FOURTH DIVISION
March 2, 2017

No. 1-14-1333

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. 11 CR 4
	)	
RASHIED ISMAIL,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Conviction for aggravated fleeing or attempting to elude police officer, based on defendant's traveling at least 21 miles per hour over speed limit, vacated and reduced to misdemeanor fleeing or eluding where State's evidence failed to establish defendant's speed during chase. Defendant's remaining convictions affirmed. State presented sufficient evidence to prove that defendant disobeyed at least two traffic control devices to support other charge of aggravated fleeing or attempting to elude police officer, where officers testified that defendant failed to stop at several stop signs during chase. Defendant's 15-year sentence for armed violence did not violate proportionate-penalties clause's proportionality requirement where it served purpose of deterring use of firearms during felonies. Provisions of aggravated unlawful use of weapon statutes did not violate proportionate-penalties clause's identical-elements test where they had different elements than FOID Card Act and unlawful use of weapons statute. Trial judge did not violate defendant's rights when he found defendant guilty after defense had rested and closing arguments were given, but before he had asked defendant if defendant wanted to testify.

¶ 2 In the early morning hours of December 1, 2010, defendant fled from police while driving in a residential area of Chicago. After a short chase, he crashed his car into a building and fled on foot, but was quickly arrested. Defendant had three firearms in his possession.

¶ 3 After a bench trial, defendant was convicted of armed violence, two counts of aggravated unlawful use of a weapon (AUUW), aggravated fleeing or attempting to elude a peace officer based on defendant's driving at least 21 miles per hour over the legal limit, and aggravated fleeing or attempting to elude a peace officer based on defendant's disobedience of two or more traffic control devices.

¶ 4 Defendant appeals, raising four issues: (1) that the State failed to prove him guilty of aggravated fleeing or eluding because it did not present evidence that he was going at least 21 miles per hour over the speed limit or that he disobeyed two or more traffic control devices; (2) that the armed violence statute violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because it imposed harsh penalties on him for exercising his constitutional right to carry a gun; (3) that the AUUW statute violates the proportionate-penalties clause because it has identical elements to other offenses that have less harsh penalties; and (4) that the trial court denied him his right against self-incrimination when it found defendant guilty before admonishing him about his right to testify, then offered defendant an opportunity to testify.

¶ 5 We agree that the State's evidence failed to establish that defendant traveled at least 21 miles per hour over the speed limit where the State's evidence of defendant's speed was vague. At best, the evidence showed that the police officers pursuing defendant drove between 40 and 50 miles per hour at some point during the chase. But the officers could not specify their top speed and could not recall the speed limit in the area of the chase.

¶ 6 But we reject defendant's remaining arguments. The State proved that defendant failed to obey at least two traffic control devices where the officers testified that defendant drove through several stop signs during the chase. Defendant's 15-year sentence for armed violence did not violate the proportionate-penalties clause's proportionality requirement because it did not shock the conscience of the community; it rationally served the purpose of deterring the use of firearms during the commission of a felony. Nor do the provisions of the AUUW statute challenged by defendant violate the proportionate-penalties clause's identical-elements test because they have different elements than the FOID Card Act and the simple unlawful use of a weapon statute. Finally, the trial court did not deprive defendant of a fair trial when defendant failed to timely assert his right to testify, and, after finding him guilty, the trial court reopened the case to allow defendant to testify anyway. The trial court was under no obligation to inquire into defendant's desire to testify at that point or to reopen the case. It did so out of a desire to protect defendant's right to testify, not to violate that right.

¶ 7 I. BACKGROUND

¶ 8 A. Motion to Quash Arrest

¶ 9 Prior to trial, defendant moved to quash his arrest and suppress evidence claiming that the police lacked probable cause to arrest him and, consequently, that the evidence of firearms found in his possession should be suppressed.

¶ 10 At the hearing on the motion, Officer Victor Perez of the Chicago police department testified that, around 3 a.m. on December 1, 2010, he was driving with his partner Officer Adolfo Garcia when he saw defendant, who was driving a gold Mercury, fail to stop at a stop sign and fail to use his turn signal while making a right turn from 28th Street onto southbound Kenneth Avenue. Perez, who was driving, turned south down an alley, driving parallel to defendant.

¶ 11 Perez testified that he emerged from the alley at 30th Street, where he looked to the east and saw defendant turn north from 30th Street onto Kostner Avenue. Perez followed defendant and caught up to him. Once Perez pulled alongside defendant's car, Garcia told defendant to pull over. Defendant looked up and made a quick right turn onto eastbound 28th Street.

¶ 12 Perez testified that, after defendant drove away, he activated his car's emergency lights and pursued defendant as defendant drove east. Defendant did not stop from Kostner Avenue to Springfield Avenue, which Perez estimated to be about 10 blocks away.

¶ 13 Defense counsel asked Perez whether he was pacing defendant's car between Kostner and Springfield, and Perez responded, "Well, I can—I am driving. I can see how fast I am going, and I can see that the vehicle is just flying[.]" Defense counsel asked Perez if he knew "exactly" how fast defendant was driving, and Perez said that his own top speed "reached at least 40 miles [per] hour on a side street." Perez also said that defendant was gaining distance from his own car during the chase.

¶ 14 Perez testified that, when defendant reached Springfield Avenue, he drove up onto the curb and crashed into a building. Defendant got out of his car and began to run, carrying a gun in his left hand and a black bag in his right. Perez got out of his own car and pursued defendant on foot. As defendant ran, he threw the bag away and dropped the gun. Defendant eventually surrendered to Perez. The bag that defendant had thrown away contained two other guns, a ski mask, money, and gloves.

¶ 15 The trial court denied defendant's motion.

¶ 16 B. Trial

¶ 17 Officers Perez and Garcia were the State's only witnesses at trial. They described the chase and arrest largely in the same way that Perez had described it at the motion to quash hearing.

¶ 18 At trial, Perez testified that, as defendant fled from them, Perez's "top speed was almost 50 miles [per] hour," and that, even at that speed, Perez was unable to catch up to defendant's car. Perez said, based on that information, he thought defendant "was going in excess of 50." The State asked Perez what the speed limit was on the street where he pursued defendant, and Perez replied, "The side streets are normally 30 miles [per] hour."

