2017 IL App (1st) 143534-U

FIRST DIVISION
August 7, 2017

No. 1-14-3534

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	) Appeal from the Circuit Court of) Cook County, Criminal Division
v.	) No. 13 CR 16854
TRAVIS RULE, Defendant-Appellant.	) Honorable Rosemary Higgins,) Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence at trial proved beyond a reasonable doubt that defendant was guilty of armed robbery while armed with a firearm. The trial court did not abuse its discretion when sentencing defendant to 27 years in prison, a term within the statutory range after considering all the relevant factors in aggravation and mitigation.

¶ 2 Following a bench trial, the trial court found defendant Travis Rule guilty of two counts of armed robbery while armed with a firearm, and two counts of aggravated unlawful restraint. The trial court sentenced defendant to a total of 27 years of imprisonment for armed robbery with a firearm to be served concurrently with 5 years for aggravated unlawful restraint. The sentence imposed for the armed robbery with firearm convictions included the 15-year mandatory firearm

enhancement. On appeal, defendant argues that: (1) the State failed to prove that the object carried by the co-defendant was a firearm; (2) the findings of guilt against defendant for both charges of armed robbery with a firearm and armed robbery with a dangerous weapon other than a firearm, were legally inconsistent; (3) defendant's sentence is excessive and should be reduced; (4) defendant's convictions for aggravated unlawful restraint should be vacated pursuant to the one-act, one-crime rule. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Following the events that took place on August 6, 2013, defendant, along with co-defendant Denzel Walker was charged with: two counts of armed robbery while armed with a firearm, two counts of armed robbery while armed "with a dangerous weapon, other than a firearm, to wit: a bludgeon," two counts of aggravated unlawful restraint while using a firearm, and two counts of aggravated unlawful restraint while using a "dangerous weapon, other than a firearm, to wit: a bludgeon."

¶ 5 At defendant's and co-defendant Walker's[1] joint bench trial, Anna DeSonia and Ashley Willis testified that, shortly after 11 a.m. on August 6, 2013, they were riding eastbound on the CTA blue line train to downtown Chicago. DeSonia testified that she entered the train at the Harlem stop around 11:13 a.m. Willis testified that, while waiting on the Austin platform, she noticed defendant and co-defendant Denzel Walker sitting next to each other. The train arrived, Willis entered a train car, and defendant and co-defendant entered the car after her. Willis noticed a woman on the train whom she did not know, but later learned it was DeSonia. Willis testified that she sat down in a seat diagonally across from DeSonia. DeSonia and Willis both

[1] The defendants Denzel Walker and Travis Rule each filed a separate appeal. The order adjudicating co-defendant Denzel Walker's appeal overlaps almost entirely with this order and is being filed concurrently. *People v. Walker*, 2017 IL App (1st) 151120-U (unpublished order under Supreme Court Rule 23).

made in-court identifications of defendant and co-defendant Walker as the two men they saw on the train.

¶ 6 DeSonia and Willis testified that initially, both defendant and co-defendant were sitting together, but then stood up. They exchanged a few words and began walking up and down the aisle of the train. Defendant stopped and stood near the doors. Co-defendant Walker approached DeSonia, sat down in an empty seat next to her, and told her to give him her phone. DeSonia testified that she had her headphones on and was using her iphone to play music. She could hear what co-defendant was saying and tried to turn her body toward the window of the train to try to shield her phone. She felt something hard stick into her side, and when she looked down she saw that co-defendant Walker had his hand on what she believed was a gun. DeSonia testified that the gun was a semiautomatic rather than a revolver because it did not have the honeycombed-shaped area where bullets are placed. Co-defendant Walker told her to give him the phone, and she did. Meanwhile, defendant was still by the door facing them and looking in their direction.

¶ 7 Willis testified that she was approximately 3 feet away when she saw DeSonia give co-defendant Walker her phone. Willis noticed defendant was one foot from her and was looking at co-defendant. Willis began to stand up and used her own phone to call 911. At that point, co-defendant Walker turned to her and pointed a gun at her. She stated that she knew that co-defendant Walker was holding a semiautomatic gun as she learned from television shows that semiautomatics do not have the spinning barrel like revolvers. As co-defendant approached her, Willis kicked him in the groin area, causing him to fall onto her. The gun touched the side of her neck for about 30 seconds. Willis stated that it was heavy and felt cold like metal. Co-defendant Walker regained his balance and yelled at her demanding her phone. Willis handed it over. She

testified that through these events, defendant was still standing by the door of the train looking at them. The entire incident lasted about 5 minutes.

