FOURTH DIVISION
December 27, 2012

No. 1-10-3161

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 08 CR 11052
	)	
JAMES ALLEN,	)	Honorable
	)	Michael J. Howlett, Jr.,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The "25 years to natural life" firearm enhancement statutes are not unconstitutionally vague on their face. The trial court did not abuse its discretion in sentencing defendant to natural life in prison for one count of first degree murder. Defendant's conviction for attempted first degree murder predicated on personal discharge of a firearm that caused great bodily harm is affirmed. Defendant's mittimus is corrected in accordance with the "one act, one crime" rule.

¶ 2 Following a bench trial, defendant James Allen was found guilty of seven counts of first degree murder, attempted first degree murder and aggravated battery with a firearm. Defendant appeals, arguing that: (1) the attempted murder convictions relating to one of the victims should

be reversed where the State failed to show that the victim suffered either permanent disfigurement or great bodily harm; (2) the "25 years to natural life" firearm enhancement statutes are unconstitutionally vague both on their face and as applied to defendant; (3) alternatively, the sentence of natural life in prison for one count of first degree murder was excessive in light of the nature of the crime and defendant's criminal history; and (4) defendant's mittimus violates the "one act, one crime" rule and therefore should be corrected. We order the mittimus corrected as described further herein; we otherwise affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested and charged by indictment with first degree murder, attempted first degree murder, and aggravated battery with a firearm in connection with shootings that resulted in the death of Jermaine Price and wounds to Kenard Williams. A third intended victim, Kenyall Holloway, was not struck.

¶ 5 The witnesses at the bench trial included Holloway and Williams. According to Holloway,[1] on May 6, 2008 at approximately 3:30 p.m. Jermaine Price and another man drove to the Tenorio Tire shop at 2548 West 63rd Street in Chicago to have a tire repaired. Holloway followed them in a separate car in case the tire became flat before they reached the shop. While Holloway waited behind the shop, defendant arrived in a minivan driven by a woman. Holloway knew defendant for approximately three or four years. Defendant exited the minivan's passenger seat holding a silver revolver and entered the tire shop. Holloway asked defendant if he was

[1] Holloway claimed at trial that he could not remember much of what happened on May 6, 2008; his handwritten statement from May 7, 2008 and a transcript of his subsequent grand jury testimony were admitted as substantive evidence under 725 ILCS 5/115-10.1 (West 2010).

"fitting to try to shoot me." On his way into the shop, defendant asked "is my motherfucking car ready?" When defendant came out of the tire shop, he told Holloway, "I don't want to see you around here no more." Defendant started to raise his gun, and Holloway ran. Defendant chased Holloway.

¶ 6 Holloway ran into the tire shop past Price. Price began to run behind Holloway as defendant, still holding the revolver, pursued the two men. As defendant chased and shot at them, Price and Holloway ran out of the front of the tire shop across 63rd Street into a vacant lot. Holloway ran to Rockwell Street and hid under a porch until he heard police sirens. When Holloway came from under the porch to talk to the police, he saw Price's body in the vacant lot.

¶ 7 At trial, Kenard Williams testified that on May 6, 2008, he was talking with a friend in the alley near 63rd Street and Rockwell, behind a vacant lot. As they talked, Williams saw three men running toward him, and the third man was shooting a gun. As Williams turned to his right and crouched on the ground, he was shot twice, in his arm and in his back. Williams was taken to the hospital by ambulance and treated, including an x-ray, cleaning and bandaging. Williams testified that he was grazed, although with the passage of two years, scars were no longer present. However, at the time of trial he still felt a sharp pain in his left arm "at times."

¶ 8 Other witnesses at trial included Porfiro Acevedo, who was driving in the area at the time of the shooting. Acevedo identified defendant in a lineup the day after the shootings. The manager of the tire shop, Rosa Neely Barajas, also testified that she knew defendant as a regular customer and had interacted with defendant shortly before the shootings. Doctor Adrianne Segovia, an assistant medical examiner employed by the Cook County Medical Examiner,

testified that to a reasonable degree of scientific certainty, Price died as a result of gunshot wounds to his head, shoulder and armpit.