¶ 19 On cross-examination, Perez reiterated that, during the chase, he was "about to reach 50 miles [per] hour" at one point. Defense counsel asked if Perez could have been driving 49 miles per hour, and Perez answered, "Could be, somewhere around there. Somewhere in that area." Perez also acknowledged that, at the motion to quash hearing, he estimated his top speed as being "at least 40 miles per hour." When defense counsel asked Perez about the discrepancy in his testimony, Perez said, "Top speed, I wouldn't know exactly, but from the best of my recollection, I know I didn't go over 50 miles [per] hour. But I know we were speeding pretty—I know we were speeding above, way above the 30 miles per hour speed limit, sir."

¶ 20 When defense counsel asked Perez how many stop signs defendant drove through without stopping, Perez said, "I think maybe five or a couple *** more but I know it was a few."

¶ 21 Garcia testified that, along with defendant failing to stop at the first stop sign, defendant failed to stop at a stop sign when he turned north onto Kostner Avenue. Garcia testified that, after Perez had activated the lights on their car, defendant "drove at a high rate of speed eastbound from Kostner." As defendant sped away from Garcia and Perez, Garcia observed defendant go "through numerous stop signs" and a red light at Pulaski Road without stopping.

Garcia estimated that defendant drove through four or five stop signs because there were stop signs every other intersection, and he and Perez pursued defendant for about 10 blocks.

¶ 22 On cross-examination, Garcia acknowledged that a report of the incident did not indicate that defendant had driven through any stop signs. Garcia also acknowledged that he did not pace defendant's car because he could not see the speedometer; Perez was driving.

¶ 23 After Perez and Garcia testified, the State rested. Defendant moved for a directed finding, which the trial court denied.

¶ 24 The parties then stipulated that Irsdro Ramirez, who owned the building that defendant crashed into, would testify that he did not observe any damage to the building after the crash and that no one from the Chicago police contacted him about any damage.

¶ 25 After the stipulation was entered, defense counsel said, "Okay. And with that, we would rest." The trial court asked if defense counsel was ready to argue, and defense counsel said that he was.

¶ 26 After closing arguments, the trial court found defendant guilty of armed violence and six counts of AUUW. With respect to the aggravated fleeing or eluding charges, the trial court said:

> "The officer said the defendant was pulling away from him and his speed was approaching 50. Assuming a 30 mile per hour speed limit, and I'm not sure if it's even that high on some of the side streets and cross streets, but the defendant would have had to have been going in excess of 50 miles [per] hour to pull away from the officer who was approaching 50 miles [per] hour [in] his car.
>
> The officer said he didn't want to go over the 50 mile per hour mark and the defendant did gain distance on him as he approached that speed.

In addition, there was evidence beyond a reasonable doubt that the defendant did disobey at least two or more traffic control devices during the pursuit; and accordingly, there's a finding of guilty on those two eluding police counts."

¶ 27 After the trial judge had found defendant guilty and ordered his bond revoked, he realized that he "forgot to admonish *** defendant on whether he wanted to testify in this case." The judge added, "The defense rested before I could do that." The court and defendant then had the following exchange:

"[THE COURT:] I'll reopen the case if in fact the defendant wants to testify in this case. The right to testify or not testify is your choice and your choice alone, [defendant]. Your lawyer can't make a decision for you. Only you can.

Knowing that, what I just told you, I'll retract this and give you an opportunity to testify if in fact you want to testify. Do you want to testify?

THE DEFENDANT: If it could help me, your Honor, I would definitely want to testify.

* * *

THE COURT: I don't know if it will aid you or not. Your lawyer can best advise you on whether it would aid you or not.

THE DEFENDANT: Your Honor, I would testify.

THE COURT: You want to testify?

THE DEFENDANT: Yes.

THE COURT: Okay. Then strike the previous findings, and we'll go back to whatever, square five or six or something, in the defense case and we'll take a few minutes recess, and then you may testify.

Keep in mind there's no guarantee I'll even change my mind or not.

THE DEFENDANT: I understand."

¶ 28 Defendant testified that, on November 30, 2010, he was employed as a plumber. He was working that day near 43rd Street and Wallace Street, repairing an outdoor sewer. He testified that it was cold, so he wore a skull cap and gloves.

¶ 29 Defendant said that, after finishing work around 7 or 8 p.m., he and his coworkers went to a bar. Around 2 a.m., defendant left and dropped off one of his coworkers at his house near 30th Street and Kostner Avenue.

¶ 30 Defendant began to drive home, when a police car pulled up behind him and with its lights on. He testified that he turned and drove about a block, then pulled over. Defendant said that he was not speeding at the time, that he did not crash his car into a building, that he did not fail to stop at any stop signs, and that he did not have a gun in his hand at any point. On cross-examination, defendant admitted that he "might have missed the first" stop sign before the officers pulled him over.

¶ 31 Defendant testified that, after the officers pulled him over, they ordered him out of the car and told him to put his hands on the hood. Defendant testified that the officers then searched his car and found three guns in a black bag he carried in the car. Defendant said that the guns were loaded but that bullets were not in the chambers of the guns. According to defendant, he had purchased the guns at a gun show in Indiana, where he lived.

¶ 32 Defense counsel and the State made additional closing arguments based on defendant's testimony. The court said that its "original ruling" would stand. The court found that defendant's testimony that he was not fleeing from the police was not credible and noted that defendant admitted to being in possession of the firearms.

¶ 33 C. Posttrial Proceedings

¶ 34 Defendant filed a posttrial motion seeking to vacate three of the counts of AUUW of which he had been convicted on the basis that they were held unconstitutional in *People v. Aguilar*, 2013 IL 112116. The trial court granted that request, vacating counts 3, 4, and 5. The court found that the remaining counts of AUUW (counts 6, 7, and 8) remained valid.

¶ 35 Defendant also alleged that the trial court prejudged his case when it found him guilty before hearing defendant's testimony. And, defendant claimed, he was effectively compelled to testify when the court found him guilty, then asked him whether he wanted to testify.

¶ 36 At the hearing on his posttrial motion, defendant testified that, when he said he wanted to testify, he did so because he wanted to do "anything [that] would help [his] case" once the judge had found him guilty. He said that he and his lawyer had talked about the possibility of testifying, but that defendant had not made a final decision about whether he would testify. The court rejected defendant's argument:

> "In my view had it been a jury that might have some type of an effect but in a bench trial there's a presumption that the judge can be fair and in this particular case all that was being done was a defendant and his lawyer were given an opportunity to reopen the case if they wanted to. If they didn't want to that was okay. The court was under no obligation to admonish the defendant but I felt that—I usually do it. Not usually. I do it in every single case, bench trial, jury trial, whatever, and I wanted to give the defendant an opportunity, one last chance if he wanted to do it or not, it was up to him and make sure that the option had been discussed with the lawyer because in most of these cases where—post-conviction related or whatever down the line the allegation is that my

lawyer didn't tell me I could testify or words to that effect. So I was basically trying to be overly fair in the case in doing that."