¶ 8 When the train stopped at the next station, which was Cicero, both defendant and co-defendant Walker ran off the train. An individual who got on the train gave the women his phone to call 911. The operator instructed the women to go to the nearest police station. The women got off at the Kedzie stop of the blue line, and walked to the police station where they met with Detective Turner. Subsequently, both DeSonia and Willis separately viewed a photo array from which they recognized defendant as the man on the train standing by the door acting as a lookout. DeSonia and Willis met separately with Detective Johnson, and viewed a line-up from which they identified defendant as the man standing by the train door acting as a lookout. Each of them made an in-court identification of defendant as the person they saw on the train, in the line-up, and from the photo array.

¶ 9 The parties stipulated to the foundation of the security camera footage at the Austin and Cicero CTA train platforms on the date in question. Both women identified defendant and co-defendant Walker in the surveillance footage.

¶ 10 Detective Johnson testified that he questioned defendant following his arrest on August 17, 2013. When asked about his participation in the robbery, defendant stated that he and co-defendant Walker entered the blue line train at Cicero and co-defendant Walker used a gun to rob the women of their iphones while he acted as a lookout near the doors of the train. Defendant also told Johnson that, after the robbery, they went to two stores attempting to sell the phones, and ultimately sold them at a store at Division Avenue and Waller Avenue.

¶ 11 The court found the victims' testimony credible and found defendant guilty on all counts. The court held that defendant and co-defendant acted together before, during, and after the robberies, and that they were accountable for each other's actions.

¶ 12 At sentencing, the court concluded that two counts of armed robbery with a dangerous weapon other than a firearm would merge into the armed robbery with a firearm counts. In aggravation, the court considered these offenses took place on a CTA train, and that the victims were on their way to work. The court considered defendant's history of prior delinquency for burglary and adult conviction for robbery. In mitigation, the court stated that it considered defendant's statement in allocution in which he expressed remorse and recognized the seriousness of the offenses. The court also noted that it considered the fact that co-defendant Walker, rather than defendant, held the gun during the offense as mitigation. The court sentenced defendant to a term of 12 years for the armed robbery with a firearm convictions, plus the mandatory 15-year enhancement for a total of 27 years to run concurrently with a term of 5 years for the two aggravated unlawful restraint with a firearm convictions. The court denied defendant's motion to reconsider his sentence. This appeal follows.

¶ 13 ANALYSIS

Sufficiency of the Evidence Claim

¶ 14 Defendant contends that the State failed to prove beyond a reasonable doubt that co-defendant Walker was armed with an actual firearm during the robberies and thus his convictions should be reduced from armed robberies (720 ILCS 5/18–2(a)(2) (West 2012)) to simple robberies (720 ILCS 5/18–1(a) (West 2012)). Defendant asserts that the victims' testimony about the gun amounted to "subjective beliefs" rather than objective proof that the weapon met the definition of a firearm, and that the description of the gun was insufficient as a matter of law to

support his convictions for armed robbery with a firearm.

¶ 15 When a defendant challenges the sufficiency of the evidence, as defendant does here, our inquiry is limited to determining "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Hall*, 194 Ill. 2d 305, 330 (2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In a bench trial, it is the responsibility of the trial court, as the trier of fact, to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009) (citing *Jackson*, 443 U.S. at 318–19). "It follows that where the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004).

¶ 16 The reviewing court should not substitute its judgment for that of trial court and it is not our function to retry the defendant. *Siguenza-Brito*, 235 Ill. 2d at 224-25. We must set aside a defendant's conviction only if, after reviewing the evidence, we find that it was so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Id.* at 225.

¶ 17 Defendant was convicted of armed robbery under section 18-2(a)(2) of the Criminal of Code of 1961 (the Code) (720 ILCS 5/18-2(a)(2) (West 2012) based, in relevant part, on the trial court's finding that co-defendant Walker committed robbery while armed with a "gun." Defendant does not dispute that he is guilty of robbery. He argues instead he is not guilty of armed robbery as the State did not prove the "firearm" element of the offense.