¶ 9 After the bench trial, defendant was found guilty on all counts. During defendant's sentencing hearing, the trial judge mentioned that he "received the pre-sentence investigation report by the Probation Department that takes us through information regarding Mr. Allen's background." The report addressed defendant's criminal record, health history, gang affiliation, employment status, family history and other information about him. The judge asked the attorneys if they wished to expand upon the report. The Assistant State's Attorney clarified a question regarding the number of other pending criminal cases for this defendant. Defendant's attorney declined to expand on or correct the presentence report. The court then heard from the attorneys in aggravation and mitigation. The Assistant State's Attorney discussed the nature of the offenses, various sentencing issues, and defendant's criminal history. Defendant's attorney urged the court to order the sentences on the attempted murder convictions to run concurrently and argued that there was no medical evidence in the form of hospital records or expert testimony as to the nature of Williams' injury. Defense counsel requested that the court impose the minimum sentence and asked the court to "take into consideration" defendant's age, 34 years old.

¶ 10 Noting that it had "no basis" to find that Williams suffered "severe bodily injury"—which would require the sentences for the attempted murder convictions to run consecutively to each other under applicable law—the court ordered that the attempted murder and aggravated battery counts all be served concurrently with each other and consecutive to the first degree murder sentence. On the first degree murder counts pertaining to Price, the trial court sentenced

defendant to natural life in prison. The court sentenced defendant to 60 years on the attempted murder counts pertaining to Williams, and to 30 years on the aggravated battery count. The court sentenced defendant to 40 years on the attempted murder counts pertaining to Holloway. On October 6, 2010, the trial court considered defendant's motion for modification, reduction of sentence, or both, provided additional details regarding the calculation of defendant's sentences, and denied the motion. Defendant timely filed this appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant challenges his conviction and his sentence with respect to all of the counts except one. We will address defendant's arguments with respect to each victim.

¶ 13 *Victim One: Jermaine Price*

¶ 14 The State prosecuted two first degree murder counts relating to the fatal shooting of Price. Count 1 alleged that defendant intentionally and knowingly shot Price while armed with a firearm. Count 6 alleged, among other things, that defendant personally discharged a firearm that proximately caused Price's death. Defendant was convicted on the first degree murder counts and sentenced to natural life in prison. Defendant's mittimus lists two murder convictions: one under Count 1 and one under Count 6, reflecting a 25 years-to-life sentencing enhancement based on personal discharge of a firearm that proximately caused death.

¶ 15 Defendant raises three arguments on appeal in connection with the counts pertaining to Price. First, defendant argues that the 25 years to natural life firearm enhancement statute is unconstitutionally vague both on its face and as applied to him. Second, defendant argues that the trial court abused its discretion in sentencing defendant to natural life in prison for one count

of first degree murder. Third, defendant argues that his mittimus lists two murder convictions—for Count 1 and Count 6—in violation of the "one act, one crime" rule; defendant seeks correction of his mittimus to reflect a single first degree murder conviction.

¶ 16 1. *Constitutionality of Firearm Enhancement Statute*

¶ 17 Defendant contends that the 25 years to natural life firearm enhancement statute regarding first degree murder (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010))[2] is unconstitutionally vague both on its face and as applied because it fails to provide any "objective criteria" to guide judges in imposing sentences within the applicable range. Defendant further asserts that the "broad" sentencing range permitted by this statute is unconstitutionally vague because it "encourage[s] arbitrary and discriminatory application of sentences based entirely on the individual judge's opinions and whims, and thus violate[s] due process."

¶ 18 We agree with the State that defendant forfeited his as-applied challenge because he did not make any constitutional challenges in the trial court. See, *e.g., Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 228 (2010) (noting that "when there has been no evidentiary hearing and no findings of fact, the constitutional challenge must be facial"); *In re Parentage of John M.*, 212 Ill. 2d 253, 268 (2004) (same); *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 32 (same). For the reasons discussed below, we conclude that the statute is constitutional on its face.

¶ 19 Statutes carry a strong presumption of constitutionality; the party challenging the constitutionality of a statute bears the burden of rebutting this presumption. *See People v.*

[2]Section 5-8-1 provides, in part, "for first degree murder, *** if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court."