¶ 37 The trial court sentenced defendant to 15 years' incarceration for armed violence (Count 1), the minimum sentence for that offense. The trial court also sentenced defendant to 3 years' incarceration on Count 9, aggravated fleeing and eluding based on defendant's driving 21 miles per hour above the speed limit, and 3 years' incarceration on Count 6, AUUW premised on defendant's possession of a firearm without a valid Firearm Owner's Identification (FOID) card. The court merged the other aggravated fleeing and eluding count (Count 11) into Count 9, and the other AUUW counts (Counts 7 and 8) into Count 6. All of defendant's sentences were to be served concurrently.

¶ 38 Defendant filed this appeal.

¶ 39 II. ANALYSIS

¶ 40 A. Aggravated Fleeing & Eluding

¶ 41 Defendant first argues that the State failed to prove him guilty of aggravated fleeing or eluding a police officer. When reviewing the sufficiency of the evidence supporting a conviction, we determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential, elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). We may not substitute our judgment for the trier of fact's with regard to the credibility of witnesses, the weight to be given to each witness's testimony, or the reasonable inferences to be drawn from the evidence. *Id.* But while the trier of fact's determinations are entitled to great deference, they are not conclusive. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A defendant's conviction will be set aside where the evidence is so

improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 42 Specifically, defendant alleges that the State failed to prove the two aggravating factors supporting the respective charges of aggravated fleeing and eluding: (1) that defendant was driving "at a rate of speed at least 21 miles per hour over the legal speed limit" (625 ILCS 5/11-204.1(a)(1) (West 2010)); and (2) that defendant disobeyed "2 or more official traffic control devices" (625 ILCS 5/11-204.1(a)(4) (West 2010)). We address each of these arguments in turn.

¶ 43 1. Driving 21 Miles Per Hour Over Speed Limit

¶ 44 First, defendant argues that the State failed to prove that he was fleeing the police while driving at least 21 miles per hour above the speed limit, because Officer Perez was only able to estimate defendant's speed, and those estimates failed to eliminate a reasonable doubt about defendant's speed. The State responds that it was reasonable for the trial court to infer that defendant was driving more than 21 miles per hour above the speed limit based on Perez's testimony.

¶ 45 When the State charges a defendant with aggravated fleeing or attempting to elude a police officer, evidence that merely establishes that a defendant was "likely *** speeding" is not enough to prove that the defendant was traveling at least 21 miles per hour over the speed limit. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 53. This court has provided several examples of how the State may establish a defendant's speed:

> "[A] defendant's speed has been established by means of a radar gun [(citation)], by a stopwatch [(citation)], by pacing the defendant's vehicle [(citation)], or by direct testimony of an officer [(citation)]." *People v. Lipscomb*, 2013 IL App (1st) 120530, ¶ 7.

While the trier of fact may "presume that a person fleeing the police may travel at a high rate of speed ***, a trier of fact must determine a defendant's guilt on the evidence presented at trial and not presume evidence when there is none." *Steele*, 2014 IL App (1st) 121452, ¶ 53.

¶ 46 In *Lipscomb*, 2013 IL App (1st) 120530, ¶¶ 2, 8, this court held that the State failed to prove that the defendant was traveling at least 21 miles per hour over the speed limit where a police officer simply testified that his own speedometer read 55 miles per hour during his pursuit of the defendant through an area where the speed limit was 15 to 20 miles per hour. While the court acknowledged that the officer estimated his speed at one point in the pursuit, it noted that there was "no evidence as to the period of time he drove at this speed, whether this was a constant speed during the pursuit or whether it was simply the speed to which he accelerated in order to catch up to [the] defendant's car." *Id.* ¶ 8. The court added that there was "no evidence dealing with the relationship of [the officer's] and [the] defendant's vehicles during the pursuit, whether [the] defendant was pulling away from [the officer] or whether [the officer] was gaining on [the] defendant." *Id.* Because of the absence of any evidence other than the officer's speed at one point during the chase, the court found that there was insufficient evidence from which the trier of fact could reasonably infer that the defendant was traveling at least 21 miles per hour over the speed limit. *Id.* ¶ 9.

¶ 47 The State's evidence in this case was similarly vague. Officer Perez never specified how fast he drove while he pursued defendant. He said that he drove nearly 50 miles per hour at some point during the chase but never said whether that meant 49 miles per hour, 48 miles per hour, or some other speed. Nor could Perez be sure about the speed limit in the area where the chase occurred—he merely testified that the speed limit is "generally" 30 miles per hour in residential

areas. And the trial court simply "assum[ed]" that the speed limit was 30 miles per hour in its findings.[1]

¶ 48 Notably, when testifying at the motion to quash hearing, Perez said that he drove "at least 40 miles [per] hour." While not technically inconsistent with his trial testimony—that he was driving nearly 50 miles per hour—it certainly suggests that Perez may have been driving closer to 40 miles per hour than 50. And, when confronted with his testimony at the hearing, Perez equivocated further, saying he "wouldn't know exactly" his top speed, that he "didn't go over 50 miles [per] hour," and that "we were speeding above, way above the 30 miles per hour speed limit."

¶ 49 We acknowledge that, unlike the officer in *Lipscomb*, Officer Perez testified that he could not catch up to defendant even though he was traveling nearly 50 miles per hour, thus giving rise to an inference that defendant was going at least as fast as Perez. But Perez testified that he never exceeded 50 miles per hour. He conceded that he could have been going 49 miles per hour or some other speed "in that area." Even assuming that the speed limit was 30 miles per hour—which neither Officer Perez nor Garcia could definitively say—it is possible that defendant could have been traveling 50 miles per hour while maintaining or even increasing his distance from the officers. And 50 miles per hour would not be 21 miles per hour over a 30 miles-per-hour speed limit.

