2017 IL App (1st) 151120-U

FIRST DIVISION
August 7, 2017

No. 1-15-1120

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court of
	) Cook County, Criminal Division
Plaintiff-Appellee,	)
	)
v.	) No. 13 CR 16854 (01)
	)
DENZEL WALKER,	) Honorable Rosemary Higgins,
	) Judge Presiding
Defendant-Appellant.	)

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 25 years in prison, a term within the statutory range after considering all the relevant factors in aggravation and mitigation.

¶ 2 Following a bench trial, defendant Denzel Walker was convicted 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 25 years in prison for the armed robbery while armed with a firearm convictions to be served concurrently with 5 years for the aggravated unlawful restraint convictions. The sentence imposed for the armed robbery with firearm convictions included the

15-year mandatory firearm enhancement. On appeal, defendant argues that: (1) 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; (2) the State failed to prove that the object carried by defendant was a firearm; (3) defendant's sentence is excessive; (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 Travis Rule 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 Rule'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 Rule 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

[1] The defendants Travis Rule and Denzel Walker each filed a separate appeal. The order adjudicating co-defendant Travis Rule's appeal overlaps almost entirely with this order and is being filed concurrently. *People v. Rule*, 2017 IL App (1st) 143534-U (unpublished order under Supreme Court Rule 23).

that she sat down in a seat diagonally across from DeSonia. DeSonia and Willis both made in-court identifications of defendant and co-defendant Rule as the two men they saw on the train.

¶ 6 DeSonia and Willis testified that initially, both defendant and co-defendant Rule were sitting together, but then stood up. They exchanged a few words and began walking up and down the aisle of the train. Co-defendant Rule stopped and stood near the doors. Defendant 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 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 defendant 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. Defendant told her to give him the phone, and she did. Meanwhile, co-defendant Rule 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 defendant her phone. Willis noticed co-defendant Rule was one foot from her and was looking at defendant. Willis began to stand up and tried to use her own phone to call 911. At that point, defendant turned to her and pointed a gun at her. She stated that she knew that defendant was holding a semiautomatic gun as she learned from television shows that semiautomatics do not have the spinning barrel like revolvers. As 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. Defendant regained his balance and yelled at her demanding her phone. Willis handed it over. She testified that through these

events, co-defendant Rule 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 Rule 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 who robbed them with a gun. Defendant was arrested on August 12, 2013. The same day, DeSonia and Willis went to the police station and separately viewed and identified defendant in a line-up as the person who robbed them of their phones with a gun.

¶ 9 The parties stipulated to the foundation of three clips from CTA security video surveillance. Both women identified defendant and co-defendant Rule in the surveillance footage.

¶ 10 On cross-examination, DeSonia indicated that defendant did not swing or held the gun up to use it, but that defendant pushed it against her body. During her cross-examination by defense counsel, Willis stated that after she viewed the line-up, she told Detective Turner that she saw defendant point something at DeSonia's side but could not tell what it was, and when defendant later approached her, she thought he "may have had a gun," but did not specifically say it was semiautomatic.

¶ 11 Detective Turner testified that he and Detective Vincent Humphrey interviewed defendant, and were later joined by an Assistant State's Attorney for a second interview. Turner admonished defendant of his *Miranda* rights, defendant indicated that he understood them, and

agreed to speak with the detectives regarding the robberies of DeSonia and Willis. Defendant stated that he took two cellphones from "two white girls," and that he was armed with a "fake BB gun." Defendant told the detectives that he and co-defendant Rule attempted to sell the cellphones at a Quickcom store located at Chicago Avenue and Central Avenue, but later sold them at another location. On cross-examination, Detective Turner testified that defendant indicated the fake gun was broken, but it was not made out of plastic.

¶ 12 The court found the victims' testimony credible and found defendant guilty on all counts. The court noted that the armed robbery with a dangerous weapon other than a firearm counts would merge into the armed robbery with a firearm counts. The court denied defendant's motion to reconsider the finding that defendant used a firearm. The court held that the testimony of both DeSonia and Willis regarding the firearm was specific, clear, unequivocal and "exceedingly credible" and that there was no evidence that defendant was holding a BB gun rather than a firearm.