¶ 18 Section 2-7.5 of the Code (720 ILCS 5/2-7.5 (West 2012)) provides that the term "firearm" has the meaning ascribed to it in section 1.1 of the Firearm Owners Identification Card

Act (FOID Act) (430 ILCS 65/1.1 (West 2012)). The FOID Act defines a firearm as: "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." 430 ILCS 65/1.1 (West 2012). The definition specifically excludes any pneumatic, spring, paint ball or BB gun and assorted other devices. *Id.* Defendant argues the State failed to prove that the "gun" DeSonia and Willis saw co-defendant Walker brandishing met this definition of a firearm or did not fall under any of the exceptions.

¶ 19 We first note that defendant includes in his brief a photograph of a pellet gun to demonstrate "that replica guns can be indistinguishable from real firearms." He also cites to various decisions from other jurisdictions where police officers mistook toy guns for real ones. This evidence was not first submitted to the trial court, and we therefore cannot consider it on appeal. *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 20 (holding that to consider photographs of a pellet gun and air pistol not submitted to the trial court "would amount to a trial *de novo* on an essential element of the charges") (quoting *People v. Williams*, 200 Ill. App. 3d 503, 513 (1990)); *People v. Clark*, 2015 IL App (3d) 140036, ¶ 24 (rejecting the defendant's request to consider "a photograph of an air rifle that would not be considered a 'firearm' under the statutory definition" and "federal and [state] cases in which police officers mistook fake guns for real guns" because they had not been submitted as evidence to the trial court).

¶ 20 Illinois courts have repeatedly addressed the issue of the sufficiency of the evidence from which a trier of fact may infer that an object used in a crime was a firearm. In *People v. Ross*, 229 Ill. 2d 255, 273-76 (2008), our supreme court rejected a presumption that an object appearing to be a gun is a loaded and operable firearm, instead finding that a trier of fact may infer from trial evidence that an object was a firearm. In *People v. Washington*, 2012 IL 107993,

our supreme court found that the victim's unequivocal testimony may be sufficient evidence that a defendant was armed with a gun during his offense. *Washington*, 2012 IL 107993, ¶ 36; *People v. Malone*, 2012 IL App (1st) 110517, ¶ ¶ 40–52; *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007). Unequivocal eyewitness testimony that a defendant held a gun is sufficient circumstantial evidence that he or she was armed with a firearm and the State does not have to prove by direct or physical evidence that the "gun" seen by the witnesses is a firearm within the meaning of the statutory definition. *People v. Wright*, 2015 IL App (1st) 123496, ¶ 74.

¶ 21 Here, the victims' testimony was circumstantial evidence sufficient to establish that co-defendant Walker used a firearm during the robberies. DeSonia testified that she felt something "really hard" pushing into her left side and then saw co-defendant Walker, sitting next to her pushing a black gun into her side while demanding her phone. DeSonia also testified that the gun was semiautomatic rather than a revolver because it did not have the honeycomb-shaped area where you place bullets of a revolver. Willis corroborated DeSonia's testimony stating that co-defendant Walker pointed the gun at her, and she knew it was a black semiautomatic gun rather than a revolver because it did not have the spinning barrel piece that revolvers do. Willis also stated that when Walker fell onto her, she felt the gun on her neck for about 30 seconds and it felt heavy and like cold metal. The court found the victims' testimony that the weapon was semiautomatic to be credible, and, on this record, we defer to the court's credibility determinations.

¶ 22 The positive and credible testimony of DeSonia and Willis, when viewed in the light most favorable to the prosecution, is sufficient to support finding beyond a reasonable doubt that Walker was armed with an actual firearm as defined by the Code during the commission of the robbery. See *Malone*, 2012 IL App (1st) 110517, ¶ 52 (the testimony of a single eyewitness that

the defendant was armed with "a black or black and silver gun," corroborated by a video which depicted "what appears to be an actual gun," was sufficient to support a finding that defendant was armed with a firearm); *People v. Washington,* 2012 IL 107993, ¶ 36 (the testimony of single eyewitness that defendant held a gun to his head supported a finding that defendant was armed with an actual firearm).