¶ 50 The State cites *People v. Brown*, 362 Ill. App. 3d 374, 377-79 (2005), in support of its claim that its evidence was sufficient, but the central issue in *Brown* was not whether the

[1] We acknowledge that, by law, the maximum speed limit in any "urban district" is generally 30 miles per hour. 625 ILCS 5/11-601(c)(1) (West 2010). But the trial court did not take judicial notice of this statute, and the State did not request the court to do so. The trial court's assumption regarding the speed limit was thus not based on the statutory speed limit.

defendant's vehicle travelled more than 21 miles per hour over the posted limit, but whether it did so after police officers signaled him to stop, versus before that moment. See also *Lipscomb*, 2013 IL App (1st) 120530, ¶ 9 (distinguishing *Brown* on same basis). Moreover, in *Brown*, the officer testified that he was driving 60 to 70 miles per hour, estimated that the defendant was driving 70 to 80 miles per hour, and said that the speed limit was 35 miles per hour. *Brown*, 362 Ill. App. 3d at 375-76. Thus, the testimony in *Brown* clearly established that defendant was traveling at least 21 miles per hour over the speed limit (*i.e.*, 56 miles per hour), where the defendant was driving, at the least, 60 miles per hour. Here, by contrast, defendant could have been driving under 51 miles per hour, since the most that Officer Perez could say was that he drove between 40 and 50 miles per hour at some point, and that he did not catch up to defendant during the chase.

¶ 51 The State's evidence unquestionably showed that defendant was speeding. But evidence that the defendant was speeding is not enough to prove that he was driving at least 21 miles per hour over the speed limit. Given the State's vague and equivocal evidence regarding defendant's speed, we find that the State failed to prove that defendant fled from the police while driving at least 21 miles per hour over the speed limit. We vacate his aggravated fleeing and eluding conviction under Count 9 to and, pursuant to Supreme Court Rule 615(b)(3), reduce it to misdemeanor fleeing or attempting to elude a police officer. See *Lipscomb*, 2013 IL App (1st) 120530, ¶ 12 (reducing conviction to misdemeanor fleeing and eluding where aggravating factor not proven).

¶ 52 2. Disobeying Two Traffic Signals

¶ 53 Defendant also argues that the State failed to prove the aggravating factor for Count 11—that defendant's flight "involve[d] disobedience of 2 or more official traffic control devices." 625

ILCS 5/11-204.1(a)(4) (West 2010). A stop sign is a traffic control device. See, *e.g.*, *People v. Grandadam*, 2015 IL App (3d) 150111, ¶¶ 26, 27 (affirming conviction for disobeying traffic control device where driver failed to stop at stop sign).

¶ 54 Defendant argues that the State failed to prove that he disobeyed at least two stop signs because neither Officer Garcia nor Officer Perez could specify "how many or which traffic devices [defendant] obeyed." But the State's evidence clearly established that defendant failed to stop at more than two stop signs after he began to flee from Garcia and Perez. Perez testified that defendant drove through "more than a few" stop signs, estimating that defendant disobeyed five or more in total. Garcia also estimated that defendant drove through four or five stop signs as well as a stop light at Pulaski Road.

¶ 55 Viewing this testimony in the light most favorable to the State, there was ample evidence to prove that defendant drove through at least two stop signs during his flight from Officers Perez and Garcia. We affirm defendant's conviction for aggravated fleeing and eluding under Count 11.

¶ 56 3. Necessity of Remand

¶ 57 Having reduced Count 9 to a misdemeanor and affirmed Count 11, we must decide the appropriate disposition of those counts in the circuit court. The trial court sentenced defendant on Count 9 and merged Count 11 into Count 9.

¶ 58 In our previous order in this case, we remanded for resentencing on Count 11 because, having vacated Count 9, Count 11 was the only conviction for aggravated fleeing and eluding left standing. The State filed a petition for rehearing, noting that Count 11 served as the predicate felony for defendant's armed violence conviction. See 720 ILCS 5/33A-2(a) (West 2010) (armed violence is commission of felony while armed with dangerous weapon). According to the State,

defendant could not be sentenced on Count 11 because sentence should be imposed only on the armed violence count, not on the count reflecting the predicate felony for armed violence. Instead, the State says, Count 11 should have been merged into Count 1. In his response, defendant agrees with the State's analysis. We granted the State's petition for rehearing and withdrew our previous order.

¶ 59 We agree with the State that no sentence can be imposed on Count 11 because it is the predicate felony for defendant's armed violence conviction. See *People v. Donaldson*, 91 Ill. 2d 164, 170 (sentence should be imposed only on armed violence conviction, not on predicate felony). Thus, resentencing on Count 11 would be improper. Rather, the mittimus should be corrected to reflect the merger of Count 11 into the armed violence count (Count 1).

¶ 60 But that leaves the question of what we should do with Count 9. As we noted above, the trial court originally sentenced defendant on Count 9. We have now reduced that count to a misdemeanor. On rehearing, neither party has offered a suggestion on the proper disposition of Count 9.

¶ 61 In *Lipscomb*, 2013 IL App (1st) 120530, ¶ 12, the court reduced the defendant's felony aggravated fleeing and eluding conviction to a misdemeanor fleeing and eluding conviction. The court noted that the defendant had already served 18 months in prison, which exceeded the maximum penalty for misdemeanor fleeing and eluding. *Id.* Thus, rather than remanding for resentencing, the court reduced the defendant's sentence to the maximum sentence for misdemeanor fleeing and eluding. *Id.*; see also Ill. S. Ct. R. 615(b)(4) (appellate court may "reduce the punishment imposed by the trial court").

¶ 62 A similar disposition is appropriate here. Defendant has already served well beyond the maximum sentence for misdemeanor fleeing or eluding and he continues to serve his 15-year

sentence for armed violence. See 625 ILCS 5/11-204(a) (West 2010) (fleeing or eluding is Class A misdemeanor); 730 ILCS 5/5-4.5-55(a) (West 2010) (sentence for Class A misdemeanor "shall be a determinate sentence of less than one year"). Thus, like the court in *Lipscomb*, we decline to remand for resentencing on Count 9. Instead, we reduce defendant's sentence on Count 9 to 364 days' incarceration.

¶ 63 We direct the clerk of the circuit court to issue a corrected mittimus reflecting the merger of Count 11 into Count 1, the reduction of Count 9 from felony aggravated fleeing and eluding to misdemeanor fleeing and eluding, and the reduction of defendant's sentence on Count 9 to 364 days' incarceration.

¶ 64 B. Proportionate Penalties and Armed Violence

¶ 65 Defendant next claims that the armed violence statute, as applied to him, violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. art. I, § 11).

