SIXTH DIVISION
September 16, 2016

No. 1-14-1606

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. 12 CR 1312
	)	
FAISON JACKSON,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's convictions and sentences for two counts of armed robbery where the trial court's erroneous admission of other-crimes evidence was harmless, the State proved him guilty beyond a reasonable doubt, and the trial court committed no abuse of discretion during sentencing. Pursuant to the agreement of the parties, we vacated two of defendant's fees and offset two other fees with the $5-per-day presentence incarceration credit.

¶ 2 A jury convicted defendant, Faison Jackson, of two counts of armed robbery while armed with a firearm and the trial court sentenced him to two concurrent terms of 35 years' imprisonment and assessed various fees. On appeal, defendant contends: (1) the trial court erred in admitting other-crimes evidence; (2) his conviction should be reduced to robbery because the State failed to prove that the weapon used was a firearm; (3) the trial court erred in sentencing him, where it improperly considered a void prior conviction in aggravation and failed to give

sufficient consideration to his youth and rehabilitative potential; and (4) he was improperly assessed several fees. We affirm defendant's convictions and 35-year concurrent sentences; we vacate two of his fees and offset two of his other fees by the $5-per-day presentence incarceration credit.

¶ 3 The State charged defendant with the November 21, 2011, armed robbery of Majdi Harb and Steven Jones while armed with a firearm. Prior to trial, the State filed a motion *in limine* requesting that it be allowed to introduce evidence that on December 4, 2011, the police arrested defendant near the November 21, 2011, armed robbery scene after they responded to the area of 7200 S. Western Avenue upon hearing shots fired and saw defendant throw a gun under a car. Defendant was charged with unlawful use of a weapon by a felon for the December 4, 2011, arrest.

¶ 4 In its *in limine* motion, the State alleged that it recovered the gun used by defendant on December 4, 2011, and that both Mr. Harb and Mr. Jones identified a photograph of the gun as "matching the weapon used on November 21, 2011, in the armed robbery." The State further alleged that the gun has "distinctive markings *** that make it readily identifiable to the victims." The State sought the admission of evidence of defendant's December 4, 2011, offense (and specifically of the gun used therein) to establish his *modus operandi*, intent, absence of mistake, accident, or innocent frame of mind on November 21, 2011.

¶ 5 At the hearing on the motion, defendant argued against the admission of evidence of his December 4, 2011, offense, noting that the gun recovered on that date was a .22 caliber pistol which was "very common" and, as such, did not establish defendant's *modus operandi*, intent, absence of mistake, accident, or innocent frame of mind on November 21, 2011. The State responded that the gun has "distinctively rusted out areas" making it readily identifiable to the

victims as the gun used during the November 21, 2011, armed robbery and, thus, that evidence of defendant's use of the gun on December 4, 2011, was relevant and admissible for the purposes set forth in the motion *in limine*. The trial court granted the *in limine* motion and admitted the evidence of the December 4, 2011, offense to show defendant's identity during the armed robbery on November 21, 2011.

¶ 6 At trial, Mr. Harb testified he is the owner of a grocery store at 2422 West Marquette Road in Chicago. Mr. Harb has known defendant for about 12 years, since he was a young boy. Defendant would come into the grocery store three or four times a week.

¶ 7 At about 7:30 p.m. on November 21, 2011, Mr. Harb was in the front of the grocery store, behind the counter "running the cash register." An employee, Steven Jones, was on the other side of the counter. Defendant came into the store wearing a baseball hat, a bandana covering the lower part of his face up to the bridge of his nose, a black sweatshirt with a hood, and blue jeans. Mr. Harb testified that even with the baseball hat, bandana and hood, defendant was showing enough of his face as to be immediately recognizable. Mr. Harb explained that he had known defendant "for a long time," that defendant "could be out of a thousand people, [and Mr. Harb would] still know that guy" and that Mr. Harb "could tell who he is." Mr. Harb also recognized defendant's voice when he began talking.

¶ 8 Two other offenders, one of whom Mr. Harb identified as Brandon Green, entered the store with defendant. Each of them was wearing a hoodie, baseball cap, and bandana covering the lower portion of the face. Defendant was holding a gun in his right hand. Mr. Green and the other offender held guns too. Mr. Harb had seen guns before and he described the gun defendant was holding as a small, black "rotary" gun "that has [a] circle around it." Mr. Harb was unable to see the handle of the gun because it was covered by defendant's hand.

