oral instructions and (b) failed to instruct the jury on the use of prior inconsistent statements as substantive evidence; and (3) Johnson's attorney provided ineffective assistance (a) by stipulating that he had two qualifying convictions and (b) by failing to object to evidence of Perry's prior convictions.

¶ 15 Prior Conviction

***3** ¶ 16 The armed habitual criminal provision of the Criminal Code provides:

> "(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 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; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm; or
>
> (3) any violation of the Illinois Controlled Substances Act * * * that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7(a) (West 2018).

¶ 17 Johnson admits he has been convicted of a violation of the Illinois Controlled Substances Act that is punishable as a Class 3 felony or higher. He argues that the second conviction on which the State relied, a home invasion committed in 2002, does not qualify as a predicate offense for an armed habitual criminal charge because he was only 15 years old in 2002.

¶ 18 In *People v. Gray*, 2021 IL App (1st) 191086, 457 Ill.Dec. 14, 194 N.E.3d 503, this court held that a conviction of a 17-year-old for possession of narcotics did not qualify as a predicate offense for an armed habitual criminal charge because the conduct did not meet the requirement of (a)(3), which requires proof of conduct that "is punishable as a Class 3 felony or higher." If a 17-year-old committed the same conduct in 2016, at the time of the gun possession, the juvenile

court would retain jurisdiction over the case, leading to a juvenile adjudication, not a conviction. Id. at ¶¶ 11-16.

¶ 19 The language of subsection (a)(2) differs significantly from the language of subsection (a)(3). Subsection (a)(2) requires only proof that the defendant possessed a firearm "after having been convicted *** [of] home invasion" and a second qualifying offense. The statute, on its face, does not require proof that the conduct would violate the home invasion statute in force at the time of the gun possession. Johnson stipulated that he had been convicted of home invasion committed when he was 15. Even though a 15-year-old charged with the same conduct would now remain in the jurisdiction of the juvenile court, Johnson's conviction qualifies as a predicate conviction under the literal terms of the armed habitual criminal statute.

¶ 20 Nonetheless, we agree with Johnson that this result creates an anomaly. If the current treatment of juveniles for conduct that violates narcotics statutes makes a prior conviction unavailable as grounds for an armed habitual criminal charge, why should the current treatment of juveniles for conduct that constitutes home invasion, vehicular hijacking, or unlawful use of a weapon by a felon make no difference for such a charge? This case is similar to *People v. Miles*, 2020 IL App (1st) 180736, 446 Ill.Dec. 458, 170 N.E.3d 984, and *People v. Williams*, 2020 IL App (1st) 190414, 449 Ill.Dec. 141, 178 N.E.3d 748. In *Miles*, this court interpreted section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2016)), which authorizes Class X sentencing for offenders found guilty of a Class 1 or Class 2 felony "after having twice been convicted *** 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." Miles had a felony conviction for aggravated vehicular hijacking that was committed when he was 15 years old. The *Miles* court found that the juvenile court acquired exclusive jurisdiction over minors charged with armed robbery and aggravated vehicular hijacking based on the 2016 amendment to section 5-130 of the Juvenile Court Act of 1987. Both armed robbery and aggravated vehicular hijacking previously disqualified minors from juvenile court jurisdiction. Hence, the legislature intended that minors who commit armed robbery and aggravated vehicular hijacking are to be treated differently from adults. The *Miles* court also found that had Miles committed his 2005 offense under the laws in effect on June 9, 2016, the juvenile court would have had exclusive jurisdiction, and Miles would not have received a Class 2 conviction. Instead, he would have received a juvenile court adjudication. Based on these findings, the *Miles* court held that the 2005 conviction should not have been considered a qualifying offense for Miles to be sentenced as a Class X offender. *Miles*, 2020 IL App (1st) 180736, ¶¶ 21-22, 446 Ill.Dec. 458, 170 N.E.3d 984.

*4 ¶ 21 The *Williams* court followed *Miles*, holding:

> "Defendant here was properly convicted of burglary in criminal court when he was 17 years old, but a[n] *** amendment to the Juvenile Court Act has since given the juvenile court exclusive jurisdiction over 17-year-old defendants charged with burglary. As *Miles* instructs, we look at the elements of his prior conviction as of the date defendant committed his current offense. [Citation.] On the date he committed the present offense, June 7, 2018, defendant's 2013 burglary conviction would have been resolved in delinquency proceedings rather than criminal court proceedings, and his predicate offense would have been a juvenile adjudication instead of a Class 2 or greater Class felony conviction. *** Following *Miles*, we find that defendant's prior burglary conviction is not an offense now *** classified in Illinois as a Class 2 or greater Class felony and, therefore, is not a qualifying offense for Class X sentencing." (Internal quotation marks omitted.) *Williams*, 2020 IL App (1st) 190414, ¶ 21, 449 Ill.Dec. 141, 178 N.E.3d 748.