Sharpe, 216 Ill. 2d 481, 487 (2005); *People v. Maness*, 191 Ill. 2d 478, 493 (2000). The court has a "duty to construe a statute in a manner that upholds its validity and constitutionality if it can be reasonably done." *People v. Malchow*, 193 Ill. 2d 413, 418 (2000); *see also People v. Sanders*, 182 Ill. 2d 524, 528 (1998). A criminal statute must meet two basic criteria to avoid being stricken as vague: first, "the statute's prohibitions are sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited." *Sharpe*, 216 Ill. 2d at 527; *see also Maness*, 191 Ill. 2d at 494. Second, "the statute provides sufficiently definite standards for law enforcement officers and triers of fact that its application does not depend merely on their private conceptions." *Sharpe*, 216 Ill. 2d at 531. In other words, a criminal statute "must adequately define the criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 177 Ill. 2d 440, 449 (1997).

¶ 20 Defendant argues that trial courts should not be allowed to impose a sentence as serious as natural life "without, at a minimum, explicit guidance regarding what factors should be taken to determine that such a sentence is merited." Defendant contends that the firearm enhancement statute at issue in his case "do[es] not offer any guidance as to what those factors should be or how much weight they should be given."

¶ 21 We agree with the State that 730 ILCS 5/5-8-1 provides "sufficient standards for trial courts to administer the law." Statutes establish the permissible range of sentences for a particular offense. *People v. Fern*, 189 Ill. 2d 48, 55 (2000). "Within that statutory range, the trial court is charged with fashioning a sentence based upon the particular circumstances of the

individual case, including the nature of the offense and the character of the defendant." *Id.* As noted by the State, the factors in aggravation and mitigation are detailed by statute. *See* 730 ILCS 5/5-8-1(a)(1); 5-5-3.1, 3.2 (West 2010). The fact that the legislature has empowered courts to exercise discretion within a statutorily prescribed range does not make the firearm enhancement statutes unconstitutionally vague. *See, e.g.*, *People v. Hickman*, 163 Ill. 2d 250, 258 (1994) ("Trial courts commonly determine sentences within statutorily defined ranges in the sound exercise of their discretion").

¶ 22 Defendant contends that "[n]one of the factors that would typically increase a sentence near or to the point of natural life —for example, where the decedent is a child, peace officer, or emergency medical technician; where the defendant has a prior murder conviction; or where the murder is accompanied by 'exceptionally brutal or heinous behavior indicative of wanton cruelty'—are present in his case." To pass muster under the due process clause, a penalty must be "reasonably designed to remedy the particular evil that the legislature was targeting." *Sharpe*, 216 Ill. 2d at 518. In enacting the firearm enhancement statutes, the legislature recognized another factor—use of a firearm in the commission of a felony —that could potentially increase a sentence near or to the point of natural life. The Illinois Supreme Court examined various challenges to the constitutionality of firearm enhancement statutes in *People v. Sharpe*, 216 Ill. 2d 481 (2005). As the supreme court noted, the legislature "clearly spelled out its intent in enacting firearm enhancements in a codified statement of legislative intent." *Id.* at 523; *see* 720 ILCS 5/33A-1(a) (West 2010), (b). The codified statement provides, in part:

> "[T]he use of a firearm greatly facilitates the commission of a criminal offense because of the more lethal nature of a firearm and the greater perceived threat produced in those confronted by a person wielding a firearm. Unlike other dangerous weapons such as knives and clubs, the use of a firearm in the commission of a criminal felony offense significantly escalates the threat and the potential for bodily harm, and the greater range of the firearm increases the potential for harm to more persons. Not only are the victims and bystanders at greater risk when a firearm is used, but also the law enforcement officers whose duty is to confront and apprehend the armed suspect."

720 ILCS 5/33A-1(a)(2) (West 2010). The legislature stated that its intent is to impose particularly severe penalties in order to deter the use of firearms in the commission of felonies. *Id.* As the *Sharpe* court concluded, "the 15/20/25-to-life enhancements are reasonably designed to remedy the particular evil the legislature was targeting." *Id.* In the instant case, the trial court noted that the facts "set forth all of the evils that people try to avoid by passing laws against guns and passing laws against bodily harm from one human being to another." We agree, and we reject defendant's vagueness challenge to the firearm enhancement statute.