¶ 9 Defendant walked behind the counter, pointed the gun at Mr. Harb's face, and knocked the phone Mr. Harb had in his hand to the ground. Defendant told Mr. Harb to get down, and he pushed Mr. Harb face-down to the floor. Defendant put his foot on Mr. Harb's back and tried to open up the cash register, but was unable to do so. Defendant pulled Mr. Harb up, put the gun near but "not touching" the back of Mr. Harb's head, and told him to open the register, which he did. Mr. Harb put the money from the cash register, about $100, in a bag, which defendant then took out of his hand. Defendant patted down Mr. Harb's pants and told him to get on the ground. Defendant, Mr. Green, and the other offender left the store.

¶ 10 Mr. Harb called the police, and when they came he told them defendant had robbed his store. On December 1, 2011, Detective Rempas came to his store and showed him some photographs. Mr. Harb identified defendant's photograph. On December 13, 2011, Mr. Harb went to the police station and picked defendant out of a lineup. On February 16, 2012, Mr. Harb returned to the police station and picked Mr. Green out of a lineup.

¶ 11 Steven Jones testified he was working at Mr. Harb's grocery store at about 7:30 p.m. on November 21, 2011, when he saw defendant, Mr. Green, and Rashee Wyrick walk past the store toward 67th Street and Artesian Avenue. The men were not wearing anything covering their faces. Mr. Jones knew Mr. Green because they had lived in the same apartment building in 2010. Mr. Jones knew defendant because he would come into the store two or three times a day.

¶ 12 About 20 or 25 minutes later, while Mr. Jones was standing in front of the counter and Mr. Harb was behind the counter near the cash register, defendant, Mr. Green and Mr. Wyrick entered the store and told everyone to get on the ground. They were each holding a "snub nose 22-caliber revolver" and wearing a hooded sweatshirt, a bandana covering the face "from the nose on down," and a hat. Defendant's sweatshirt was black. Mr. Jones testified that even with

the hooded sweatshirts, hats and bandanas, the three men exposed enough of their faces to be recognizable.

¶ 13 Mr. Jones got on the ground while defendant went behind the counter toward Mr. Harb. Mr. Jones looked up and saw Mr. Green standing near him. Mr. Green forced Mr. Jones' head to the floor, put the gun to the back of his head, and told him he would be shot if he moved again. Mr. Green went through his pockets and took $40 and his phone. After about 10 or 15 minutes, defendant, Mr. Green, and Mr. Wyrick all left the store together.

¶ 14 On December 1, 2011, Detective Rempas came to the grocery store and showed Mr. Jones some photographs. Mr. Jones identified defendant's photograph. On December 13, 2011, Mr. Jones went to the police station and identified defendant in a police lineup. Mr. Jones also picked Mr. Green's photograph out of a photo spread on January 10, 2012, and picked Mr. Green out of a lineup on February 16, 2012.

¶ 15 The State called Office William Wagner to testify about the other-crimes evidence. The trial court instructed the jury that Officer Wagner's testimony may be received only for the limited purpose of establishing defendant's identity as one of the armed robbers.

¶ 16 Officer Wagner testified that at about 12:40 a.m. on December 4, 2011, he and his two partners made a traffic stop at 7240 South Claremont Avenue. While conducting the stop, they heard gunshots about one-half block north. Officer Wagner and his partners went to the area where the shots were fired and saw several men, including defendant, running from the area. The officers chased the men, and Officer Wagner saw defendant, wearing a grey hoodie, throw a revolver under a car. Officer Wagner chased defendant, but lost him.

¶ 17 Office Wagner returned to the car and waited to see if defendant would come back for the gun. About 10 minutes later, defendant returned to the car, crouched down, and looked under the

car. The officers announced their presence and defendant ran away. Defendant was arrested following a chase. An officer recovered defendant's gun from under the car. The gun (People's exhibit number 11) was a black, 22-caliber revolver, containing five live rounds.

¶ 18 On cross-examination, defense counsel asked Officer Wagner whether there was anything "special" about the 22-caliber revolver; Officer Wagner replied: "It's got red dye on it or something. That's about it." Neither the gun, nor a photograph of the gun, is contained in the record on appeal.

¶ 19 During Mr. Harb's testimony, the State showed him People's Exhibit 11, the gun recovered on December 4, 2011, and asked whether he recognized it as being the weapon used during the November 21, 2011, armed robbery. Mr. Harb expressed some uncertainty, noting that People's Exhibit 11 was small and black like the weapon used during the armed robbery, but that he never saw the handle of the gun used during the armed robbery and therefore did not know if People's Exhibit 11 was the same gun. Mr. Harb gave no testimony indicating that either People's Exhibit 11, or the gun used by defendant during the armed robbery, contained any red dye.