¶ 22 We note that "there are powerful reasons to discount or disregard some or most juvenile convictions once the individual becomes an adult. First, on risk-related grounds the juvenile prior is likely to be less probative of re-offending, simply through the passage of time. Second, from a retributive perspective, juveniles are universally deemed to be less culpable than adult offenders convicted of crimes of comparable seriousness. Indeed, the Supreme Court has found that Third, the transition to adulthood should offer individuals an opportunity to shed their juvenile criminal transgressions, unless these are clearly predictive of further offending." See *Should Juvenile Prior Crimes Count Against Adult Offenders? What Does the Public Think?* Robina Institute of Criminal Law and Criminal Justice. [1]

¶ 23 We further note that panels of the appellate court have disagreed with *Miles*, *Williams*, and *Gray*. See *People v. Williams*, 2021 IL App (1st) 191615, 457 Ill.Dec. 92, 194

N.E.3d 581 and *People v. Reed*, 2020 IL App (4th) 180533, 448 Ill.Dec. 48, 175 N.E.3d 717. However, we find *Miles*, *Williams*, and Gray persuasive. To obtain a conviction for aggravated vehicular hijacking (*Miles*), burglary (*Williams*), delivery of narcotics (Gray), or home invasion (here), the prosecution would need to prove that the defendant was at least 18 years old at the time of the offense, or that the defendant merited transfer to the criminal courts under the restrictive provisions for such transfer. See 705 ILCS 405/5-120 (West 2016). In view of the changes to the Juvenile Court Act of 1987, for most offenses age of the defendant operates as an element of the offense.

¶ 24 Here, the prosecution showed that Johnson had two prior felony convictions on his record. As to the conviction for home invasion committed when Johnson was 15, the prosecution did not show that the conviction was for conduct that "is punishable" as a felony on the date of the firearm possession in 2019. Because the prosecution failed to prove the two prior convictions of the kind required to show a violation of the armed habitual criminal provision of the Criminal Code, we reverse the conviction for violation of the armed habitual criminal provision of the Criminal Code.

¶ 25 Credibility

***5** ¶ 26 Johnson next points out that the conviction rests entirely on the testimony of one witness, Dibiase. Johnson argues that no reasonable trier of fact could have found Dibiase's testimony credible. We will not reverse a conviction for insufficient evidence if any reasonable trier of fact could have found all the elements of the charged offense proven beyond a reasonable doubt. *People v. Wright*, 2017 IL 119561, ¶ 70, 418 Ill.Dec. 866, 91 N.E.3d 826.

¶ 27 We agree with Johnson that Dibiase's testimony raises significant credibility issues. According to Dibiase's testimony, he first saw the gun before he took Perry out of the car. He then cuffed Perry and escorted her to the back of the car – leaving Johnson with immediate access to the gun as Dibiase walked away. Dibiase's conduct, as Dibiase described it, appears at least grossly negligent, as it needlessly exposed Dibiase, Perry, and three other officers to mortal danger.

¶ 28 Only Dibiase testified to hearing Johnson confess to gun possession. Dibiase did not obtain from Johnson any signed statement, not even a signed waiver of his constitutional rights. Dibiase also did not ask police labs to check the gun for fingerprints. Hence, Dibiase's conduct appears inconsistent with reasonable police procedures.

¶ 29 However, we defer to the jury's credibility determinations. *People v. Coulson*, 13 Ill. 2d 290, 295-96, 149 N.E.2d 96 (1958). A reviewing court will not normally substitute its own judgment for that of the jury, especially with respect to credibility determinations. *People v. Locascio*, 106 Ill. 2d 529, 537, 478 N.E.2d 1358, 88 Ill.Dec. 632 (1985). We find the improbabilities in Dibiase's testimony insufficient to compel rejection of the jury's finding. Dibiase's testimony that he saw Johnson pushing a gun between the seat cushions supports the conclusion Johnson possessed a gun. See *People v. Balark*, 2019 IL App (1st) 171626, ¶ 94, 439 Ill.Dec. 136, 147 N.E.3d 811.

¶ 30 Instructions

¶ 31 Johnson contends the court made two errors in instructing the jury. First, the court's written instructions did not include the oral instruction concerning prior inconsistent statements, and the court did not explain to the jury the difference between the oral and the written instructions. Second, the court did not instruct the jurors that they could consider Dibiase's grand jury testimony as substantive evidence.