¶ 23 2. *Excessive Sentence*

¶ 24 Defendant argues that the trial court abused its discretion in sentencing defendant to natural life in prison for one count of first degree murder. Defendant contends that "the trial court gave no indication that it considered the goals of rehabilitating defendant or restoring him

to productive citizenship." Defendant further asserts that the trial court gave "little indication that it considered any relevant factors in mitigation," such as defendant's employment for approximately two years as a clothing salesman prior to these offenses. Arguing that a "45-year sentence would in no way deprecate the seriousness of the offense [defendant] committed," defendant urges this court to exercise its authority pursuant to Illinois Supreme Court Rule 615(b)(4) to reduce the sentence imposed by the trial court.

¶ 25 We agree with the State that the trial court acted within its discretion in sentencing defendant to natural life. "A sentence within the statutory limits for the offense will not be disturbed unless the trial court has abused its discretion." *People v. Flores*, 404 Ill. App. 3d 155, 157 (2010). A trial court is in a superior position to consider such factors as a defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010).

¶ 26 The sentencing judge is charged with "the difficult task of fashioning a sentence which would strike the appropriate balance between protection of society and rehabilitation of the offender. [Citations.] Yet, the objective of restoring the offender to useful citizenship is to be accorded no greater consideration than that which establishes the seriousness of the offense. [Citations.]" *People v. Smith*, 258 Ill. App. 3d 1003, 1028 (1994). A "trial court's examination of a presentence investigation report which recites several mitigating factors is 'in itself, a basis for finding that defendant's [rehabilitative potential] was considered. [Citations.]" *People v. Parker*, 192 Ill. App. 3d 779, 789 (1990).

¶ 27 During defendant's sentencing hearing, the trial judge said that he received the

presentence investigation report. The court offered the attorneys an opportunity to expand upon the report and also heard from the attorneys regarding aggravation and mitigation. Where mitigation evidence is before the court, it is presumed that a sentencing court considered the evidence. See *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011); *People v. Cotton*, 393 Ill. App. 3d 237, 267 (2009). A trial court is not required to specifically refer to the mitigating evidence when imposing the sentence. In other words, the trial court was not required to "detail for the record the process by which [it] concluded that the penalty [it] imposed was appropriate. [Citations.]" *People v. Ramos*, 353 Ill. App. 3d 133, 138 (2004).

¶ 28 A sentence within statutory limits will be deemed excessive and the result of an abuse of discretion "where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). We believe that the sentence of natural life in prison for the first degree murder of Price is neither at variance with the "spirit or purpose" of the law, nor "manifestly disproportionate to the nature of the offense." The trial judge explicitly noted the seemingly unprovoked and senseless nature of the murder, finding that defendant "simply saw someone and you decided that person's life had to be extinguished." A reviewing court may not substitute its judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 212-13; *Stacey*, 193 Ill. 2d at 209; *People v. Streit*, 142 Ill. 2d 13, 19 (1991). The trial court did not abuse its discretion in sentencing defendant to natural life in prison for one count of first degree murder, and that sentence is affirmed.

¶ 29 3. *Corrections to the mittimus*

¶ 30 Defendant argues that his mittimus should be corrected to reflect the proper number of

convictions based on the acts actually charged. The one-act, one-crime rule prohibits multiple convictions when the convictions stem from the same physical act or one of the offenses is a lesser-included offense of the other. *See People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 31 With respect to Price, the court found defendant guilty of two counts of first degree murder of the same victim. The State agrees with defendant that this court should correct the mittimus to reflect a single conviction for one count of first degree murder. Because a single death can support only one murder conviction, we hereby direct the clerk to amend the mittimus to reflect one conviction for first degree murder under Count 6, the more serious conviction; the sentence for Count 6 shall remain natural life. The clerk is directed to vacate Count 1.

¶ 32 *Victim Two: Kenard Williams*

¶ 33 The trial court convicted defendant of two counts of attempted murder and one count of aggravated battery relating to the shooting of Williams. Counts 11 and 12 of the indictment alleged that defendant "without lawful justification, with intent to kill, did an act, to wit: James Allen shot Kenyard Williams while armed with a firearm, which constituted a substantial step towards the commission of first degree murder, and during the commission of the offense he personally discharged a firearm." The sole difference between the two counts is that Count 11 alleged that defendant caused "great bodily harm" to Williams, while Count 12 alleged that defendant caused "permanent disfigurement" to Williams. Count 13 of the indictment charged defendant with aggravated battery with a firearm. The court sentenced defendant to 60 years on the attempted murder counts and to 30 years on the aggravated battery count.

