

his three sentences may run consecutively upon a finding of severe bodily injury. He also contends that his 48-year total prison sentence is unconstitutional as applied to him because it is disproportionate to his role in the offenses and the court was precluded from meaningfully considering his youth and rehabilitative potential. For the reasons stated below, we affirm.

¶ 3 Defendant and codefendant Joseph Jackson were charged with aggravated battery with a firearm, aggravated kidnapping, armed robbery, and home invasion all allegedly committed on or about October 24, 2012. The aggravated battery charge alleged that they discharged a firearm in committing a battery and thereby injured Curtis Clay. The aggravated kidnapping charges alleged that they secretly confined Clay against his will and carried him from one place to another while armed with a firearm. The armed robbery count alleged that they took money and keys from Clay by force or threat of force while armed with a firearm. The home invasion count alleged that they entered the home of Curtis Clay and remained there while knowing or having reason to know that at least one other person was present, and intentionally injured Olisha Gross by choking her. No charge alleged great bodily harm to Clay or Gross. Codefendant was not tried with defendant.

¶ 4 At trial, Curtis Clay testified that he was walking along a street after 2 p.m. on the day in question when a black van pulled up and two men exited, one of them holding a gun. The men forced Clay into the van at gunpoint, and the armed man beat him over the head with the gun. A third man was driving the van. "They" took Clay's Gucci belt, keys, telephone, and about \$700 cash. The men drove Clay back to his apartment building, where the driver and another man exited while the man with the gun stayed with Clay in the van. When the armed man answered a telephone call, Clay grabbed the gun and grappled with the man until the man pulled the trigger

and Clay was shot in the left hip. As he continued struggling with the man, Clay broke one of the van's windows and put a leg through the opening. As a passerby called the police, Clay took hold of the gun and threw it through the window, then himself fell or jumped through the window.

The man from the van followed him out, but Clay reached the gun first and fired several shots at the man as he fled. The two men who had left the van then exited Clay's apartment building and fled the scene. Clay was treated in a hospital for "a day or two" for his gunshot wound. While in the hospital, Clay viewed photographic arrays but made no positive identification. A police detective testified that Clay viewed the arrays in the hospital on the afternoon on October 25, the day following the shooting.

¶ 5 Clay's girlfriend Olisha Gross testified that she was in Clay's apartment when two men entered. One man told Gross he was going to kill her, then choked her and threw her onto a bed. The men ransacked the apartment, including the bedrooms of Clay and his mother, and removed various items. The man who choked Gross told the other man to tie up Gross, but instead the other man told her to go into the washroom. While in the washroom, Gross heard gunshots; she peeked out and saw that the men were gone. The apartment door had no signs of being broken open. Gross viewed two lineups and identified a man in each but could not recall at trial who she had identified. A police detective testified that Gross identified defendant from one lineup as the man who threatened and choked her, and identified codefendant from the other lineup as the other man who ransacked Clay's apartment.

¶ 6 Shortly after the incident, police stopped a black van with a broken window and bullet holes. Defendant and codefendant fled the van from the driver and passenger side respectively, and both were arrested nearby. Upon arrest, defendant had a Gucci belt from Clay's apartment

1-14-0903

and jewelry owned by Clay's mother, and codefendant had \$608 cash. Found in the van was Clay's Gucci belt taken from his person. Defendant's fingerprints were on the sliding door of the van. Defendant's gunshot residue test was negative, and codefendant's test was inconclusive.

¶ 7 Defendant gave a post-arrest statement that he, codefendant and a man defendant knew as "Deez" were in the van when Deez forced Clay into the van at gunpoint. Deez held the gun throughout the incident. While defendant and codefendant went into Clay's apartment building, defendant stayed in the hallway as lookout.

¶ 8 Following closing arguments, instructions, and deliberations, the jury found defendant guilty of aggravated kidnapping, armed robbery, and aggravated battery with a firearm and found him not guilty of home invasion. The instructions for aggravated kidnapping and armed robbery included as an element of those offenses that defendant, or someone for whose conduct he was legally responsible, was armed with a firearm.