¶ 66 Statutes carry a strong presumption of constitutionality. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). The legislature has broad discretion in setting criminal penalties. *People v. Taylor*, 102 Ill. 2d 201, 208 (1984); *Sharpe*, 216 Ill. 2d at 487. The legislature's power is not unlimited, however, as the sentences it prescribes must satisfy constitutional constraints. *People v. Morris*, 136 Ill. 2d 157, 161 (1990). We review the constitutionality of a statute *de novo*. *People v. Masterson*, 2011 IL 110072, ¶ 23.

¶ 67 The armed violence statute makes it an offense to commit any felony while armed with a dangerous weapon, including a firearm. 720 ILCS 5/33A-2(a) (West 2010). A violation of the statute with a Category I weapon (including a handgun (720 ILCS 5/33A-1(c)(2) (West 2010)) is a Class X felony with a minimum sentence of 15 years' imprisonment. 720 ILCS 5/33A-3(a) (West 2010).

¶ 68 The proportionate-penalties clause of the Illinois Constitution states 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. The proportionate-penalties clause places two limits on the legislature's ability to prescribe criminal sentences: (1) it prohibits criminal penalties that are "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community"; and (2) it prevents offenses with the same elements from having different sentences. (Internal quotation marks omitted.) *Sharpe*, 216 Ill. 2d at 487, 521.

¶ 69 Defendant argues that the armed violence statute violates each of these two limits. We will start with the first, defendant's claim that the mandatory minimum 15-year sentence is so cruel and disproportionate that it shocks the conscience.

¶ 70 In *Brown*, 362 Ill. App. 3d at 385, this court held that the 15-year minimum sentence for armed robbery predicated on the felony of aggravated fleeing or attempting to elude did not violate the proportionate-penalties clause. The court noted that the armed violence statute was enacted " 'to respond emphatically to the growing incidence of violent crime,' " that the chance of violence increases when a felony is committed while the defendant is armed, and that the harsh penalties in the armed violence statute serve a deterrent purpose. *Id.* at 384 (quoting *People v. Alejos*, 97 Ill. 2d 502, 507-08 (1983)). The court then explained why aggravated fleeing or attempting to elude was an appropriate predicate felony for the offense of armed violence:

> "If ever there was a felony offense during which the use of a deadly weapon should be deterred, it is a high-speed flight from or attempt to elude police. The possible consequences to the peace officers involved, and to any citizens unlucky enough to be nearby, if defendant decided to employ that deadly weapon, especially a firearm, are

> unquestionable. It is not the case, as defendant posits, that defendant's felony offense of armed violence predicated on aggravated fleeing or attempting to elude was merely a misdemeanor offense of unlawful use of a weapon that was enhanced to a felony simply because defendant was driving more than 20 miles over the speed limit. It is not just the speed of defendant's car that elevated the offense of aggravated fleeing or attempting to elude to the status of a felony. It is the fact that this speeding occurred in an attempted flight from peace officers, from uniformed police in a marked squad car who had given defendant a signal to stop. Defendant's flight from police, his refusal to stop when so ordered by the civil authority sworn to protect our lives, laws and property, elevates his offense to a felony, a felony then exacerbated by defendant's decision to carry a firearm during its commission." *Brown*, 362 Ill. App. 3d at 384-85.

While recognizing that the 15-year minimum sentence was "a stringent penalty," the court found that penalty to be reflective of the seriousness of the offense. *Id.* at 385. Thus, the court held that the sentence was "not cruel, degrading, or so grossly disproportionate to the offense as to shock the moral sense of the community." *Id.*

¶ 71 We adhere to our precedent in *Brown*. A 15-year sentence is not so grossly disproportionate as to shock the moral sense of the community when considering defendant's acts. Defendant fled from the police in his vehicle while he was carrying three handguns. The possibility of violence erupting from that situation is apparent, and the deterrent purpose of the armed violence statute is served by the statute's admittedly harsh minimum sentence.

¶ 72 Defendant acknowledges this court's holding in *Brown* but contends that his case is different because, in *Brown*, there was evidence that the defendant fired his weapon. *Brown*, 362 Ill. App. 3d at 375. That factual distinction is accurate, but the court in *Brown* did not consider

the defendant's use of a handgun in evaluating the 15-year minimum for armed violence. To the contrary, the court considered whether "a 15-year sentence for *possessing* a gun while fleeing from police shocks the moral conscience." (Emphasis added.) *Id.* at 382. And that makes sense, as the defendant in *Brown* did not use the firearm while he was fleeing—the police testified that they heard gunshots *before* they began their pursuit. *Id.* at 375. Nor was the defendant in *Brown* charged with the provision of the armed violence statute that prohibits the "discharge[ ]" of a firearm during a felony offense (720 ILCS 5/33A-2(b) (West 2010)); he was charged with the same offense as defendant in this case. Thus, the court in *Brown* considered whether a 15-year sentence for merely possessing a firearm during an attempt to flee from the police shocked the conscience—the same issue that defendant presents in this case.

¶ 73 Defendant also argues that *Brown* is distinguishable because, at the time that case was decided, "Illinois law generally prohibited anyone from carrying a handgun in public." He points out that, since *Brown* was decided, our supreme court has held that the second amendment of the United States Constitution (U.S. Const. amend. II) provides individuals a right to carry firearms outside of the home. See, *e.g.*, *People v. Mosley*, 2015 IL 115872, ¶ 25. According to defendant, this second amendment jurisprudence makes the armed violence statute unconstitutional, as it penalizes him for exercising his constitutional right to carry a firearm in public.

¶ 74 While the Illinois Supreme Court has recognized the individual right to bear arms outside the home, it has also recognized that " 'the right secured by the Second Amendment is not unlimited,' " and that " 'the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' " *People v. Aguilar*, 2013 IL 112116, ¶ 26 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). And the court has expressly

recognized that " 'prohibitions on the possession of firearms by felons' " do not violate the second amendment. *Aguilar*, 2013 IL 112116, ¶ 26 (quoting *Heller*, 554 U.S. at 626-27).

¶ 75 Armed violence is not a statute that imposes a "flat ban" on carrying firearms outside the home. See, *e.g.*, *Aguilar*, 2013 IL 112116, ¶ 19 (striking down statute that constituted a " 'flat ban' " on carrying firearms outside the home (quoting *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012))). To the contrary, it prohibits the *commission of a felony* while armed with a firearm. If the second amendment allows states to prohibit felons from possessing firearms (see *Aguilar*, 2013 IL 112116, ¶ 26; *Heller*, 554 U.S. at 626-27), it would be absurd to suggest that the second amendment prevents states from prohibiting the possession of a firearm during the commission of a felony. Defendant's citation to second-amendment jurisprudence does not persuade us to depart from the court's holding in *Brown*.