¶ 13 At sentencing, the court indicated that it considered the victims' impact statements, and the parties' arguments in aggravation and mitigation. In aggravation, the court considered these offenses took place on a CTA train and threatened serious public harm. In mitigation, the court stated that it considered defendant's background, his "very moving social history," including the abuse by his stepbrother. Although the court initially imposed sentences for all the armed robbery counts, subsequently, it issued a corrected *mittimus* that reflected defendant's convictions for the charges contained in counts 1 and 2, armed robbery while armed with a firearm, and counts 5 and 6, aggravated unlawful restraint with a firearm. The court sentenced defendant to a term of 10 years for the armed robbery with a firearm convictions plus the

mandatory 15-year enhancement for a total of 25 years to run concurrently with a term of 5 years for the two aggravated unlawful restraint with a firearm convictions. This appeal follows.

¶ 14 ANALYSIS

¶ 15 Defendant's Convictions

¶ 16 Defendant initially argued that the trial court erred in finding him guilty of armed robbery while armed 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. However, he withdrew this issue from our consideration acknowledging that the *mittimus* properly indicates that he was convicted and sentenced to 25 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. Defendant acknowledged that he was not convicted of the offenses of armed robbery while armed with a dangerous weapon contained in counts 3 and 4.

¶ 17 Defendant argues next that the State failed to prove beyond a reasonable doubt that he was armed with an actual firearm during the robbery and thus his conviction 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 argues that the State did not present the object used during the armed robberies, which defendant told the police it was a fake BB gun. Defendant claims that victims' sparse description of the gun, and their unfamiliarity with weapons was "meager evidence," insufficient to establish that the weapon was a firearm. 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 the description of the gun was insufficient as

a matter of law to support his conviction for armed robbery with a firearm.

¶ 18 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)). 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.

¶ 19 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 did not prove that the "gun" DeSonia and Willis saw defendant brandishing met this definition of a firearm or did not fall under any of the exceptions.

¶ 20 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).

¶ 21 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.

¶ 22 Here, the victims' testimony was circumstantial evidence sufficient to establish that defendant used a firearm during the robberies. DeSonia testified that she felt something "really hard" pushing into her left side and then saw defendant, 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 defendant 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 defendant fell onto her, she felt the gun on her neck for about 30 seconds and it felt heavy and like cold metal.

¶ 23 The court expressly made several credibility determinations. The court found the victims' testimony that the weapon was semiautomatic to be credible, despite their limited knowledge and unfamiliarity of guns. The court also indicated that there was no evidence that defendant used a BB gun during the commission of the armed robberies. Defendant's challenge to the sufficiency of the evidence is simply a request to reweigh the evidence and substitute our own factual determination regarding the nature of the firearm which we cannot entertain. 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.

¶ 24 Here, 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 defendant 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).

¶ 25 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.

¶ 26 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 defendant possessed one. *Id.*

¶ 27 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.

¶ 28 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.

¶ 29 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 uncontroverted testimonial evidence was sufficient to support a finding by the trial court that defendant was armed with a firearm as defined by the Code. Accordingly, we affirm defendant's convictions for armed robbery while armed with a firearm.

¶ 30 Defendant's Sentence

¶ 31 Defendant argues next that the trial court abused its discretion when sentencing defendant to a term of 25 years in prison. Defendant contends that the court sentenced defendant without considering defendant's youth and minimal criminal history and requests we remand the case for resentencing.

¶ 32 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.

¶ 33 Here, the 25-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).

¶ 34 At the sentencing hearing, Willis read her victim impact statement acknowledging defendant's difficult social background, but stating that defendant knew that the "horrific" crime he committed against her was wrong. DeSonia's victim impact statement was also published. She indicated that defendant robbed her of her sense of security, her faith and positive outlook of humanity. The State argued in aggravation that the court should sentence defendant to 40 years

in prison because defendant's conduct threatened serious harm, defendant committed the offenses while on a train used for public transportation, and a lengthy sentence would deter others from committing the same crime.