¶ 9 The pre-sentencing investigation report (PSI) reflects that defendant, born in 1993, received four juvenile dispositions, twice in 2008 for receiving or possessing a stolen vehicle, in 2009 for residential burglary, and in 2010 for attempted residential burglary. He was convicted of residential burglary in 2011 and received four years' imprisonment. Defendant told the PSI preparer that he lived with both his parents until his father's 2010 death, and described "a good home" with no abuse or neglect. The PSI preparer found a 1997 case terminating the parental rights of defendant's mother because she had a substance abuse problem and a tire iron had been dropped on defendant's head from a neighbor's balcony. Defendant's mother told the PSI preparer that his father had custody of him and she was "always around her son when he was growing up." Defendant has three siblings, to whom he is close. He lived with his mother and one of his

1-14-0903

sisters until his arrest, and intended to live with his mother after prison "until he can get on his feet." Defendant has a young daughter who is raised by her mother. He attended but did not complete high school with "good" grades, and he stated his intent to seek his GED and vocational training in prison. He worked with his father on masonry "side jobs" to his father's construction employment, was otherwise supported by his mother, and stated his intent to seek a commercial driving license and work as a truck driver. Defendant described his physical health as good except for having rods in his legs from being shot in 2012. He denied any mental health issues or treatment, and denied ever taking illegal drugs or drinking alcohol. He claimed to have no gang affiliation but acknowledged that police have identified him as a member first of the Black Disciples and then the Gangster Disciples. He has several tattoos but denied they are gang-related.

¶ 10 At sentencing, the State argued the gravity of defendant's offenses: Clay was dragged at gunpoint off the street and defendant's ransacked his apartment. The State argued that, while the jury found defendant not guilty of home invasion, the court could consider Gross's testimony regarding what happened in the apartment. The State argued that defendant's "extensive" juvenile record of burglary and stolen-vehicle offenses, followed by a residential burglary conviction for which he was on parole at the time of the instant offenses, support a "harsh sentence" in light of the fact that he had a good childhood and did not abuse drugs or alcohol. The State sought a sentence of at least 55 years, with consecutive sentencing based on Clay's severe bodily injury and minimums of 6 years for aggravated battery and 21 years (with firearm enhancements) for aggravated kidnapping and armed robbery.

1-14-0903

¶ 11 Defense counsel noted that defendant was only 20 years old and his mother and sister were in court. His mother's parental rights were terminated, and he was raised by his father until he died. Defendant was shot in the hip after his prison sentence "while he was trying to enroll himself in school." Counsel asked for the court to be "extremely lenient."

¶ 12 Defendant addressed the court, acknowledging that he has been "in and up out of jail." He does not blame anyone else for his mistakes, he said, and would learn from his mistakes and not repeat them. He asked for "some light at the end of the tunnel" to "see his mother and sister," noting that he was estranged from his mother for years and was only now becoming close to her.

¶ 13 The court noted that it considered the PSI, trial evidence, and sentencing arguments in light of the aggravating and mitigating factors. The court found that Clay suffered "great bodily harm" because he was shot in the hip and was in the hospital for "a number of days. So therefore, the sentences will be served consecutive[ly]." The court sentenced defendant for aggravated kidnapping and armed robbery to prison terms of 21 years each including a 15-year firearm enhancement, and for aggravated battery with a firearm to 6 years, all to be served consecutively.

¶ 14 Defendant timely filed a motion to reconsider his sentence, arguing that his sentence was excessive in light of his background and the nature of his participation in the offenses. While the motion challenged the enhanced or extended sentences, it did not challenge consecutive sentencing. The court denied the motion, and this appeal followed.

¶ 15 On appeal, defendant first contends that his consecutive sentencing was improper as there was no severe bodily injury, and alternatively that a finding of severe bodily injury supports running only two of his three sentences consecutively. The State contends that defendant has forfeited this claim by not raising it in his post-sentencing motion, and defendant argues that we

may consider it as plain error. *People v. Downs*, 2015 IL 117934, ¶¶ 13-15. The first step in plain error analysis is determining whether there was a clear or obvious error at all. *Id.*, ¶ 13.