¶ 76 We hold that the 15-year minimum sentence for armed violence predicated on aggravated fleeing or attempting to elude a police officer is not so cruel, degrading, or wholly disproportionate to the offense to shock the conscience of the community.

¶ 77 C. Proportionate Penalties and AUUW

¶ 78 Defendant next argues that the provision of the AUUW statute of which he was convicted—section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code of 1963 (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010))—violates the proportionate-penalties clause because it imposes more serious penalties than two other statutes that proscribe the same conduct: (1) section 2(a)(1) of the Firearm Owners Identification Card Act (the FOID Card Act) (430 ILCS 5/2(a)(1) (West 2010)); and (2) section 24-1(a)(4)(iii) of the Criminal Code of 1963 (720 ILCS 5/24-1(a)(4)(iii) (West 2010)).

¶ 79 As we noted above, the proportionate-penalties clause prohibits offenses with the same elements from having different sentences. *Sharpe*, 216 Ill. 2d at 487, 521. To determine if two statutes with the same elements impose different sentences, we apply the "identical elements test, which requires the court to compare the elements of each offense as set forth in the statute defining it." *People v. Ligon*, 2016 IL 118023, ¶ 16. If the two offenses do not have identical elements, the proportionate-penalties argument automatically fails. *Sharpe*, 216 Ill. 2d at 521 ("A defendant may no longer challenge a penalty under the proportionate penalties clause by comparing it with the penalty for an offense with different elements."); *People v. Williams*, 2015 IL 117470, ¶¶ 14, 21.

¶ 80 Section 24-1.6(a)(1), (a)(3)(C) states:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; [and]
>
> ***
>
> (3) One of the following factors is present:
>
> * * *
>
> (C) the person possessing the firearm has not been issued a currently valid [FOID card.]"

We now determine whether either of the two statutes defendant cites contain the same elements as section 24-1.6(a)(1), (a)(3)(C).

¶ 81 1. Section 24-1.6(a)(1), (a)(3)(C) and FOID Card Act

¶ 82 First, defendant contends that section 24-1.6(a)(1), (a)(3)(C) has the same elements as section 2(a)(1) of the Firearm Owners Identification Card Act (430 ILCS 5/2(a)(1) (West 2010)), which states:

> "No person may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a [FOID] Card previously issued in his or her name by the Department of State Police under the provisions of this Act."

Defendant argues that, under both statutes, "the prosecution must prove that the defendant possessed a firearm and did not have a valid FOID card," but that a violation of section 24-1.6(a)(1), (a)(3)(C) is a Class 4 felony (720 ILCS 5/24-1.6(d)(1) (West 2010)), whereas a violation of the FOID Card Act is a misdemeanor (430 ILCS 65/14(b) (West 2010)).

¶ 83 Shortly after defendant filed his opening brief in this case, our supreme court decided *Williams*, 2015 IL 117470, ¶¶ 14, 21, which held that section 24-1.6(a)(1), (a)(3)(C) and section 2(a)(1) of the FOID Card Act had different elements, and thus the very proportionate-penalties argument that defendant raises here failed as a matter of law. Specifically, the court noted that 24-1.6(a)(1), (a)(3)(C) "requires proof that a person possessed a firearm outside his home," whereas "the FOID Card Act does not have a location requirement." *Id.* ¶ 14. We are bound by our supreme court's holding in *Williams*.

¶ 84 Defendant argues that, pursuant to *Aguilar*, 2013 IL 112116, the location element is irrelevant because the second amendment applies with equal force inside and outside the home. But the Illinois Supreme Court rejected the same argument in *Williams*:

> "Defendant maintains that *Aguilar* agreed with the proposition in *Moore* that 'there is no constitutional difference between possessing a firearm inside one's home versus outside the home.' However, defendant misconstrues our holding in *Aguilar*. Our exact language in *Aguilar* was: '[o]f course, in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation.' [Citation.] In *Aguilar*, we held section 24–1.6(a)(1), (a)(3)(A) of the AUUW statute facially unconstitutional. [Citation.] We did not address the constitutionality of any other subsection in the statute. Thus, *Aguilar* is inapplicable here." *Id.* ¶ 16 (quoting *Aguilar*, 2013 IL 112116, ¶ 21).

Pursuant to *Williams*, we reject defendant's argument that section 24-1.6(a)(1), (a)(3)(C) and section 2(a)(1) of the FOID Card Act have identical elements. See also *People v. Schweihs*, 2015 IL 117789, ¶ 14 (relying on *Williams* to find no proportionate penalties violation between same statutes).

¶ 85 2. Sections 24-1.6(a)(1), (a)(3)(C) and UUW

¶ 86 Next, defendant contends that section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute has identical elements to section 24-1(a)(4)(iii), which defines the non-aggravated version of the offense of unlawful use of weapons (UUW), but that the UUW provides for less stringent penalties for the same offense.

¶ 87 Again, the AUUW statute, section 24-1.6(a)(1), (a)(3)(C), states:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; [and]

***

(3) One of the following factors is present:

* * *

(C) the person possessing the firearm has not been issued a currently valid [FOID card.]"

¶ 88 The relevant language of the UUW cited by defendant provides:

"(a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

(4) Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm, *except that this subsection (a)(4) does not apply to or affect transportation of weapons that meet one of the following conditions*:

* * *

(iii) are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a

> currently valid [FOID] card." (Emphasis added.) 720 ILCS 5/24-1(a)(4)(iii) (West 2010).

A violation of section 24-1(a)(4)(iii) is a Class A misdemeanor. 720 ILCS 5/24-1(b) (West 2010).

¶ 89 Defendant argues that, under sections 24-1.6(a)(1), (a)(3)(C) and 24-1(a)(4)(iii), "the prosecution must prove that the defendant possessed a firearm outside the home, and did not have a valid FOID card." The State responds that these sections have different elements because under section 24-1.6(a)(1), (a)(3)(C) the State must prove that the defendant did not have a FOID card, whereas section 24-1(a)(4)(iii) simply provides a valid FOID card as a possible *defense*. We agree with the State.