¶ 20 The State then questioned Mr. Harb as to whether People's exhibit number 11 was "similar" to the gun used by defendant during the armed robbery. Mr. Harb testified only: "It was black. It was black. It was a black gun."

¶ 21 During cross-examination, Mr. Harb testified in pertinent part:

> Q. "Mr. Harb, you said that the gun that was showed to you by the State's Attorney, it looked like the gun that was used at the robbery that day, correct?
>
> A. Yes, sir.
>
> Q. And that's because it was a black gun, correct?

A. The one I saw is black.

Q. Okay.

A. The handle, I can't see the handle.

Q. So all you seen was a black gun?

A. Yes.

Q. Was there anything special about this gun that you seen that made it look different than other guns?

A. I don't know too much about guns. I can't tell you-I can't give you an answer.

Q. So your answer is no?

A. I don't know too much about guns. It was a small gun, a rotary gun. It's black.

Q. So Mr. Harb, was there anything special about the gun that would help you identify it from other guns?

A. No."

¶ 22 Mr. Jones testified that the gun defendant was holding during the armed robbery was a "black steel 22-caliber revolver snub nose." When asked whether there were "any marks or anything on it," Mr. Jones testified: "I can't remember." The State never asked Mr. Jones whether he could identify People's Exhibit 11 as the gun used by defendant during the armed robbery.

¶ 23 Linell Randle testified for the defense that she is defendant's grandmother, and that on November 21, 2011, between 12 and 6 p.m., defendant was at her house helping her move furniture and set up tables for a birthday dinner for her son, Andre. The dinner started at 6 p.m. and lasted until about midnight; defendant was there the entire time. On cross-examination, Ms.

Randle testified she never told the police or the State's Attorney that defendant was at her home at the time of the armed robbery on November 21, 2011.

¶ 24 Defendant rested. Following closing arguments, the jury convicted defendant of the armed robbery of Mr. Harb and Mr. Jones.

¶ 25 At the sentencing hearing, defendant presented testimony from Ms. Randle in mitigation. Ms. Randle stated that defendant had made "mistakes" and had gotten a woman pregnant, but he had recently told his mother that he was going to stop hanging out "in the streets with his friends." In the month prior to the armed robbery, defendant spent most of his time with the woman he had impregnated. Ms. Randle asked the court to be lenient when sentencing defendant.

¶ 26 Gwendolyn Jackson, defendant's mother, testified in mitigation that defendant's father had not been a part of defendant's life since he was nine years old. Ms. Jackson testified that defendant had gotten into trouble as a juvenile and gone to boot camp, but that after completing boot camp he did a "360 turn" and stopped "hanging in the old neighborhood." She stated that defendant has a two-year-old daughter whom he has never seen, and he had recently gotten another young woman pregnant. Defendant was looking for employment at the time of the armed robbery.

¶ 27 The State argued in aggravation that the presentence investigation report (PSI) indicates defendant is demonstrating "an escalating pattern of violence." The State noted that defendant's initial crimes were residential burglaries, but that now he is "arming himself."

¶ 28 Defense counsel argued in mitigation that defendant was only 18 years old when he committed the armed robbery. He noted that defendant has not seen his father since he was nine

years old, that he has a two-year-old daughter whom he has never seen, and that his mother and grandmother have been in court for every appearance.

Defendant spoke in allocution and stated: "I would like to apologize for the victim. Say sorry to the victim." The trial court stated that it had read four letters from defendant's supporters. It also stated that it had read the PSI, and that defendant had four juvenile findings for residential burglary, and a "gun case" for which he received boot camp as an adult. The court noted: "It does seem that he has escalated from doing residential burglaries to going around with a gun to committing armed robberies of individuals who he's known for years. Either somebody from your neighborhood [sic]. You are going to stick a gun in his face [sic]."

¶ 29 The court acknowledged defendant's apology to the victims and sentenced him to 35 years' imprisonment on each armed robbery conviction (20 years for armed robbery and 15 years for using a firearm), the sentences to run concurrently.

¶ 30 Defendant appeals.

¶ 31 First, defendant contends the trial court erred by admitting other crimes evidence, specifically, the evidence that on December 4, 2011, the police arrested defendant for unlawful use of a weapon by a felon near the November 21, 2011, armed robbery scene after they responded to the area of 7200 S. Western Avenue upon hearing shots fired and saw defendant throw a gun under a car. The trial court admitted the other crimes evidence to show defendant's identity as the perpetrator of the November 21, 2011, armed robbery.