¶ 16 As a threshold matter, we must determine whether the trial court made a finding of severe bodily injury for the purpose of imposing consecutive sentencing even though the court used the phrase "great bodily harm" in making that finding. Section 5-8-4 of the Code of Corrections governs consecutive and concurrent sentencing, and provides in relevant part that "[t]he court shall impose consecutive sentences [when o]ne of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(d)(1) (West 2014). Aggravated kidnapping, armed robbery, and aggravated battery with a firearm are all Class X felonies (720 ILCS 5/10-2(b), 12-3.05(e), (h), 18-2(b) (West 2014)), thus consecutive sentencing may apply if "severe bodily injury" was inflicted. We are aware that districts of the appellate court disagree as to whether "great bodily harm" and "severe bodily injury" are one in the same. Although the fourth district found in *People v. Witherspoon*, 379, Ill. App. 3d 298, 308 (2008), that the difference was merely semantic (*Id.*), the first district in *People v. Williams*, 335, Ill. App. 3d 596, 599-600 (2002), found that "severe bodily injury" requires something more than "great bodily harm" because "where the legislature uses certain words in one instance and different words in another, different results were intended." *Id.* at 599-600. The second district agreed with this conclusion in *People v. Alvarez*, 2016 IL App (2d) 140364, ¶ 23.

¶ 17 We need not resolve this conflict here, however, because it is clear from the record that the court actually made a finding of "severe bodily injury" but misstated it as "great bodily harm." What distinguishes this case from *Witherspoon*, *Williams*, and *Alvarez*, is that in those

cases the trial court made specific findings of "great bodily harm" for other purposes. *Alvarez*, 2016 IL App (2d) 140364, ¶ 23; *Witherspoon*, 379, Ill. App. 3d at 308; *Williams*, 335, Ill. App. 3d at 599-600. Thus, the question before the appellate court was whether those findings of "great bodily harm" were sufficient to support the imposition of consecutive sentences. *Alvarez*, 2016 IL App (2d) 140364, ¶ 23; *Witherspoon*, 379, Ill. App. 3d at 308; *Williams*, 335, Ill. App. 3d at 599-600. In contrast, here, the court never made a finding of "great bodily harm" for another purpose. None of the charges alleged great bodily harm and defendant's enhanced sentences were mandatory 15-year firearm enhancements based upon the jury's verdicts alone. The court stated that Clay's gunshot injury constituted "great bodily harm" in the context of imposing consecutive sentences, where the relevant issue is whether there was "severe bodily injury." Therefore, we conclude from the record that the court found Clay's suffered "severe bodily injury," but merely phrased its finding incorrectly.

¶ 18 We now turn to whether the court erred in finding Clay's gunshot wound to be "severe bodily injury." Whether a particular bodily injury is severe is a question of fact subject to the manifest-weight standard. *Alvarez*, 2016 IL App (2d) 140364, ¶ 19. A court's finding of a severe bodily injury is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the finding is unreasonable, arbitrary, or not based on the evidence presented. *Id.*; *People v. Deleon*, 227 Ill. 2d 322, 331-32 (2008).

¶ 19 Here, Clay and Gross testified to a gunshot being fired, and Clay testified to being wounded in the hip by that gunshot. Clay's testimony that he was in the hospital for a "day or two" to treat his wound is corroborated by the detective who visited him in the hospital on the afternoon of the day after the shooting; that is, about a full day later. Although no evidence was

introduced that Clay underwent "surgery or intensive treatment," a day or more in the hospital is not "very brief" (as defendant argues) and supports a conclusion that Clay suffered more than a small injury treatable with basic emergency-room treatment. While more evidence as to Clay's injury or treatment would have been preferable, the finding of severe bodily injury does not strike us as unreasonable or arbitrary, and we do not find the opposite conclusion (that Clay's gunshot wound was not a severe bodily injury) to be clearly evident. Therefore, the court's finding of severe bodily injury is not against the manifest weight of the evidence.