¶ 34 Defendant raises three arguments on appeal in connection with the counts pertaining to

Williams. First, defendant argues that the 25 years to natural life firearm enhancement statute is unconstitutionally vague both on its face and as applied to him. Second, defendant argues that this court should reverse his convictions for the attempted murder of Williams because the State failed to prove Williams suffered great bodily harm or permanent disfigurement. Third, defendant argues that his mittimus lists three convictions and sentences with respect to the shooting of Williams, on Counts 11, 12 and 13, in violation of the "one act, one crime" rule; defendant seeks correction of his mittimus.

¶ 35 1. *Constitutionality of Firearm Enhancement Statute*

¶ 36 Defendant argues that the 25 years to natural life firearm enhancement statute regarding attempted first degree murder (720 ILCS 5/8-4(c)(1)(D) (West 2010)) is unconstitutionally vague because the "broad" sentencing range fails to provide "objective criteria" to guide judges in imposing sentences and "encourage[s] arbitrary and discriminatory application of sentences" based on the individual judge's "opinions and whims." For the reasons stated above in connection with the firearm sentencing enhancement for first degree murder (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)), we do not believe the statute is unconstitutionally vague on its face, and we believe the "as-applied" challenge has been forfeited. Recognizing our "duty to construe a statute in a manner that upholds its validity and constitutionality if it can be reasonably done," *People v. Malchow*, 193 Ill. 2d 413 418 (2000), we agree with the State that the statute provides "sufficient standards for trial courts to administer the law." As noted by the Illinois Supreme Court in *Sharpe,* 216 Ill. 2d at 523, "the 15/20/25-to-life enhancements are reasonably designed to remedy the particular evil the legislature was targeting," namely, gun violence. We agree, and

we reject the defendant's vagueness challenge to this firearm enhancement.

¶ 37 2. *Permanent Disfigurement or Great Bodily Harm*

¶ 38 Defendant argues that this court should reverse his convictions for the attempted murder of Williams because the State failed to prove Williams suffered great bodily harm or permanent disfigurement. Section 8-4 of the Criminal Code of 1961 provides, in part: "[T]he sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that *** an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1)(D) (West 2010). The sentencing range for a Class X felony before applying the firearm sentencing enhancement is 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2010). The court sentenced defendant to 60 years, stating:

> "Mr. Williams *** was essentially a definition of an innocent bystander who only by luck of the physics at they applied that day survived the day. He was injured. He was injured by the use of a firearm ***, and it was personally discharged by this Defendant Mr. Allen. And the statute talks in terms of bodily harm, great bodily harm. And that clearly happened. I have found that it was not severe bodily injury. Therefore, Mr. Allen, on the counts related to the attempted murder against Mr. Williams, I hereby sentence you to 60 years in the Illinois Department of Corrections."

At the hearing on defendant's modification motion, the trial court provided the following clarification: "The sentence regarding the attempted murder on Williams, the defendant is sentenced to 30 years on the specific act of the attempted murder, which is enhanced for the firing as well as great bodily harm. And that sentence is increased by another 30 years. So it is 30 plus 30, a 60 year sentence."

¶ 39 On the mittimus, Count 11 ("great bodily harm") and Count 12 ("permanent disfigurement") are each listed with a sentence of 60 years. The mittimus further provides that "the sentence imposed on Counts #8, #10, #11, #12, #13 to run concurrent with each other; and also to run consecutive to the sentence imposed on Counts #1 and #6 (natural life)."

¶ 40 Defendant argues that because the State failed to prove Williams suffered great bodily harm or permanent disfigurement, this court should reverse his convictions for the attempted murder of Williams or, in the alternative, vacate the sentencing enhancement and remand for resentencing with a non-enhanced Class X sentencing range of 6 to 30 years. Defendant concedes that the standard of review ordinarily would be whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of the offense were proven beyond a reasonable doubt. However, defendant contends that "where (as here) the facts are not in dispute, this Court reviews *de novo* the question of whether the defendant's conduct satisfied the statutory elements of the crime charged."