¶ 32 Evidence of crimes for which defendant is not on trial is inadmissible to show defendant's criminal propensity. *People v. Martin*, 2012 IL App (1st) 093506, ¶ 35. Propensity evidence is inadmissible because it has so much probative value that it may convince the jury to convict defendant because he is a bad person and deny defendant a fair opportunity to defend against the

charged offense. *People v. Quintero*, 394 Ill. App. 3d 716, 725 (2009). However, other crimes evidence may be admitted when relevant to prove any other material issue in a case, including identity. *Martin*, 2012 IL App (1st) 093506, ¶ 35.

¶ 33 Other crimes evidence may be admissible to show identity in one of two ways. *People v. Clark*, 2015 IL App (1st) 131678, ¶ 50. In the first way ("the common object method"), another crime may be used to prove defendant's identity by "link[ing] the defendant to the offense at issue through some evidence, typically an object, from the other offense." *Quintero*, 394 Ill. App. 3d at 727. "For example, where the defendant uses a firearm in one offense and the State has evidence that the same firearm was used in a subsequent offense, evidence of the first offense may be introduced to prove that the defendant committed the second offense." *Clark*, 2015 IL App (1st) 131678, ¶ 50 (citing *People v. Coleman*, 158 Ill. 2d 319, 335 (1994); *People v. Richardson*, 123 Ill. 2d 322, 339-40 (1988); and *Martin*, 2012 IL App (1st) 093506, ¶ 38).

¶ 34 In the present case, there was no evidence at trial indicating that People's exhibit number 11, the gun used by defendant during the December 4, 2011, weapons offense, was the same gun used by defendant during the November 21, 2011, armed robbery. Mr. Harb testified that the gun defendant used during the armed robbery was small and black with a circle around it, but he did not see the gun's handle and therefore did not know if it was the same gun as People's exhibit number 11. Mr. Jones testified the gun used in the November 21, 2011, armed robbery was a snub nosed, black .22-caliber revolver, but he was never asked at trial whether it was the same gun as People's exhibit number 11.

¶ 35 There was evidence at trial indicating that the guns were *not* the same. Officer Wagner testified that People's exhibit number 11 was a .22-caliber revolver with five live rounds, containing a red dye on it, whereas neither Mr. Harb nor Mr. Jones testified that the gun

defendant used during the armed robbery contained such a red dye. Mr. Harb testified the gun contained no special indentifying features visible to him and Mr. Jones similarly testified that he did not remember the gun having any special identifying features.

¶ 36 In the absence of any evidence linking the weapons used during each offense, the other-crimes evidence was inadmissible to prove defendant's identity under the common object method.

¶ 37 The second method the State may use to prove defendant's identity via other crimes evidence is to show that the two crimes establish defendant's *modus operandi*. *Clark*, 2015 IL App (1st) 131678, ¶ 52. "When using other-crime evidence to establish a defendant's *modus operandi*, there must be a strong and persuasive showing of similarity between the charged crime and the other-crime evidence. The offenses must share such distinctive common features as to earmark both acts as the handiwork of the same person. The degree of similarity required to introduce other-crime evidence under the *modus-operandi* [exception] is higher than for any of the other exceptions." (Internal quotation marks and citations omitted.) *Id*. ¶ 53.

¶ 38 The *modus operandi* exception does not apply here as the November 21, 2011, armed robbery and the December 4, 2011, unlawful use of a weapon by a felon do not share distinctive common features earmarking both acts as the handiwork of the same person. The evidence at trial showed that defendant committed the armed robbery at about 7:30 p.m. on November 21, 2011, after entering the grocery store with two other men, all of whom were armed. Each man was wearing a hooded sweatshirt, hat, and bandana. Defendant's sweatshirt was black. Defendant walked over to Mr. Harb, who was behind the counter, pointed the small, black 22-caliber revolver at him, and pushed him to the ground. After trying unsuccessfully to open the cash register, defendant pulled Mr. Harb up, put the gun to the back of his head, and ordered him

to open the register. After Mr. Harb opened the register and put the cash in a bag, defendant took the bag, patted down Mr. Harb's pants, and ordered him to the ground. Defendant and the other two men left the store.

¶ 39 The evidence at trial regarding defendant's unlawful use of a weapon by a felon showed that, on December 4, 2011, officers making a traffic stop at about 12:40 a.m. at 7240 South Claremont Avenue, heard the sound of gunshots about one-half block away. Arriving at the scene, the officers saw several men, including defendant, run from the area. The officers pursued the men, and Officer Wagner saw defendant, wearing a grey hoodie, throw a 22-caliber revolver under a car. Defendant returned to the car 10 minutes later, but ran away again when the officers announced their presence. The officers chased defendant and arrested him.