¶ 20 We next address defendant's alternative contention: that a finding of severe bodily injury supports consecutive sentencing for only two of his three offenses.

¶ 21 Consecutive sentencing is mandatory only for those offenses that trigger the application of the relevant statutory mandate, with consecutive sentences for triggering offenses served prior to any sentences imposed for non-triggering offenses and multiple non-triggering offenses served concurrently after any consecutive sentences for triggering offenses. *People ex rel. Senko v. Meersman*, 2012 IL 114163, ¶¶ 17-18, citing *People v. Curry*, 178 Ill. 2d 509, 538-39 (1997).

¶ 22 Our supreme court has interpreted a statutory predecessor to Section 5-8-4(d)(1) to require consecutive sentencing where the severe bodily injury was inflicted during the commission of the felony of Class 1 or greater. *People v. Whitney*, 188 Ill. 2d 91, 99 (1999). The *Whitney* court rejected the proposition that "only Class X or Class 1 felonies where severe bodily injury is an inherent factor trigger consecutive sentences ***. Instead, any Class X or Class 1 felony that results in severe bodily injury being inflicted on the victim of that felony triggers consecutive sentences." *Id.*

¶ 23 This court has previously "confront[ed] the precise definition of the *Whitney* court's phrase 'during the commission' of the triggering felony. The question presented to us is: did the shooting of Jeremy Price occur 'during the commission' of either the triggering offense of armed robbery or home invasion?" *People v. Sample*, 326 Ill. App. 3d 914, 926. (2001). Noting that Price was the sole victim, killed by a single gunshot, and that first degree murder was not a triggering offense at the time, we upheld the *Sample* defendant's consecutive sentencing for first degree murder, armed robbery, and home invasion, concluding that:

"Within the course of a few minutes, defendant, and those for whose actions he was held criminally responsible, entered Price's home by force, threatened him with a weapon, shot him, and stole his drugs. To parse the crimes out into bounded acts would contradict the reality that these crimes were intertwined both temporally and functionally." *Id.*, at 928.

¶ 24 We find that nothing in section 5-8-4(d)(1) supports defendant's claim that a single bodily injury supports only a single triggering offense. Our supreme court in *Whitney* interpreted this statute to require that severe bodily injury be inflicted in the commission of a felony of Class 1 or greater, rejecting a requirement that the severe bodily injury be inherent to the triggering offense. This court in *Sample* applied the severe bodily injury in the then-non-triggering offense of first degree murder to the potential triggering offenses of armed robbery and home invasion and found both to be triggering offenses. We see no reason not to follow *Sample* and do the same. Indeed, this case is even stronger than *Sample* because all of defendant's offenses are Class X felonies and thus potential triggering offenses. Within the course of a few minutes, defendant and his accomplices forced Clay off the street into a van, threatened him with a gun, shot him, and stole property from his person and home. As in *Sample*, we refuse to parse these temporally and

functionally intertwined offenses, and we affirm consecutive sentencing of three offenses upon a single instance of severe bodily injury.

¶ 25 Defendant also contends that his 48-year total prison sentence is unconstitutional as applied to him because it is disproportionate to his role in the offenses and the court was precluded from meaningfully considering his youth and rehabilitative potential.

¶ 26 The State responds that defendant had forfeited his as-applied constitutional challenge by not raising it in the trial court. "An as-applied constitutional challenge is dependent on the particular circumstances and facts of the individual defendant" so "it is paramount that the record be sufficiently developed in terms of those facts and circumstances." *People v. Thompson*, 2015 IL 118151, ¶¶ 36-37. Defendant replies that the facts needed to consider his claim are contained in the record, including that he was only 19 years old at the time of the offenses and the trial evidence allegedly shows that his "participation in these offenses was relatively minimal." For the reasons set forth below, even if the record was sufficient to present defendant's challenge, we do not find that his rights were violated. See *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 51.