¶ 35 In mitigation, defense counsel argued that defendant was a "very young man," and was raised by the Department of Children and Family Services after his parents died. Defense counsel urged the court to allow defendant the opportunity to pursue his education while incarcerated and asked the court to impose the minimum 21-year sentence. In imposing the sentence, the court considered the victims' impact statements, and all the evidence in aggravation and mitigation. In mitigation, the court considered the "very moving social history of the defendant," including the loss of his parents at a young age, and the abuse by his step-brother. In aggravation, the court considered the crimes occurred on CTA posing serious public harm. The court noted it wanted to deter similar crimes in the future.

¶ 36 Defendant contends next that, although he was not a juvenile at the time he committed the armed robberies, he is a relatively young offender and that the trial court did not adequately consider his rehabilitative potential. Relying on *Graham v. Florida*, 560 U.S. 48 (2010), and *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 and being prone to peer pressure.

¶ 37 Those cases are not applicable here, where defendant was 18 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.

¶ 38 Defendant also cites *People v. House*, 2015 IL App (1st) 110580 where the court applied *Miller* and held that the mandatory life sentence applied to a 19-year old violated the proportionate penalties clause. In *House*, the 19-year old defendant was found guilty under a theory of accountability for the murder of two victims. *Id.* ¶ 101. The *House* court noted that the mandatory natural life sentencing statute was unconstitutional as applied to defendant when his young age as well as his participation as an accomplice where relevant "when considered alongside." *Id.* The court held that the mandatory nature of the sentence precluded the sentencing court from considering any factors in mitigation. *Id.* at ¶ 100.

¶ 39 In contrast here, defendant was not convicted under an accountability theory, nor was he subject to a mandatory life sentence. Therefore, unlike *House*, the court was not precluded from considering any mitigating factors, including defendant's age in imposing the sentence. 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 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.

¶ 40 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 judge determined that defendant's conduct endangered the public, and there existed a need for deterrence. The court also acknowledged that it could sentence defendant to a higher term, however, it considered that defendant wanted "to receive treatment" while in custody and it would make treatment a condition of his sentence. Defendant's 25-year sentence is not only within the applicable statutory range, but it is well below the maximum permissible sentence. We conclude that the court did not abuse its discretion in sentencing defendant to 25 years for armed robbery. The trial court properly considered the seriousness of the offense and relevant factors in mitigation and aggravation when it imposed a sentence within the statutory range. The court acted within its discretion when it imposed a well-thought-out sentence. Accordingly, we decline to reduce defendant's sentence or to remand for a new sentencing hearing.

¶ 41 Aggravated Unlawful Restraint Convictions

¶ 42 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 robbery. Accordingly, we vacate defendant's convictions and sentence for aggravated unlawful restraint and instruct the trial court to amend the mittimus accordingly.

¶ 43 Lastly, defendant argues and the State agrees, that defendant's mittimus should be corrected to reflect that defendant was entitled to credit for 394 days spent in custody prior to sentencing. Section 5–8–7(b) of the Unified Code of Corrections provides that an offender "shall be given credit for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5–8–7(b) (West 2006). *People v. Johnson*, 401 Ill. App. 3d 678, 680 (2010). The credit calculation includes the day that the defendant is taken into custody and any partial day of custody, but excludes the day the defendant is sentenced. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 71.

¶ 44 Defendant was in custody beginning August 12, 2013, and was initially sentenced on September 10, 2014 when he received 394 days as credit for the presentence incarceration. On November 6, 2014, the court issued a corrected *mittimus*, which again awarded him 395 days of credit. However, the corrected *mittimus* incorrectly indicated that the credit was awarded "as the day of this order" rather than *nunc pro tunc* to September 10, 2014. Therefore, we instruct the trial court to amend the *mittimus* to reflect the award of 394 days of credit *nunc pro tunc* to September 10, 2014, for time defendant actually served from August 12, 2013, his arrest date, to September 10, 2014, the date of defendant's initial sentencing.

¶ 45 CONCLUSIONS

¶ 46 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.

¶ 47 Affirmed as modified.