¶ 23 Defendant avers that the courts in *Malon*e and *Washington* erroneously relied on "precedent that analyzed the pre-amended armed robbery statute," which required a defendant be armed with a "dangerous weapon" (720 ILCS 5/18–2 (West 1994)) rather than a "firearm," as currently required. However, the crux of these decisions is that unequivocal and uncontroverted eyewitness testimony that a defendant held a gun is sufficient circumstantial evidence that the defendant was armed with a firearm. *Washington*, 2012 IL 107993, ¶ 36; *Malone,* 2012 IL App (1st) 110517, ¶ 51-52; see also *People v. Pryor*, 372 Ill. App. 3d 422, 430 (2007). Further, there is no established "minimum requirement for showing a defendant possessed a firearm." *People v. Jackson*, 2016 IL App (1st) 141448, ¶17. Accordingly, *Malone* and *Washington* are dispositive here.

¶ 24 We find the unequivocal and uncontroverted testimony of both DeSonia and Willis, combined with the circumstances under which they were clearly able to view the weapon, is sufficient to allow a reasonable inference that the weapon was an actual firearm. See *Jackson*, 2016 IL App (1st) 141448, ¶ 15. As a result, the State did not need to present a firearm in order for the trier of fact to find that co-defendant Walker possessed one. *Id.*

¶ 25 Defendant contends that the *Malone* court improperly shifted the burden of proof to the defendant when it found that the firearm element of the offense of armed robbery was proved by the absence of evidence that the object was not a real gun. Defendant mischaracterizes the

court's reasoning. In *Malone*, the court found that the defendant was armed with an actual firearm based on the testimony of an eye-witness, noting "[t]here was no contrary evidence presented that the gun was a toy gun, a BB gun, or anything other than a real gun." *Malone*, 2012 IL App (1st) 110517, ¶¶ 40–52. We do not find that *Malone* improperly shifted the burden of proof to the defendant. The absence of evidence that the object viewed by the witness was not a gun simply supported the trial court's finding that the State's witnesses were reliable. Accordingly, we reject defendant's contention that *Malone* was improperly decided.

¶ 26 Defendant argues this case is controlled by *People v. Ross*, 229 Ill. 2d 255 (2008). The *Ross* court held that the State had produced insufficient evidence of a "dangerous weapon" in an armed robbery case where the victim testified that the gun was small, portable, and concealable and a police officer testified that the gun was a .177-caliber pellet gun with a three-inch barrel. *Id.* at 276-77. However, the current version of the armed robbery statute deleted the requirement of proof of a "dangerous weapon" when the defendant is armed with a firearm. See 720 ILCS 5/18-2(a)(2) (West 2008); *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 37.

¶ 27 In this case, both victims testified that defendant used a gun during the commission of the robberies. Unlike *Ross*, there was no evidence suggesting the gun falls within the statutory exception to the general, broad definition of a firearm in the FOID Act, nor is this a case where the State destroyed the gun, precluding the defendant from mounting a defense. See *People v. Crowder*, 323 Ill. App. 3d 710, 712-13 (2001). Viewing the testimony of DeSonia and Willis in the light most favorable to the State, we find that the unimpeached and uncontroverted testimonial evidence was sufficient to support a finding by the trial court that co-defendant Walker was armed with a firearm as defined by the Code. Accordingly, we affirm defendant's

convictions for armed robbery while armed with a firearm based on a theory of accountability.

¶ 28 Mutually Exclusive Offenses Claim

¶ 29 Defendant also argues that the trial court erred in finding him guilty of armed robbery with a firearm pursuant to section 18-2(a)(2) of the Code (720 ILCS 5/18–2(a)(2) (West 2012) and armed robbery while armed with "a dangerous weapon, other than a firearm, to wit: a bludgeon" pursuant to section 18-2(a)(1) of the Code (720 ILCS 5/18–2(a)(1) (West 2012) because the elements of these offenses are mutually exclusive. Defendant contends that both offenses arose from the same act, yet possessed mutually exclusive elements with respect to the weapon used. According to defendant, the object carried by co-defendant Walker could not simultaneously be both a firearm and a weapon other than a firearm. Defendant maintains that the court imposed a legally inconsistent verdict and requests a reversal of the court's findings of guilt on all four counts and a remand for a new trial.

¶ 30 Defendant acknowledges that he did not object at trial, and did not include this claim in his posttrial motion, but asks us to review it for plain error. Defendant also asks us to review the forfeited error on the basis that he was denied effective assistance of counsel as a result of his counsel's failure to object based on the proper grounds and for counsel's failure to preserve the error for review.