¶ 27 Defendant received the minimum sentences for aggravated battery with a firearm, and for aggravated kidnapping and armed robbery committed while armed with a firearm; the latter included mandatory 15-year firearm enhancements. 720 ILCS 5/10-2(a)(6), (b), 12-3.05(e)(1), (h), 18-2(a)(2), (b); 730 ILCS 5/5-4.5-25(a) (West 2014).

¶ 28 The Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishments." U.S. Const., amend. VIII. This provision prohibits not only "inherently barbaric punishments" but those "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59 (2010). The Illinois Constitution provides that "[a]ll penalties shall be determined both according

to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, Art. I, § 11.

¶ 29 In *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2460 (2012)("U.S. *Miller*"), the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" The Supreme Court held that minors are constitutionally different from adults for sentencing purposes, being more impulsive and more vulnerable to negative influences and peer pressure than adults, and not having the fully-formed character of adults so that their actions do not necessarily indicate irreversible depravity. *Id.* at ___, 132 S. Ct. at 2463-68.

¶ 30 In *Thompson*, our supreme court considered the contention of a defendant who was 19 years old at the time of his offenses – two counts of first degree murder – that U.S. *Miller* should apply to him so that his mandatory sentence of natural life imprisonment was unconstitutional as applied to him. *Thompson* held that the defendant could not raise his as-applied challenge for the first time on appeal from an untimely collateral petition, distinguishing cases that allowed U.S. *Miller* claims to be raised for the first time on appeal. Unlike those cases, the *Thompson* "defendant was 19 years old when he committed the murders. Indisputably, he was not a minor for purposes of sentencing. Therefore, defendant cannot obtain the same collateral relief afforded the defendants *** who all received mandatory natural life sentences for crimes committed when they were under the age of 18 in violation of *Miller*." *Id.*, ¶ 43.

¶ 31 In *Hunter*, a defendant who was 16 years old at the time of his offenses was convicted of aggravated kidnapping, armed robbery, and aggravated vehicular hijacking. Facing sentencing ranges of 21 to 45 years including a 15-year firearm enhancement, he received concurrent prison

sentences of 21 years. We rejected the defendant's argument "that the mandatory firearm enhancement precludes the trial court from considering mitigating factors in sentencing juvenile offenders, and, therefore, may be unconstitutional under the eighth amendment." *Id.*, ¶ 54. We noted that we rejected a similar argument in *People v. Pace*, 2015 IL App (1st) 110415, involving a U.S. *Miller* challenge by a 16-year-old offender to a 100-year total prison sentence including a 25-year firearm enhancement, where the minimum total sentence was 57 years, on the grounds that the court had discretion to sentence the defendant between 57 years' and natural life imprisonment. *Hunter*, ¶ 54, citing *Pace*, ¶ 134. The *Hunter* court similarly held that its sentencing ranges were "substantial" but nonetheless their "defendant was not subject to a sentence comparable to the penalty that was rejected in *Miller*." *Hunter*, ¶ 55.

¶ 32 Noting that the trial court was presented with the *Hunter* defendant's mitigating factors in the PSI and duly considered those factors, we held that his sentences were not disproportionate under the Eight Amendment. *Id.*, ¶ 56. As to the proportionate-penalties clause, we noted that we had already upheld a 25-year mandatory firearm enhancement against a proportionate-penalties challenge by a 16-year-old offender in *People v. Banks*, 2015 IL App (1st) 130985. "In the present case, as in *Banks*, the mandatory firearm enhancement did not preclude the trial court from considering defendant's age as mitigation in its determination of defendant's sentence. Therefore, we find no violation of the proportionate penalties clause." *Hunter*, ¶ 59. Seeing no reason not to follow *Banks*, we did so. *Id.*, ¶¶60-62.