¶ 41 We agree with the State regarding the applicable standard of review and conclude that "[v]iewing the evidence in the light most favorable to the People, a rational trier of fact could have found defendant guilty of attempt first degree murder that proximately caused great bodily

harm to Williams beyond a reasonable doubt." *See, e.g.*, *People v. Lopez-Bonilla*, 2011 IL App (2d) ¶14 ("[A]s long as the evidence was sufficient to support a finding of great bodily harm, the trial court's determination will be affirmed."); *People v. Matthews*, 126 Ill. App. 3d 710, 715 (1984) ("[I]t is apparent that in the instant case there was sufficient evidence from which the jury could conclude that [the victim] suffered great bodily harm."); *People v. Olmos*, 67 Ill. App. 3d 281, 290 (1978) ("Based on this evidence, the jury's finding of great bodily harm is not so improbable or unjustified to warrant reversal."). The question of whether defendant inflicted great bodily harm or permanent disfigurement is a question of fact.[3] *See, e.g.*, *People v. Doran*, 256 Ill. App. 3d 131, 136 (1993); *Matthews*, 126 Ill. App. 3d at 715 (noting the "well-settled rule that what constitutes great bodily harm is a question of fact").

¶ 42 During the trial, the State's attorney questioned Williams about his injuries:

"MS. GALASSINI: Let's talk about the injuries. You said two gunshot wounds, correct?

A: Yes.

Q: And one went into your right arm?

A: Yes, ma'am.

Q: And one grazed your back or your shoulder area?

A: One grazed my arm and my back.

Q: Do you still have scarring from those bullet wounds?

A: Can I speak freely?

THE COURT: Sure.

A: I took my shirt off and they're not there. It's been two years.

MS. GALASSINI: Q: Are they healing a little bit?

[3] Even assuming *arguendo* that we agreed with defendant and adopted a *de novo* standard of review, we would nonetheless conclude that "great bodily harm" was present in the instant case.

A: Yes because they were grazed, not thoroughly through.

Q: Did you have medical attention because of those bullet wounds?

A: Yes.

Q: Did you immediately have an ambulance on the scene take you to the hospital?

A: Yes, ma'am.

Q: What treatment did you receive at the hospital?

A: X-ray, cleansing and bandage.

Q: Any bullets removed?

A: No, ma'am.

Q: Do you still have any problems with your arm because of those injuries?

A: Yes, ma'am.

Q: Tell us about those.

A: There's still a pain in my arm, sharp pain in my left arm at times. It just pains.

Q: Is that where you were shot?

A: Yes, ma'am.

Q: Point to your body where you were shot. ***

A: May I? That arm (Indicating.)

MS. GALASSINI: And for the record it's the bicep area and he's indicating with a highlighter in a straight manner. ***

MS. GALASSINI: And the other one?

A: (Indicating.)

Q: And so it scraped your back.

MS. GALASSINI: May he [sic] record reflect that he has the highlighter parallel against his back like a graze wound.

THE COURT: Yes, it may so reflect.

MS. GALASSINI: Q: After you went to the hospital you were released, correct?

A: Yes, ma'am.

¶ 43 The Illinois Supreme Court has defined "bodily harm" as "some sort of physical pain or damage to the body, like lacerations, bruises, or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). Although the term "great bodily harm" is "not susceptible of precise legal definition," this court has noted that it "requires a more serious or grave injury than 'bodily harm.' " *Doran*, 256 Ill. App. 3d at 136. The question of whether the victim's injuries rise to the level of great bodily harm is neither dependent on the hospitalization of the victim nor the permanency of his disability or disfigurement. *People v. Lopez-Bonilla*, 2011 IL App (2d) 100688, ¶ 13. Instead, the relevant question for the trier of fact to answer is "what injuries the victim in fact received." *People v. Edwards*, 304 Ill. App. 3d 250, 254 (1999).