¶ 31 Under plain error review, we will grant relief to a defendant in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) if the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Before addressing

either of these prongs of the plain-error doctrine, however, we must determine whether a "clear or obvious" error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009).

¶ 32 We review *de novo* the issues of whether a defendant was improperly convicted of multiple offenses based on the same act and whether one conviction is a lesser-included offense of another. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 33 Initially, we note that, defendant's judgment of conviction as reflected by the Order of Commitment and Sentence entered by the court on October 16, 2014, indicates only two convictions for armed robbery while armed with a firearm for the offenses committed against the two victims. The court stated that it found defendant guilty of all counts, but it merged the two convictions of robbery while armed with "a dangerous weapon, other than a firearm, to wit: a bludgeon" contained in counts 3 and 4 into the convictions of armed robbery with a firearm, counts 1 and 2. See *People v. Cruz*, 196 Ill. App. 3d 1047, 1052 (1990) (holding that a verdict does not equal a judgment of conviction, and the sentence is a necessary part of a complete judgment of guilt).

¶ 34 The effect of a trial court merging one conviction into another conviction is vacatur of the merged conviction. *People v. Martino*, 2012 IL App (2d) 101244, ¶ 8 n. 1 citing *People v. Jones*, 337 Ill. App. 3d 546, 555 (2003). Thus, when the trial court merged counts 3 and 4 into counts 1 and 2, the convictions contained in counts 3 and 4 were vacated by operation of law. Defendant was ultimately convicted and sentenced to 27 years in prison for the two offenses of armed robbery while armed with a firearm committed against the two victims, contained in counts 1 and 2 only. We find no error and we reject defendant's claim that that he was convicted of mutually exclusive offenses.

¶ 35 Defendant's reliance on *People v. Clark*, 2016 IL 118845, is misplaced. In *Clark*, our supreme court held that the aggravated vehicular hijacking with a dangerous weapon other than a firearm and armed robbery with a dangerous weapon other than a firearm are not the lesser-included offenses of aggravated vehicular hijacking with a firearm and armed robbery with a firearm. 2016 IL 118845, ¶¶ 29-38. In *Clark*, the State did not charge defendant with aggravated vehicular hijacking or armed robbery with a dangerous weapon other than a firearm. The charging instrument in *Clark* lacked any language from which "to reasonably infer an allegation that defendant was armed with a dangerous weapon other than a firearm" and the charging instrument could not "be construed so broadly as to include the possession of a weapon that is something 'other than a firearm' " *Id.* ¶ 29. Under those circumstances, the court held the two offenses were "mutually exclusive" of each other, and the uncharged offenses (aggravated vehicular hijacking while armed with a dangerous weapon and armed robbery while armed with a dangerous weapon other than a firearm) were not lesser-included offenses of the charged offenses (aggravated vehicular hijacking with a firearm and armed robbery with a firearm. *Id.* ¶ 38. *Id.* Therefore, the court vacated the defendant's convictions for the uncharged offenses. *Id.* at ¶ 34.

¶ 36 In reaching its decision, the Clark court reviewed two prior decisions, *People v. McBride*, 2012 IL App (1st) 100375, ¶¶ 24, 26 (finding that a firearm did not constitute a "dangerous weapon, other than a firearm" as defined in the aggravated vehicular hijacking statute), and *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 38 (concluding that the uncharged offense of armed robbery while armed with a dangerous weapon other than a firearm was not a lesser-included offense of armed robbery while armed with a firearm).

¶ 37 Here, unlike *Clark*, *McBride*, and *Barnett*, defendant was charged in count 1 and 2 with armed robbery while armed with a firearm pursuant to 720 ILCS 5/18-2(a)(2) and in counts 3 and 4 with armed robbery while armed with "a dangerous weapon, other than a firearm, to wit: a bludgeon" pursuant to 720 ILCS 5/18-2(a)(1). See *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 34 ("Had the State elected to obtain a two-count indictment in this case, separately alleging a violation of section 18–2(a)(1) (dangerous weapon other than a firearm) and a separate violation of section 18–2(a)(2) (firearm), the conviction for armed robbery would have been proper.").