¶ 40 On these facts, the only similarity between the two offenses is that defendant was holding a gun during both. As discussed, there was no evidence that the guns were the same and there was some evidence they were different in that the gun used during the December 4, 2011, weapons offense had red dye on it, unlike the gun used in the November 21, 2011, armed robbery. In the absence of any peculiar or distinctive common features earmarking both crimes as the handiwork of defendant, the December 4, 2011, offense was inadmissible to prove defendant's identity under the *modus operandi* exception.

¶ 41 The State argues that *People v. Bragg*, 277 Ill. App. 3d 468 (1995), compels a different result. The defendant there was convicted of armed robbery following a jury trial, and he argued on appeal that the trial court erred by allowing the State to introduce handguns found in his codefendant's apartment. *Id.* The appellate court found no error, noting that witnesses stated that defendant committed the armed robbery with a handgun. The appellate court held that "[a]

sufficient nexus exists where the weapon is suitable for the crime charged although it need not have been actually used in committing the crime." *Id*.

¶ 42 *Bragg* is inapposite, because here the State introduced not only the weapon, but also evidence of his separate weapons offense, detailing the report of gunshots fired, the chase of the suspect, the surveillance of the car under which the gun was thrown, and defendant's arrest after he returned to the vehicle. For the reasons discussed above, the admission of such other-crimes evidence was erroneous.

¶ 43 However, the error was harmless given all the evidence of defendant's identity as one of the armed robbers. Specifically, Mr. Harb identified defendant at trial and in a photo array and in a lineup. Mr. Harb explained he had known defendant for about 12 years, and that defendant frequented his grocery store three or four times per week. Mr. Harb testified that although defendant was wearing a hoodie, baseball cap, and bandana when he walked into the grocery store and robbed him at gunpoint, enough of his face was exposed to make him immediately recognizable. Mr. Harb also recognized defendant by his voice.

¶ 44 Similarly, Mr. Jones identified defendant at trial and in a photo array and in a lineup. Mr. Jones explained that he knew defendant because he would come into the grocery store two or three times a day. Mr. Jones also knew defendant's codefendant, Mr. Green, because they used to live in the same apartment building. Mr. Jones testified he saw defendant, Mr. Green, and Mr. Wyrick walk past the store at about 7:30 p.m. on November 21, 2011. They were not wearing anything covering their faces. About 25 minutes later, they all returned to the store, brandishing guns and wearing bandanas. Like Mr. Harb, Mr. Jones was able to see enough of defendant's face to recognize him. Mr. Jones saw defendant go behind the counter toward Mr. Harb, while

Mr. Green forced Mr. Jones' head to the floor, threatened to shoot him, and robbed him of $40 and his phone.

¶ 45 Given Mr. Harb's and Mr. Jones' positive identifications of defendant, the error in admitting the other crimes evidence was harmless. See *Martin*, 2012 IL App (1st) 093506, ¶ 43 (the erroneous admission of other-crimes evidence is harmless error when defendant is neither prejudiced nor denied a fair trial based on its admission).

¶ 46 Next, defendant contends the State failed to prove him guilty of armed robbery beyond a reasonable doubt and that we should reduce his conviction from armed robbery to robbery because the State failed to present evidence that he was armed with a firearm during the offense. When presented with a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Malone*, 2012 IL App (1st) 110517, ¶ 26. "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 47 Defendant was charged with armed robbery under section 18-2(a)(2) of the Criminal Code (Code), which provides that a person commits armed robbery when he commits robbery while he carries on or about his person or is otherwise armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2012). Section 2-7.5 of the Code (720 ILCS 5/2-7.5 (West 2010)) provides that the term "firearm" has the meaning ascribed to it in section 1.1 of the Firearm Owners Identification Card Act (430 ILCS 65/1.1 (West 2010)). Section 1.1 of the Firearm Owners Identification Card Act states:

" 'Firearm' means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas; excluding, however:

(1) any pneumatic gun, spring gun, paint ball gun, or B-B gun which expels a single globular projectile not exceeding .18 inch in diameter or which has a maximum muzzle velocity of less than 700 feet per second;

(1.1) any pneumatic gun, spring gun, paint ball gun, or B-B gun which expels breakable paint balls containing washable marking colors;

(2) any device used exclusively for signaling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission;