¶ 90 We take guidance first from *People v. Tolbert*, 2016 IL 117846, ¶¶ 1, where the Illinois Supreme Court held that the "invitee requirement" of the AUUW statute was "an exemption to the offense that the defendant must raise and prove," rather than an element that the State must prove. The court noted that the relevant language in the AUUW statute—that an individual does not commit the offense while " 'on the land or in the legal dwelling of another person as an invitee with that person's permission' " (*id.* ¶ 13 (quoting 720 ILCS 5/24-1.6(a)(1) (West 2012))—was also found in section 24-2 of the Criminal Code of 2012 (720 ILCS 5/24-2 (West 2012)), "which is titled, 'Exemptions.' " *Id.* ¶ 16. The supreme court noted that the "Exemptions" statute further prescribed that " 'An information or indictment based upon a violation of any subsection of this Article [Article 24] need not negative any exemptions contained in this Article. The defendant shall have the burden of proving such an exemption.' " *Id*. (quoting 720 ILCS 5/24–2(h) (West 2012)). Thus, the court concluded, "[t]he plain language of section 24-2 establishes that the invitee requirement of section 24-1.6 was intended by the

General Assembly to be an exemption to the offense of [AUUW] and not an element." *Id.* ¶ 17. It was therefore "incumbent on the defendant to prove his entitlement to the exemption." *Id.*

¶ 91 Like the invitee requirement of the AUUW statute, the FOID-card requirement of the UUW statute—that a defendant does not commit UUW when the firearms "are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid [FOID] card" (720 ILCS 5/24-1(a)(4)(iii) (West 2010))—also appears in the "exemptions" statute. Specifically, section 24-2(i) of the Criminal Code of 1963 (720 ILCS 5/24-2(i) (West 2010)) states:

> "[N]othing in this Article [(*i.e.*, Article 24)] shall prohibit, apply to, or affect the transportation, carrying, or possession of any pistol, revolver, stun gun, taser, or other firearm *** which is unloaded and enclosed in a case, firearm carrying box, shipping box, or other container, by the possessor of a valid [FOID] Card."

Because section 24-2 contains identical language to the FOID-card requirement in section 24-1(a)(4)(iii), the reasoning of *Tolbert* applies here. The FOID-card requirement in the UUW statute, section 24-1(a)(4)(iii), is not an element of the offense of UUW that the State must prove; it is an exemption that the defendant must establish.

¶ 92 As additional support for our conclusion, in *People v. Foster*, 394 Ill. App. 3d 163, 169 (2009), this court held that the exceptions to AUUW found in section 24-1.6(c) of the Criminal Code of 1963 (720 ILCS 5/24-1.6(c) (West 2010)) are not elements of the offense of AUUW. Section 24-1.6(c) provides that the AUUW statute "does not apply" to the possession or transportation of weapons that:

> "(i) are broken down in a non-functioning state; or
>
> (ii) are not immediately accessible; or

> (iii) are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card." 720 ILCS 5/24-1.6(c) (West 2010).

¶ 93 The defendant in *Foster* pointed to paragraph (i) above, referring to weapons in a "nonfunctioning state." Foster, 394 Ill. App. 3d at 169 (quoting 720 ILCS 5/24-1.6(c)(i) (West 2010)). The defendant argued that it was the State's burden to prove that the weapon found in his possession was *not* "nonfunctioning," but this court held that this language was not an element of the offense but rather an exception, and the State "[was] not required to disprove that exception." *Id*.

¶ 94 *Foster* is applicable here because the language found in section 24-1.6(c), which *Foster* held to be an exception to AUUW and not an element, is the same language in the UUW statute to which defendant now points for his proportionate-penalties argument. *Compare* 720 ILCS 5/24-1.6(c) (West 2010) *with* 720 ILCS 5/24-1(b) (West 2010). If that language found within the AUUW statute is an exception to the offense and not an element, we can see no reason to read that same language in the UUW statute differently.

¶ 95 Thus, for all of these reasons, we conclude that the FOID-card requirement in the UUW statute, is not an element of the offense of UUW that the State must prove; it is an exemption that the defendant must establish.

¶ 96 In contrast, as the supreme court has reminded us twice in the last year, the lack of a valid FOID card *is* an essential element of the offense of AUUW as defined by section 24-1.6(a)(1), (a)(3)(C). See *Schweihs*, 2015 IL 117789, ¶ 14 ("[T]o prove the offense of AUUW [under section 24-1.6(a)(1), (a)(3)(C)], *the State is required to establish* that [a] defendant knowingly carried on his person or in any vehicle, outside the home, a firearm *without having been issued a*

valid FOID card." (Emphases added.)); *Williams*, 2015 IL 117470, ¶ 14 ("A person violates section 24–1.6(a)(1), (a)(3)(C) of the AUUW statute by knowingly carrying on his person or in any vehicle, outside the home, a firearm without having been issued a valid FOID Card."). Because the State must prove that the defendant lacked a FOID card to secure a conviction under section 24-1.6(a)(1), (a)(3)(C), but the lack of a FOID card is *not* an element of UUW under section 24-1(a)(4)(iii), these offenses do not meet the identical-elements test.

¶ 97 Because neither statute to which defendant compares section 24-1.6(a)(1), (a)(3)(C) has the same elements as that statute, this proportionate-penalties argument likewise fails. *Id*.

¶ 98 D. Finding of Guilt Before Defendant's Testimony

¶ 99 Finally, defendant contends that the trial court deprived him of a fair trial by finding him guilty before he had an opportunity to testify. And, defendant says, by only giving him the chance to testify after already finding him guilty, the court effectively compelled him to testify.

¶ 100 A criminal defendant has a fundamental right to testify or not to testify. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *People v. Patrick*, 233 Ill. 2d 62, 69 (2009). Only the defendant may waive that right (*id*.); the decision to testify or not is not a strategic matter left to trial counsel. *People v. Smith*, 326 Ill. App. 3d 831, 845 (2001).

¶ 101 But it is well-established that "a defendant seeking reversal of his conviction on the basis that he was precluded from testifying at trial must demonstrate that he 'contemporaneously asserted his right to testify by informing the trial court that he wished to do so.' " *People v. Morris*, 2014 IL App (1st) 130512, ¶ 48 (quoting *People v. Smith*, 176 Ill. 2d 217, 234 (1997)). "If a defendant is represented by counsel at trial and does not testify, a trial court may presume that he chose not to exercise this right, unless he notified the trial court of his desire to testify." *People v. Davis*, 378 Ill. App. 3d 1, 11 (2007).