¶ 38 Unlike these cases, the court did not find defendant guilty of an uncharged offense. The court held that the evidence at trial supported both theories of armed robbery. Both victims testified that they saw co-defendant Walker pointing a "gun" at them. DeSonia indicated that the weapon felt "heavy" when co-defendant pushed into her left side when asking for her phone. Willis testified that the gun felt "heavy" like cold metal on her neck when co-defendant tripped and touched her neck with the weapon after she kicked him in the groin. Based on the victims' testimony, the "gun" that co-defendant used in the robbery could have been used as a bludgeon. *People v. McBride*, 2012 IL App (1st) 100375, ¶ 54, ("[O]ur supreme court has made clear that the State has the burden to prove that the gun was a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or a bludgeon" (internal quotation marks omitted").

¶ 39 In addition, as noted in the previous section, the State presented evidence beyond a reasonable doubt that co-defendant Walker was armed with a firearm while committing the robberies against the two victims, and, based on an accountability theory, the court properly convicted defendant of two counts of armed robbery while armed with a firearm. However, as the trial court recognized, defendant's convictions for armed robbery with a dangerous weapon

were merged at sentencing since both forms of armed robbery convictions were based on the same physical act. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Accordingly, the court did not enter a legally inconsistent judgment of conviction against defendant and we find no error to justify the application of the plain error doctrine.

¶ 40 Defendant also argues that counsel performed deficiently by not objecting to the court's entering legally inconsistent guilty verdicts against defendant. To be entitled to relief for ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 27. Unless the defendant makes both showings under *Strickland*, we cannot conclude that he received ineffective assistance. See *People v. Munson*, 171 Ill. 2d 158, 184 (1996). Since defendant's convictions for armed robbery with a firearm were proper and the court did not enter a legally inconsistent judgment of conviction against defendant, defendant cannot show that counsel's performance was unreasonable. Accordingly, defendant is not entitled to relief under his claim of ineffective assistance of counsel.

¶ 41 Excessive Sentence Claim

¶ 42 Defendant contends that his 27-year sentence was excessive and should be reduced. Defendant argues that the trial court abused its discretion when it: (1) failed to consider defendant's particular conduct during the offenses; (2) improperly considered a factor inherent in the offense; and (3) failed to consider defendant's youth and background in fashioning his sentence. In addition, defendant claims that his sentence is unconstitutionally disparate to the 25-year sentence received by co-defendant Walker who was armed during the commission of the offenses.

¶ 43 Generally, the trial court is in a better position than a court of review to determine an

appropriate sentence based on the particular circumstances of each case. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 50 citing *People v. Kennedy*, 336 Ill. App. 3d 425, 433 (2002). The trial court has broad discretionary powers in imposing a sentence. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). We accord the trial court great deference with respect to its role in balancing factors in aggravation and mitigation in order to craft a proper sentence. *People v. Burnette*, 325 Ill. App. 3d 792, 807–08 (2001) (citing *People v. Illgen*, 145 Ill. 2d 353, 379 (1991)). Therefore, a reviewing court may not modify a defendant's sentence absent an abuse of discretion. *Alexander*, 239 Ill. 2d at 212.

¶ 44 Here, the 27-year sentence defendant received was within the permissible sentencing range. He was convicted of armed robbery while armed with a firearm, which has a sentencing range of 21 to 45 years. 720 ILCS 5/18–2(a)(2),(b) (West 2012). Defendant was sentenced on counts 1 and 2, armed robbery with a firearm, against each of the victims, to be served concurrently. His sentence on each count included the mandatory firearm enhancement of 15 years. The court also sentenced defendant to concurrent 5-year terms on counts 5 and 6 for aggravated unlawful restraint. Where a sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 45 In imposing the sentence, the court considered the nature and circumstances of the offenses, the presentence investigation report, the arguments of counsel, defendant's character, background and defendant's remarks in allocution. In mitigation, the court considered defendant's statement where he expressed remorse and recognized the seriousness of the offenses. The court also considered the fact that co-defendant Walker, rather than defendant, held the gun during the offenses as mitigation.

¶ 46 In aggravation, the court considered the serious nature of the offenses and the need to deter others from committing the same crimes. The court indicated that the armed robbery was committed on CTA, a public way, while the victims were commuting to work. The court considered defendant's criminal history consisting of a prior delinquency for burglary and a conviction for robbery. The court also noted that defendant was on probation for the burglary delinquency when he committed the robbery and on probation for the robbery when he committed the instant offenses, circumstances reflecting defendant's failed attempt at rehabilitation.