¶ 44 In the cases cited by defendant where the court found insufficient evidence of great bodily harm, there were substantial questions regarding the extent of the victim's injury. For example, in *People v. Watkins*, 243 Ill. App. 3d 271 (1993), the victim was grazed by bullet on his left side, causing holes in his clothing. *Id.* at 278. Because there was "no evidence that the bullet affected [the victim] in any manner other than grazing his side," the court vacated the aggravated battery conviction based on great bodily harm. *Id.* In *In re T.G.*, 285 Ill. App. 3d 838 (1996), the victim received three stab wounds in the chest, but only felt the first one. *Id.* at 846. Finding "no other evidence of the extent or nature of his injuries," the court concluded that great bodily harm was not proven. *Id.* In *People v. Figures*, the bullet pierced the victim's shoe but did not penetrate his skin; although he was treated at the hospital, his injury required "very little attention." 216 Ill. App. 3d 398, 402 (1991). We held that such injury rose to the level of "bodily harm" but not great bodily harm. *Id.* In *In re J.A.*, 336 Ill. App. 3d 814 (2003), the

victim who was stabbed once in the shoulder explained that the stabbing felt like "somebody pinch you." *Id.* at 815. At the hospital, the victim refused to have his wound stitched and was given pain pills. This court modified the defendant's adjudication of delinquency from aggravated battery to battery, concluding that there was insufficient evidence that the victim suffered great bodily harm.

¶ 45 Unlike the victims in the cases cited above, Williams continued to suffer ongoing "problems" and "pain" as a result of his injuries, at least as of the time of trial. Williams was shot twice, transported to the hospital by ambulance, and was treated. At the trial – two years after the shooting – Williams testified, "There's still a pain in my arm, sharp pain in my left arm at times. It just pains." Courts have found great bodily harm even in cases in which the victim did not suffer ongoing issues. *See, e.g.*, *Edwards*, 304 Ill. App. 3d at 254-55 (holding trial court did not err in finding great bodily harm to gunshot victim hit by bullet that went through her shin, leaving a scar but no difficulty walking after one week following the shooting); *People v. Ayala*, 208 Ill. App. 3d 586, 598 (1990) (declining to reverse jury verdict finding great bodily harm where the bullet passed through gunshot victim's leg and victim spent only thirty minutes in the hospital after the shooting). In sum, we believe that the State provided sufficient evidence for a rational trier of fact to conclude that defendant caused Williams great bodily harm.

¶ 46 Defendant correctly notes that the trial court expressly found that Williams did not suffer "severe bodily injury" but did suffer "great bodily harm" as a result of the gunshot wounds. A finding of severe bodily injury would have necessitated the sentences for the attempted murder convictions to run consecutively, not concurrently. *See* 730 ILCS 5/5-8-4(d)(1) (West 2010).

We decline to adopt the view urged by defendant and set forth by the Fourth District in *People v. Witherspoon*, 379 Ill. App. 3d 298, 308 (2008), that the difference between "great bodily harm" and "severe bodily injury" is "merely semantic; no meaningful distinction can be made between 'great' and 'severe' or between 'harm' and 'injury.'" Rather, we agree with the First District in *People v. Williams*, 335 Ill. App. 3d 596, 600-01 (2002): "Where the legislature uses certain words in one instance and different words in another, different results were intended. Because 'great bodily harm' defines an offense, while 'severe bodily injury' mandates consecutive sentencing, we conclude 'severe bodily injury' requires a degree of harm to the victim that is something more than that required to create the aggravated battery offense." *See also People v. Russell*, 143 Ill. App. 3d 296, 304 (1986) ("[W]e believe there can be a difference between the degree of great bodily harm which a jury may, as the trier of fact, find sufficient to find a defendant guilty of aggravated battery, and the degree of severe bodily injury which the court may find, in the exercise of its judicial discretion to be one of the factors which warrants a consecutive sentence"). We believe there is a meaningful distinction between "severe bodily injury" and "great bodily harm" and therefore conclude that the trial court's express finding that Williams did not suffer severe bodily injury does not mandate reversal of defendant's conviction. We affirm defendant's conviction and sentence under Count 11 of the indictment.

¶ 47 Defendant also maintains that his conviction for attempted murder should be reversed because the State failed to prove that Williams suffered "permanent disfigurement" as a result of the shooting, an element of Count 12 of the indictment. The Supreme Court of Illinois has defined disfigurement as "that which impairs or injures the beauty, symmetry, or appearance of a

person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner." *Superior Mining Co. v. Industrial Commission*, 309 Ill. 339, 340 (1923); *see also People v. Woods*, 173 Ill. App. 3d 244, 249 (1988). Williams testified that after two years, the scars where he was shot were no longer visible. The State concedes that Williams did not suffer permanent disfigurement as a result of the shooting. We agree.