¶ 32 The trial court has discretion to decide whether to give proffered instructions. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505, 771 N.E.2d 357, 264 Ill.Dec. 653 (2002). The court abuses its discretion if it gives unclear or misleading instructions or if the instructions do not fairly and correctly state the law. *Id.* at 507, 264 Ill.Dec. 653, 771 N.E.2d 357. We will not reverse the judgment based on erroneous instructions unless the error prejudiced the appellant. *Knight v. Chicago Tribune Co.*, 385 Ill. App. 3d 347, 358, 895 N.E.2d 1007, 324 Ill.Dec. 292 (2008).

¶ 33 The judge permitted Johnson to present evidence of Dibiase's grand jury testimony as a prior statement inconsistent with Dibiase's testimony at trial. The decision accorded with *People v. Billups*, 318 Ill. App. 3d 948, 957, 742 N.E.2d 1261, 1269, 252 Ill.Dec. 397 (2001), where the court explained that it is left to the sound discretion of trial court to determine whether a witness' prior statement is inconsistent with his present testimony. A direct contradiction

of the testimony is not required for a prior statement of a witness to be considered inconsistent with his trial testimony. A "prior statement is deemed inconsistent when it omits a significant matter that would reasonably be expected to be mentioned if true." *Billups*, 318 Ill. App. 3d at 957, 252 Ill.Dec. 397, 742 N.E.2d 1261.

*6 ¶ 34 Dibiase testified to the grand jury that he saw the gun when he removed Johnson from the car. A reasonable trier of fact could find that if he had seen the gun earlier, before he removed Perry from her car, Dibiase would have told the grand jury. The judge did not abuse his discretion when he allowed the grand jury testimony into evidence and read the jury the first part of IPI 3.11, instructing the jury on the use of the prior testimony for impeachment. The judge decided he had erred in the oral instructions. Hence, the judge gave the jury written instructions that made no reference to prior inconsistent statements.

¶ 35 To withdraw an erroneous instruction after reading it to the jury, the court must inform the jury that the court is withdrawing the instruction. *Osmon v. Bellon Construction Co.*, 53 Ill. App. 2d 67, 202 N.E.2d 341 (1964). This court has held that recalling or withdrawing the instruction is the only way to correctly remove the error. See *Bochat v. Knisely*, 144 Ill. App. 551 (1908), where the court had read the instructions and, as the jury was about to retire, the court called them back and informed them that one instruction he had given was incorrect. The judge then read it to them, stated that he was withdrawing it, and they should give it no consideration by treating it as if it had not been given. The Appellate Court held that this was the correct procedure. Both a withdrawal of the erroneous instruction and the giving of a correct instruction have been held necessary to correct an error. "The withdrawal must be express and unqualified and in language so explicit as to preclude the inference that the jury might have been influenced by the erroneous instruction." *Osmon v. Bellon Construction Co.*, 53 Ill. App. 2d 67, 71, 202 N.E.2d 341 (1964).

¶ 36 "[J]ury instructions should not be misleading or confusing (citation); and the giving of conflicting instructions *** is not harmless error." *People v. Bush*, 157 Ill. 2d 248, 253-54, 623 N.E.2d 1361, 1364, 191 Ill.Dec. 475 (1993). We find the trial judge erred by sending the jury written instructions that differed from the oral instructions, without explaining the difference to the jury.

¶ 37 The conviction here rested entirely on the credibility of uncorroborated portions of a well-impeached witness's testimony. We find the error in instructing the jury about the use of prior inconsistent statements for impeachment prejudiced Johnson. We reverse and remand for a new trial. Because of our finding on this issue, we need not address the other alleged instruction error or Johnson's claim that his counsel provided ineffective assistance.

¶ 38 CONCLUSION

¶ 39 The trial court erred by giving the jury written instructions that differed significantly from the oral instructions without explaining the difference. In view of the weak evidence against Johnson, we find the error prejudicial. We find the evidence sufficient to permit retrial without violating double jeopardy principles.

¶ 40 We reversed Johnson's conviction for armed habitual criminal because he committed one of the predicate offenses when he was 15 years old. As relief on this issue, Johnson has requested that we reduce his conviction to unlawful use of a weapon by a felon and remand for resentencing. However, because we also reverse Johnson's conviction based on the trial court's error in instructing the jury, we remand for a new trial.

¶ 41 Reversed and remanded.

Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2022 IL App (1st) 201034-U, 2022 WL 3718040

Footnotes

1 The Robina Institute of Criminal Law and Criminal Justice is a nonpartisan research institute at the University of Minnesota Law School.

No. 130173

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DESHAWN WALLACE, Defendant-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-20-0917. There on appeal from the Circuit Court of Cook County, Illinois , No. 19 CR 7197. Honorable Ursula Walowski, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, Attorney General's Office, 115 S. LaSalle Street, Chicago, IL 60603, eserve.criminalappeals@ilag.gov;

Mr. Deshawn Wallace, 5101 West Washington, Chicago, IL 60644

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 4, 2025, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Jacob J. Vicik
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