¶ 47 Defendant contends that the court failed to consider as a mitigating factor defendant's minimal participation in the offense as an unarmed lookout. Defendant claims that the court's statement indicating that defendant was equally culpable and "part of the whole process" reflected that the court failed to consider defendant's minimal role in the crimes. The following exchange took place after defendant spoke in allocution:

> "THE DEFENDANT: What took place in the robbery. I didn't get involved with Denzel or call the police. I just stood there and watched it. I was shocked. I didn't know what to do. I had a phone. I could have called the police. But I just walked off the train. I didn't know what to do.
>
> THE COURT: Certainly, Mr. Rule, your conduct was equally culpable. You were a part of the whole process. It was necessary for two parties to participate in this process, for that to have occurred.
>
> I will take into consideration your remorse. *** The fact that you weren't the one engaged in the battle that caused one of the victims to physically defend herself doesn't

change the seriousness and threatened serious harm created here by your co-offender and you together, in concert. "

¶ 48 Contrary to defendant's argument, we find that this excerpt did not reflect the court's refusal to consider defendant's involvement in the offenses as a mitigating factor. Instead, the court was responding to defendant's claim that he was too shocked by co-defendant Walker's action to intervene. The court contrasted and explained defendant's role with that of co-defendant Walker, indicating that defendant did not physically engage with the victims. The court also explained that, when acting as a lookout for co-defendant Walker and not intervening, defendant's guilt was established through proof of the behavior of co-defendant Walker with whom defendant engaged in a common criminal design. See *People v. Stanciel*, 153 Ill. 2d 218, 233 (1992). Moreover, before sentencing defendant, the trial court specifically stated: "I've already taken into consideration the fact that your co-defendant had the gun in hand." Therefore, the court considered that defendant's role and participation in the offense was less than the role assumed by co-defendant Walker.

¶ 49 Defendant also argues that the trial court improperly relied on the fact that defendant and co-defendant Walker threatened serious harm with a weapon as a factor in aggravation despite the fact that it is a factor inherent in the offense of armed robbery with a firearm. Specifically, defendant points to the court's statements before sentencing that "there was physical harm threatened with the use of a weapon," and that co-defendant "had a gun in hand."

¶ 50 "[T]he question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. When potential consideration of improper sentencing factors is at issue, "the reviewing court can determine 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." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). In considering whether reversible error occurred, a reviewing court should make its decision based on the record as a whole, rather than focus on a few words or statements of the trial court. *People v. Miller*, 2014 IL App (2d) 120873, ¶ 37.

¶ 51 Before imposing defendant's sentence, the court indicated that it considered that co-defendant Walker had the gun as a factor in mitigation, rather than as an aggravating factor. Furthermore, after reviewing the record, we find the trial court did not improperly rely on its statement that "there was physical harm threatened with the use of a weapon," when sentencing defendant. The trial court is not required to refrain from any mention of the factors which constitute elements of an offense, and a mere reference to the existence of such a factor is not reversible error. *People v. Jones*, 299 Ill. App. 3d 739, 746 (1998).

¶ 52 Prior to making the statement, the court recounted that the crime occurred on CTA while the victims were travelling to work. After stating that "there was physical harm threatened with the use of a weapon," the court explained that it found the testimony of the victims concerning the size and the weight of the gun to be credible, and that the victims' testimony established that the gun "would have sufficed as a deadly weapon." When viewed in this context, the comment does not indicate the court was improperly considering this element as an aggravating factor. The court simply mentioned that the testimony of the victims established the weapon element of the offense of armed robbery. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 50. ("While the trial court may not consider a factor implicit in the offense as an aggravating factor in sentencing it may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense committed by the defendant")

¶ 53 Defendant contends next that he is a relatively young offender and that the trial court did not adequately consider his rehabilitative potential. Relying o*n Graham v. Florida*, 560 U.S. 48 (2010), an*d Miller v. Alabama*, 567 U.S. 460 (2012), where the United States Supreme Court found unconstitutional the imposition of mandatory life sentences for juvenile offenders, defendant asserts that his age at the time of these events mitigates his actions as being attributable to a lack of maturity.