(3) any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition; and

(4) an antique firearm (other than a machine-gun) which, although designed as a weapon, the Department of State Police finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon." *Id.*

¶ 48 Defendant argues that the State failed to introduce evidence establishing that the object in his hand at the time of the armed robbery was an actual gun as opposed to a BB gun, toy, or replica gun that is excluded from the definition of "firearm." Defendant also argues the State failed to introduce evidence establishing that the object in each of the other offender's hands was a gun. Defendant's argument is unavailing where: Mr. Harb testified that he had seen guns before and that the weapon defendant pointed at his face and, later, at the back of his head, was a

small, black gun with a circle around it; and Mr. Jones testified that each of the three offenders, including defendant, was holding a "snub nose 22-caliber revolver," and that Mr. Green placed his gun to the back of Mr. Jones' head and threatened to shoot him if he moved. Viewing the testimony of Mr. Harb and Mr. Jones in a light most favorable to the State, any rational trier of fact could have found the evidence was sufficient to establish defendant and the other offenders were armed with a firearm. See *People v. Wright*, 2015 IL App (1st) 123496; *People v. Clark*, 2015 IL App (3d) 140036; and *People v. Fields*, 2014 IL App (1st) 110311 (holding that the State does not have to prove the gun is a firearm by direct or physical evidence, and that the unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that defendant was armed with a firearm during the robbery); *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007) (defendant's threat to shoot victim was circumstantial evidence he was carrying a firearm during the robbery).

¶ 49 Defendant argues that *Wright*, *Clark*, and *Fields* are wrongly decided as they relied on case law construing a prior version of the armed robbery statute requiring the State to prove that defendant was armed with a "dangerous weapon" as opposed to the current version requiring the State to prove defendant was armed with a "firearm." This same argument was raised and rejected in *Clark*, which held that the reasoning employed in the cases construing the prior armed robbery statute continues to apply even under the current version of the statute. See *Clark*, 2015 IL App (3d) 140036, ¶¶ 25-27.

¶ 50 Defendant also argues that *People v. Ross*, 229 Ill. 2d 255 (2008), and *People v. Crowder*, 323 Ill. App. 3d 710 (2001), compel a result different than the one reached here. In *Ross*, the defendant was convicted of armed robbery. *Ross*, 229 Ill. 2d at 258. On appeal, the appellate court held that the State failed to prove beyond a reasonable doubt that the pellet gun

used by the defendant was a dangerous weapon, as required under the armed robbery statute (720 ILCS 5/18-2(a) (West 1998)), in effect at the time of the offense. *Ross*, 229 Ill. 2d at 258. Our supreme court affirmed, holding:

> "[T]he evidence regarding [the defendant's] gun was thin. [The victim] testified that the gun was small, portable, and concealable; the police officer testified that the gun was a .177-caliber pellet gun with a three-inch barrel. The State never presented the gun or photographs of the gun at trial. There was no evidence that the gun was loaded, there was no evidence that it was brandished as a bludgeon, and there was no evidence regarding its weight or composition. The trial court incorrectly based its ruling on the subjective feelings of the victim, rather than the objective nature of the gun. The appellate court correctly concluded that the evidence was insufficient to prove that the gun was a dangerous weapon, and correctly directed the trial court to enter a judgment of conviction for simple robbery and sentence [the defendant] accordingly." *Id*. at 276-77.

¶ 51 The supreme court distinguished *Ross* in *People v. Washington*, 2012 IL 107993. In *Washington*, the State indicted the defendant for armed robbery, aggravated kidnapping and aggravated vehicular hijacking. *Id*. ¶ 5. The State alleged that the defendant committed each of the offenses while armed with a dangerous weapon, a firearm. *Id*.

¶ 52 At trial, the victim testified he and his cousin made a delivery to a grocery store in Chicago, after which the victim sat in the delivery truck and saw the defendant walking toward him. *Id*. ¶ 10. The victim started to exit the truck, but the defendant pointed a gun at his head and forced him back inside. *Id*. The defendant's accomplice entered the driver's side of the truck and began driving, while the defendant pointed the gun at the victim's head and told him not to move. *Id*.

¶ 53 The driver eventually stopped and the defendant forced the victim, at gunpoint, to move into the back cargo area of the truck. *Id.* ¶ 11. The truck began moving again, and the victim heard police sirens. *Id*. The defendant was arrested. *Id*. ¶ 12.