¶ 102 Here, defendant did not alert the trial court that he wanted to testify before he rested his case. Nor could defendant plausibly claim that the trial court denied him an opportunity to do so; immediately after entering into a stipulation with the State, defense counsel said, "Okay. And with that, we would rest." The court then offered the defense time to prepare its closing argument, but defense counsel declined that offer. The trial court then heard defense counsel's closing argument and the State's closing argument. Only after both parties had argued did the trial court find defendant guilty. Defendant certainly had the chance to assert his right to testify but did not. Thus, defendant waived his right to testify. See, *e.g.*, *People v. Davis*, 373 Ill. App. 3d 351, 361 (2007) (defendant waived right to testify when defendant did not "alert[ ] the trial court that he wanted to testify"); *Chatman*, 357 Ill. App. 3d at 704 ("[W]e ascertain no instance where defendant notified the court of his desire to testify at his own trial, and we therefore conclude that the trial court *** was correct in presuming that defendant had waived it.").

¶ 103 Nor did the trial court err in failing to admonish defendant regarding his right to testify. Our supreme court has held that "the trial court is not required to advise a defendant of his right to testify, to inquire whether he knowingly and intelligently waived that right, or to set of record [the] defendant's decision on this matter." *Smith*, 176 Ill. 2d at 235. Thus, the trial court was under no obligation to tell defendant about his right to testify before permitting the parties to deliver closing arguments.

¶ 104 And we find no error in the trial court's decision to reopen the case to let defendant testify after admonishing him of his right to testify. "It is within the trial court's sound discretion as to whether a case may be reopened for further evidence, and unless that discretion is clearly abused, reversal will not result." *People v. Collier*, 329 Ill. App. 3d 744, 749 (2002). Even though the trial court should exclude a defendant's testimony "[o]nly under the most extreme

circumstances" (*id.*), this court has affirmed trial courts' decisions to deny defendants the opportunity to testify when they have not asserted their right to testify in a timely manner. See, *e.g.*, *id.* at 750 (affirming decision to not reopen case where "defendant turned down three opportunities to testify before the trial court denied his request to reopen his case"). Here, the trial court took the conscientious action of advising the defendant of his right to testify even though the court was not obligated to do so. And the court then reopened the case to hear defendant's testimony, as well as new closing arguments from both parties, before finally finding him guilty.

¶ 105 Defendant suggests that the trial court prejudged his guilt by finding him guilty before he testified when, in reopening the case, the court said, "[W]e'll go back to whatever, square five or six or something, in the defense case and we'll take a few minutes recess, and then you may testify." Defendant contends that returning to "square one," *i.e.*, ordering a completely new trial, "was the only constitutional choice."

¶ 106 Defendant is incorrect. This court has expressly recognized that, in bench trials, courts can, and often should, reopen cases when a defendant asserts his desire to testify after resting his case. See, *e.g.*, *People v. Figueroa*, 308 Ill. App. 3d 93, 104 (1999); *People v. Johnson*, 151 Ill. App. 3d 1049, 1054 (1987). And as we pointed out above, the court is not even required to reopen a case whenever the defendant says he wants to testify; the decision to reopen a case is left to the court's discretion. *Collier*, 329 Ill. App. 3d at 749. Thus, the trial court was not obligated to order a new trial when defendant belatedly asserted his desire to testify.

¶ 107 Nor do we agree with defendant's suggestion that, when the court reopened the case, it "could not be fair and impartial when listening to [defendant's] testimony because it had already formed its opinion that he was guilty." During defendant's testimony and the subsequent closing

arguments, the trial court made no comments suggesting bias or a refusal to consider defendant's testimony with an open mind, and we will not presume otherwise without record evidence to the contrary. See, *e.g.*, *People v. Abston*, 263 Ill. App. 3d 665, 673 (1994) (declining to presume that trial judge had prejudged defendant's case even though he had already found codefendant guilty where there was no indication on record that court had prejudged defendant's case, had relied on improper evidence, or had been unwilling to hear defendant's evidence).

¶ 108 Defendant cites *People v. Johnson*, 4 Ill. App. 3d 539, 541 (1972), in support of his argument that the trial court improperly prejudged his case, but in *Johnson*, the trial court found the defendant guilty after "the direct examination of a defense witness had just been completed, and the trial judge did not even wait for the prosecutor to proceed with cross-examination, for the defense to rest, or for final argument to be made." Here, the court gave the defense time to present its case, to rest, and to argue before finding defendant guilty. That the trial court elected to admonish defendant of his right to testify and to reopen the trial to allow defendant to present additional evidence and present another closing argument does not demonstrate any prejudgment on the trial court's part.

¶ 109 Defendant also argues that the trial court effectively compelled him to testify when, after finding him guilty, it offered to reopen the case and allow defendant to testify. But the trial court was not required to reopen the case and let defendant testify at all. Defendant had his opportunity to assert his right to testify, but he did not seize it. Defendant has not explained how we can possibly say that the trial court erred in giving him another opportunity to assert a right when it was under no obligation to do so.

¶ 110 We recognize that, when the trial court asked defendant if he wanted to testify after it had found him guilty, the only rational answer to that question was yes. Defendant had nothing to

lose and everything to gain by testifying at that point. But defendant suffered no detriment when the trial court exercised an abundance of caution in ensuring that his right to testify was protected. If anything, defendant received an additional benefit by the trial court's offer to reopen the case.

¶ 111 Nor does defendant's testimony at the hearing on his posttrial motion support his claim that he was compelled to testify. Defendant said he testified because he was "[t]rying to help [his] case." He never said that he felt as though he had to testify, or that he wanted to testify before defense counsel rested his case.

¶ 112 We hold that the trial court committed no error in admonishing defendant of his right to testify and reopening his case to allow defendant to exercise that right.

¶ 113 III. CONCLUSION

¶ 114 For the reasons stated, we vacate defendant's conviction for aggravated fleeing or attempting to elude a peace officer on Count 9, and enter judgment of conviction on Count 9 for misdemeanor fleeing or attempting to elude a peace officer. We reduce defendant's sentence on Count 9 to 364 days' incarceration. We affirm defendant's conviction for aggravated fleeing or attempting to elude a peace officer on Count 11 and direct the clerk of the circuit court to correct the mittimus to reflect the merger of Count 11 into Count 1. We affirm defendant's remaining convictions and sentences.

¶ 115 Vacated in part and judgment modified; affirmed in part; mittimus corrected.