¶ 54 Those cases are not applicable here, where defendant was 20 years old at the time of these offenses, and was not facing the hardest punishments such as a life sentence, natural life, life without the possibility of parole as a minimum sentence without regard to his age or youth. *People v. Thomas*, 2017 IL App (1st) 142557, ¶¶ 26, 48 (citing *People v. Reyes*, 2016 IL 119271, ¶¶ 9-10 (a criminal defendant, 18 years of age or older, is an adult offender to whom *Graham*, *Miller*, and similar decisions do not apply)). This court noted in *Thomas* that our supreme court in *Reyes* "did not indicate it would extend the protections of *Miller* to adult offenders." *Thomas*, 2017 IL App (1st) 142557, ¶ 26.

¶ 55 Defendant also cites *People v. Harris*, 2016 IL App (1st) 141744, *appeal allowed*, No. 121932 (May 24, 2017) (holding that a 76-year sentence for 18-year old offender convicted of first degree murder represents *de facto* life sentence and violates the proportionate penalties clause) and *People v. House*, 2015 IL App (1st) 110580 (holding that mandatory natural life term for 19-year old defendant convicted under an accountability theory violates the proportionate penalties clause). But *Harris* and *Hous*e are distinguishable from the instant case because defendant's 27-year sentence does not constitute a life sentence or a *de facto* life sentence for defendant.

¶ 56 Moreover, where mitigation evidence and a presentencing report have been submitted to the trial court, such as here, it is presumed, absent any evidence to the contrary, that the court considered the evidence and took into account the defendant's potential for rehabilitation. *People v. Madura*, 257 Ill. App. 3d 735, 740-41 (1994). The trial court specifically indicated that it reviewed the presentence investigation report and considered it in fashioning defendant's sentence. The sentencing court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123.

¶ 57 Here, while the court considered all the factors offered in mitigation and in aggravation, the court gave weight to the seriousness of the offense, which is the most significant factor in imposing sentence. See *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. The court determined that defendant's conduct endangered the public, there existed a need for deterrence, and defendant had a prior criminal record that included a burglary delinquency and a conviction for robbery. Defendant's 27-year sentence is not only within the applicable statutory range, but it is well below the maximum permissible sentence. Accordingly, we find no abuse of discretion.

¶ 58 Lastly, defendant claims that his 27-year sentence is unconstitutionally disparate to the 25-year sentence the court imposed on co-defendant Walker who was the principal and more culpable actor. Defendant points out that, at the time of trial, co-defendant Walker had another pending robbery charge. Defendant argues that the "minor differences" between his background and co-defendant Walker's background cannot justify defendant receiving a greater sentence.

¶ 59 We disagree. To prevail on a claim of disparate sentencing, a defendant must demonstrate that he and his co-defendant were similarly situated with respect to background, prior criminal

history, and potential for rehabilitation. *People v. Ramos*, 353 Ill. App. 3d 133, 139, (2004) citing *People v. Curry*, 296 Ill. App. 3d 559, 569 (1998). Defendant cannot show that he was similarly situated with co-defendant Walker: Walker did not have a prior criminal history, and unlike Walker, defendant cannot demonstrate a potential for rehabilitation when he did not take into account the seriousness of his action when committing two serious crimes while being placed on probation. In addition, at the time co-defendant Walker committed the crimes, he had not been convicted of any offenses. In the light of the fact that there is ample evidence to suggest that co-defendants are not similarly situated, and given the great deference with which we are to review the trial court's decision, we affirm the imposition of defendant's 27-year sentence.

¶ 60 Aggravated Unlawful Restraint Convictions

¶ 61 Defendant argues, and the State concedes, that his convictions for aggravated unlawful restraint should be vacated under the one-act, one-crime rule because it arose from the same physical act as his convictions for armed robbery. See *People v. McWilliams*, 2015 IL App (1st) 130913 ¶¶ 18-19 (the restraint of two complainants "was inherent in the robbery and ended concurrent with the robbery"). Here, the detention of both DeSonia and Willis was neither separate nor distinct from the armed robberies. Accordingly, we vacate defendant's convictions and sentence for aggravated unlawful restraint and instruct the trial court to amend the *mittimus* accordingly.

¶ 62 CONCLUSIONS

¶ 63 Based on the foregoing, we affirm defendant's convictions and sentence for armed robbery while armed with a firearm. We vacate defendant's convictions and sentence for aggravated unlawful restraint.

¶ 64 Affirmed as modified.