¶ 54 The jury convicted the defendant of all the charged offenses. *Id*. ¶ 21. The defendant appealed, and the appellate court considered whether the State presented evidence sufficient to prove that he committed the offenses while armed with a dangerous weapon. *Id*. ¶ 25. The appellate court relied on *Ross* and held that the evidence was not sufficient to uphold the defendant's convictions and remanded the cause to the trial court with instructions to enter judgment and sentences on the lesser-included offenses of kidnapping, vehicular hijacking, and robbery. *Id*.

¶ 55 The supreme court reversed the appellate court. *Id*. ¶ 44. The supreme court noted that, in *Ross*, the evidence indicated that the weapon used was a small BB gun with only a three-inch barrel, and was not a dangerous weapon. *Id*. ¶ 34. Unlike in *Ross*, there was no evidence in the case before it that the weapon displayed by the defendant was anything other than a "real gun." *Id*. ¶¶ 35, 36. The supreme court held that, viewing the victim's unequivocal testimony and the circumstances pursuant to which he was able to see the gun in the light most favorable to the State, any rational trier of fact could have found that the defendant possessed a real gun and convicted him of the charged offenses. *Id*. ¶¶ 36, 37.

¶ 56 The instant case is more similar to *Washington* than to *Ross*, as Mr. Harb and Mr. Jones testified to defendant's holding a real gun (a 22-caliber revolver according to Mr. Jones) as opposed to a toy gun or BB gun and there was no contrary evidence. Viewing the testimony of Mr. Harb and Mr. Jones in the light most favorable to the State, any rational trier of fact could

find that defendant was armed with a gun that met the statutory definition of firearm and convicted him of armed robbery.

¶ 57 In the other case cited by defendant, *Crowder*, the defendant there was charged with unlawful possession of weapons by a felon and unlawful use of weapons. *Crowder*, 323 Ill. App. 3d at 711. The trial court dismissed the indictment where the State destroyed the gun that formed the basis of the charges after the defendant requested to view the gun. *Id*. The State appealed the dismissal of the indictment. *Id*. The appellate court affirmed, holding that the trial court properly dismissed the indictment to avoid a due process violation, reasoning that without being able to inspect the weapon, the defendant would not be able to refute in any meaningful way the State's contention that the weapon was a firearm. *Id*. at 711-12.

¶ 58 Unlike *Crowder*, the instant case does not involve the State's destruction of a gun sought by defendant during discovery; rather, it involves the question of whether the evidence at trial was sufficient for the jury to find beyond a reasonable doubt that defendant possessed a firearm during the robbery. As discussed earlier, we have found the testimony of Mr. Harb and Mr. Jones sufficient.

¶ 59 Next, defendant contends the trial court erred in sentencing him to two concurrent 35-year sentences. Defendant forfeited review by failing to file a post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

¶ 60 Even addressing the sentencing issues on the merits, we find no reversible error. "A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. A sentence will be deemed 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." (Internal citations and quotation marks omitted.) *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 61 Defendant first contends the trial court erred during sentencing when it considered in aggravation his prior conviction for aggravated unlawful use of a weapon (AUUW). Defendant cites *People v. Aguilar*, 2013 IL 112116, in which our supreme court held that the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), facially violates the right to keep and bear arms as guaranteed by the second amendment to the United States constitution. *Aguilar*, 2013 IL 112116 at ¶ 22.[1] Defendant argues that *Aguilar* effectively voided his prior AUUW conviction,[2] and that the trial court's reliance on that conviction necessitates a new sentencing hearing pursuant to *People v. Fischer*, 100 Ill. App. 3d 195 (1981). In *Fischer*, the appellate court reversed and remanded for resentencing where the trial court "improperly relied upon defendant's 1965 conviction for possession of marijuana, a conviction based upon a statute later declared unconstitutional." *Id*. at 200.

¶ 62 We find a more recent case, *People v. McFadden*, 2016 IL 117424, to be dispositive. In *McFadden*, the supreme court addressed in pertinent part whether the defendant should receive a new sentencing hearing on his armed robbery convictions because the trial court considered in aggravation that he had a prior conviction for section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute found unconstitutional in *Aguilar*. *Id*. ¶ 40. The supreme court noted that the record was unclear whether the defendant's prior AUUW conviction was for section 24-1.6(a)(1), (a)(3)(A), the section found unconstitutional in *Aguilar*; however, even if his AUUW conviction was

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[1] The supreme court has since clarified that section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute is facially unconstitutional, without limitation. *People v. Burns*, 2015 IL 117387, ¶ 25.