¶ 48 However, because there was sufficient evidence to support the conviction for "great bodily harm," the 25 years to natural life enhancement would still be imposed under Criminal Code section 8-4. Furthermore, we agree with the State that defendant was not harmed because even if there was any variation between the crimes charged and the crimes proved, which we do not believe there was, defendant was not misled in his defense. *See, e.g.*, *People v. Jordan*, 102 Ill. App. 3d 1136, 1140 (1982). We note that the trial court referred to "great bodily harm" but never referenced "permanent disfigurement" during the sentencing hearing or the subsequent hearing on the modification motion. Although the court did not make any express findings regarding permanent disfigurement—instead seemingly merging the "counts" together in a single sentence—the mittimus separately lists Count 11 (alleging great bodily harm) and Count 12 (alleging permanent disfigurement) with a 60 year sentence on each. As discussed below, we are correcting the mittimus to address this issue and other sentencing matters.

¶ 49 3. *Corrections to the mittimus*

¶ 50 Counts 11 and 12 of the indictment charged defendant with attempted first degree murder relating to the shooting of Williams. The sole difference between the two counts is that Count 11 alleged that defendant caused "great bodily harm" to Williams, while Count 12 alleged that

defendant caused "permanent disfigurement" to Williams. Count 13 of the indictment charged defendant with aggravated battery with a firearm.

¶ 51 We have affirmed defendant's conviction and sentence under Count 11 of the indictment. With respect to Count 12, as discussed herein, we agree with defendant and the State that there was no "permanent disfigurement." The clerk of the circuit court is directed to vacate Count 12. Also, given that all three counts stem from the same physical act of shooting Williams, and aggravated battery with a firearm is a less culpable offense than attempted murder, the clerk is directed to vacate Count 13. In sum, we direct the clerk to amend the mittimus to reflect one conviction for attempted murder of Williams under Count 11; the sentence for Count 11 shall remain 60 years. The clerk is directed to vacate Counts 12 and 13.

¶ 52 *Victim Three: Kenyall Holloway*

¶ 53 The trial court convicted defendant of two counts of attempted murder relating to Holloway. Under Counts 8 and 10 of the indictment, the State charged that defendant committed attempted murder in that he without lawful justification, with intent to kill, shot at Kenyall Halloway while armed with a firearm, which constituted a substantial step towards the commission of first degree murder. Count 10 also included the allegation that defendant personally discharged a firearm when shooting at Holloway. The court sentenced defendant to 40 years on the attempted murder counts pertaining to Holloway.

¶ 54 Defendant argues on appeal that his mittimus lists two convictions and sentences with respect to the shooting at Holloway, on Counts 8 and 10, in violation of the "one act, one crime" rule. The State agrees with defendant that a single attempted murder conviction should stand

with respect to Holloway. We direct the clerk of the circuit court to amend the mittimus to reflect one conviction for attempted murder of Holloway under Count 10, the more serious count; the sentence for Count 10 shall remain 40 years. The clerk is directed to vacate Count 8.

¶ 55 *Concurrent versus consecutive sentencing*

¶ 56 As discussed herein, the trial court found that Williams did not suffer "severe bodily injury" as a result of the shooting. Pursuant to 730 ILCS 5/5-8-4(d)(1) (West 2010), a finding of severe bodily injury would have required the sentences for the attempted murder conviction to run consecutively, not concurrently.

¶ 57 In the interest of clarity, we hereby direct the clerk to indicate on the mittimus that the sentences for Counts 10 and 11 run concurrent with each other and consecutive to the sentence for Count 6.

¶ 58 CONCLUSION

¶ 59 We reject defendant's contention that the "25 years to natural life" firearm enhancement statutes are unconstitutionally vague. We also reject defendant's alternative argument that his sentence of natural life in prison for first degree murder relating to the fatal shooting of Price is excessive. Although we agree with defendant that the State failed to prove Williams suffered "permanent disfigurement," we affirm defendant's conviction and sentence for the attempted murder of Williams predicated on personal discharge of a firearm that caused great bodily harm. Finally, we direct the clerk of the circuit court to correct defendant's mittimus as provided herein.

¶ 60 Affirmed; mittimus corrected.