¶ 33 In *People v. Miller*, 202 Ill. 2d 328 (2002)("Illinois *Miller*"), a 15-year-old offender convicted of two counts of first degree murder on an accountability basis, for standing as a lookout for the shooters, was sentenced to 50 years' imprisonment rather than the mandatory

sentence of natural life imprisonment because the trial court found the latter unconstitutionally disproportionate as applied. Our supreme court affirmed, acknowledging that mandatory natural life for double murder had previously and generally been upheld but finding that such a sentence was disproportionate – "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community" – in their case because their defendant was a juvenile convicted strictly on an accountability basis. *Id.* at 338. Noting the "long-standing distinction made in this state between adult and juvenile offenders," the supreme court found that "the convergence of the *** transfer statute, the accountability statute, and the multiple-murder sentencing statute eliminates the court's ability to consider any mitigating factors such as age or degree of participation." *Id.* at 341-42.

¶ 34 This court has declined to extend Illinois *Miller* to non-juvenile defendants. *People v. Griffin*, 368 Ill. App. 3d 369, 379 (2006)(17-year-old); *People v. Winters*, 349 Ill. App. 3d 747, 750-51 (2004)(18-year-old); *People v. McCoy*, 337 Ill. App. 3d 518, 525 (2003)(19-years-old).

¶ 35 In *People v. Nichols*, 2012 IL App (2d) 100028, a 16-year-old offender convicted of two counts of aggravated criminal sexual assault and sentenced to the minimum 32 years in prison – consecutive 16-year prison sentences including a mandatory 10-year weapon enhancement – raised a disproportionate-penalties challenge based on Illinois *Miller*. *Id.*, ¶¶ 72-80. We affirmed, distinguishing Illinois *Miller* on two grounds. Firstly, the defendant's degree of participation in his offenses was significant, unlike the "passive lookout" in *Miller*. *Id.*, ¶ 81. Secondly, he was not sentenced to natural life imprisonment as in *Miller*; that is, his 32-year minimum sentence "enables defendant to become rehabilitated and restored to society as a useful citizen." *Id.*, ¶ 82.

¶ 36 Here, while defendant relies heavily upon his youth and the two *Miller* cases in arguing that his sentences were disproportionate, his case is highly distinguishable. First and foremost, defendant does not fall under either *Miller* because he was 19 years old at the time of his offenses. As stated above, our supreme court in *Thompson* declined to apply U.S. *Miller* to a non-minor, and we have declined to extend Illinois *Miller* to non-juveniles. Also, as in *Hunter* and *Nichols* but unlike either *Miller*, defendant was not sentenced to natural life imprisonment but a determinate if lengthy prison term that allows for his restoration to society. *Hunter*, ¶ 55; *Nichols*, ¶ 82; cf. *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶ 27 (100-year total prison sentence "effectively imprisons Sanders for the remainder of the lifetime he can expect to live.").

¶ 37 Turning to the particulars of defendant's case, he argues that his participation in the offenses was "relatively minimal." However, the evidence shows that he was not merely a driver and lookout as he claimed in his statement. Gross testified that two men ransacked Clay's apartment and one of them choked and threatened to kill her. She had identified defendant as the man who attacked her and codefendant as the other man. Defendant had upon arrest a belt and jewelry from inside Clay's apartment. The evidence shows that defendant drove a man kidnapped at gunpoint to his apartment, entered and ransacked the apartment, choked an occupant, and ended up with a Gucci belt and jewelry. His participation was neither marginal nor passive as in Illinois *Miller*. As to his rehabilitative potential, the PSI does not support his claims that his "background does not suggest a lack of mitigation or rehabilitative potential" or that the instant offenses occurred "shortly after the death of" his father. Defendant had four juvenile dispositions for stolen vehicle and burglary offenses, and a residential burglary conviction. At least two dispositions precede his father's 2010 death, which was not "shortly" before the October 2012

1-14-0903

instant offenses. The trial court clearly considered defendant's mitigation insofar as it imposed minimum sentences for all three offenses, and we find that his mitigation does not rise to the level of rendering his sentences disproportionate. We conclude that defendant's sentences would not violate the proportionate-penalties clause if his claim had been properly raised below.

¶ 38 Accordingly, the judgment of the circuit court is affirmed.

¶ 39 Affirmed.