[2] The State does not dispute that defendant's AUUW conviction was under section 24-1.6(a)(1), (a)(3)(A) invalidated by *Aguilar*.

constitutionally infirm, the supreme court held that resentencing was not required because the weight the trial court placed on the AUUW conviction "was not significant." *Id*. ¶ 41. The supreme court noted that the trial court had referenced, during sentencing, the defendant's extensive general criminal history and the nature of the particular armed robberies at issue, and that defendant's concurrent sentences for armed robbery were 16 years below the maximum permissible sentences. *Id*. ¶44-45. On that record, the supreme court determined that resentencing on his armed robbery convictions was not required. *Id*. ¶ 46.

¶ 63 In the present case, as in *McFadden*, the trial court placed little emphasis on defendant's AUUW conviction; in its brief comments during sentencing, the trial court expressed its concern with the escalation of defendant's criminal behavior over the years, starting with residential burglaries and culminating in the armed robbery of a person he had known for many years. The trial court mentioned the AUUW conviction in passing[3] when discussing the escalation of defendant's criminal behavior, but the court did not focus on it, and instead emphasized that defendant was now committing violent criminal acts against persons in his own neighborhood. See also *People v. Bourke*, 96 Ill. 2d 327, 332 (1983) ("where it can determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required"). The concurrent sentences imposed on defendant were 10 years below the maximum permissible sentences. On this record, resentencing is not required.

¶ 64 Defendant argues the trial court improperly considered in aggravation that he used a gun during the armed robbery. See *People v. Saldivar*, 113 Ill. 2d 256, 272 (1986) (the trial court

[3] The trial court referenced the AUUW conviction as a "gun case [for which defendant] received boot camp as an adult."

may not consider in aggravation a factor that is inherent in the offense for which the defendant is being sentenced).

¶ 65 "A trial court is not required to refrain from any mention of sentencing factors that constitute elements of the offense. [Citation.] Sentencing hearings do not occur in a vacuum and the duty to impose a fair sentence entails an explanation of the court's reasoning in the context of the offenses of which a defendant has been convicted. A fair sentence is not just the product of mechanically tallying factors in aggravation and mitigation and calculating the result. Indeed, a sentencing hearing is likely the only opportunity a court has to communicate its views regarding the defendant's conduct and thus we do not agree that a trial judge's commentary on the nature and circumstances of a defendant's crimes necessarily results in improperly using elements of the offense as factors in aggravation." *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 15.

¶ 66 The trial court here briefly recited the nature and circumstances of defendant's crime, noting he was the first offender to enter the store and go behind the counter, where he stuck a gun in the victim's face, and that he tried to mask himself but was recognizable to the victim who had known him for years. The trial court's commentary indicates it properly considered the degree and gravity of defendant's conduct, but does not establish that it improperly considered an element of the offense as an aggravating factor in sentencing.

¶ 67 Finally, defendant argues that the trial court erred during sentencing when it failed to take into account his youth and rehabilitative potential. The record indicates otherwise. After hearing all the evidence in aggravation and mitigation, the trial court expressly stated it had read the PSI and considered defendant's educational background, social history, criminal history and family life, as well as his rehabilitative potential. The court acknowledged defendant's apology to the victim, but noted the escalating pattern of his criminal behavior and sentenced him to two

concurrent terms of 35 years' imprisonment. The sentence was within the statutory range and did not constitute an abuse of discretion.

¶ 68 Defendant contends, and the State agrees, that the $5 electronic citation fee and the $5 court system fee imposed under section 5-1101(a) of the Counties Code (55 ILCS 5/5-1101(a) (West 2012)), should be vacated because defendant was not subject to either of those fees under the facts of this case. Accordingly, we vacate the $5 electronic citation fee and the $5 court system fee.

¶ 69 Defendant argues, and the State agrees, that the $15 State Police Operations fee and the $50 court systems fee imposed under section 5-1101(c)(1) of the Counties Code (55 ILCS 5/5-1101(c)(1) (West 2012)), are actually fines that should be completely offset by the $5-per-day presentence incarceration credit. Accordingly, we offset defendant's $15 State Police Operations fee and his $50 Court Systems fee with his sentencing credit, thus eliminating them.

¶ 70 Defendant argues that the $2 Public Defender Records Automation fee and the $2 State's Attorney Records Automation fee are really fines that should be offset by the $5-per-day presentence incarceration credit. The appellate court has held they are both fees, not fines (see *People v. Rogers*, 2014 IL App (4th) 121088, and *People v. Bowen*, 2015 IL App (1st) 132046) and, as such, they are not offset by the $5-per-day presentence incarceration credit. See *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 41 (the credit applies only to fines, not fees).

¶ 71 Affirmed as modified.