FIRST DIVISION
March 30, 2018

No. 1-15-0832

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	09 CR 14151
	)	
DARIUS WITHERSPOON,	)	Honorable
	)	Gregory Ginex,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Harris concurred in the judgment.
Justice Mikva dissented in part.

ORDER

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt. The 25-year firearm enhancement imposed in this case did not violate the eighth amendment or the proportionate penalties clause as applied to defendant. Section 5-4.5-105(b) (730 ILCS 5/5-4.5-105(b) (West 2016)) is not retroactive.

¶ 2 Following a bench trial, juvenile defendant Darius Witherspoon was convicted of three counts of attempt first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm and two counts of aggravated battery. Defendant was sentenced to 31 years' imprisonment: 6 years for the attempt murder and a 25-year enhancement for knowingly discharging a firearm causing great bodily harm. On appeal defendant argues: (1) his attempt murder conviction should be reduced to aggravated battery with a firearm because the State did

not prove beyond a reasonable doubt that he possessed the specific intent to kill when he fired a gun in the direction of Kelvin Greenfield; (2) the imposition of the then-mandatory 25-year firearm add-on violated the eighth amendment as applied to him and was unconstitutionally disproportionate as applied to him because he was 17-years-old at the time of the offense, had no criminal record, and the judge stated that he wished he did not have to apply the add-on; and (3) whether, in the alternative, he is entitled to a new sentencing hearing under section 5-4.5-105 because that section is retroactive to cases pending on direct review. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 At trial, Kelvin Greenfield testified that on July 4, 2009, at approximately 11:00 p.m., he walked to his sister's, Zandra Burrell's, house in the vicinity of Butterfield and Wolf roads in Hillside. As he was walking, he saw "two cute young" identical twins, who were later identified as Ashri and Ashley Broadwater, at the gas station across the street. He could not decide which one to pick so he kept walking.

¶ 5 When he arrived at his sister's house, his younger brother Zachary came down the stairs. Zachary told Kelvin that he was going to hang out with a girl and needed Kelvin to be his "wingman" and "take the other girl off his hands." They met up with Ashri and Ashley, the girls Kelvin had seen at the gas station. Zachary and Ashley left to go to his mother's home, which was located in an apartment building directly across from Zandra's residence. Kelvin and Ashri walked north on Wolf Road.

¶ 6 As they were walking, less than two minutes later, Ashri pointed out defendant who was standing in a gangway, and told Kelvin that defendant was her boyfriend. Kelvin and Ashri walked toward defendant. Defendant asked Kelvin who he was and Kelvin responded, "Who is

you?" Defendant answered, "This my girl." Kelvin stated, "I didn't know, that's basically something you can take up with your girl, I didn't know." Defendant responded, "You must be new to the neighborhood." Kelvin explained that he was Zachary's brother. Defendant said, "Oh, you cool."

¶ 7 Kelvin began walking back across the street to Zandra's house and just before he placed his foot on the curb he heard Ashri scream, "No, D.J., no." Kelvin turned around, looked over his shoulder and saw defendant standing a few buildings away with a silver gun in his right hand with a shirt covering part of it. Defendant shot four times and Kelvin was able to see the flash of the gun. The first shot missed Kelvin and went over his head. The second shot entered Kelvin's lower back as he turned his head and body to look to see where defendant was. Kelvin saw defendant running southbound from across Wolf Road. Kelvin then began "zig-zagging" in between buildings, trying to get out of defendant's line of fire.

¶ 8 Kelvin then got into the parking lot in between the buildings where Zandra and her mother lived, and defendant ran after Kelvin and fired two more shots. Kelvin was able to make it into Zandra's building and ran up the stairs to her house and said, "D.J. shot me." He then went into the bathroom to look at his wound.

¶ 9 Kelvin testified that the police were called and an ambulance came and took him to Loyola Hospital. There he underwent surgery due to injuries he sustained as a result of the gunshot. He testified that he was shot in the kidney and sustained a broken rib cage. The bullet was lodged in his rib cage approximately one centimeter from his spine. While at the hospital, he gave a statement to the police. He also identified defendant in a photo array.

¶ 10 Zandra Burrell, Kelvin's sister, testified that she lived in an upstairs apartment on Wolf Road in Hillside in 2009. On July 4, 2009, she arrived home about midnight and fell asleep on

the couch. She heard some loud noises which she realized they were gunshots. She heard someone running up her stairs and then Kelvin came through her door. She saw that he had been shot.

¶ 11 Ashley Broadwater testified that she has a twin sister Ashri. Ashley was a sophomore in high school in July 2009. She was in Hillside on July 4, 2009, at 10 p.m. after defendant and his friend picked her and Ashri up from a party. She and Ashri were walking near the intersection of Butterfield and Wolf Roads when a young man began following them. He kept trying to speak with her and she told him "no." At some point, Zachary started walking with them. She and Zachary walked ahead and continued to Zachary's house. Ashley testified that she did not see defendant again that night and did not recall seeing him with a firearm or seeing him in any altercations. Ashley later met with the police and identified defendant as "D.J."

¶ 12 Ashri Broadwater testified that she was 16-years-old on July 4, 2009, when she and her sister Ashley went to the gas station on Butterfield and Wolf Roads. As they were walking away from the gas station, Zachary and Kelvin approached them. Kelvin began speaking with her and attempted to get her phone number. She told Kelvin that she had a boyfriend but he persisted. She had been dating Darius, whom she called D.J., for about four months. Ashri called defendant, telling him that she was down the street and proceeded to walk towards defendant with Kelvin beside her. Defendant came outside and upon seeing Kelvin told him to, "Get the fuck back" and instructed Ashri to go into the house. When Ashri went into the hallway of the house she heard distinct sounds which she believed to be gunshots. Defendant then came inside and told his brother that he had fired his gun into the air. Ashri later identified defendant in a photo array and gave a handwritten statement to police.

¶ 13 Sergeant Carlo Viscioni of the Hillside police department testified that on July 5, 2009, he was assigned to investigate a shooting in the 400 block of Wolf Road. When he responded to the scene, he was advised that there was a suspect by the name of "D.J." After looking for shell casings at the scene, Sergeant Viscioni went to Loyola medical center and spoke with Zandra. Defendant was in surgery at the time. After speaking with Zandra he began actively seeking defendant but was unable to locate him that day.

¶ 14 On July 5, 2009, Sergeant Viscioni spoke with Kelvin in his hospital room. Kelvin viewed a photo array and identified defendant as the person who shot him. Sergeant Viscioni then spoke with Ashri and Ashley. At the police station, Ashri identified defendant in a photo as the person she knew as D.J. Ashley also identified defendant from a photo as the person she knew as D.J. Defendant turned himself into the police station on July 7, 2009.

¶ 15 The State rested. Defendant's motion for a directed verdict was denied.

¶ 16 The court found defendant guilty of attempt murder and all counts of aggravated battery with a firearm. Defendant was sentenced to the minimum sentence of six years' imprisonment with a 25-year mandatory firearm enhancement for a total of 31 years. This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant alleged that the State failed to prove him guilty of the attempt murder of Kelvin Greenfield beyond a reasonable doubt. Specifically, defendant argues that the State failed to prove that defendant had the intent to kill Kelvin when he fired a gun in Kelvin's direction. While defendant does admit he shot at Kelvin, he states that he only wanted to scare Kelvin. Defendant claims that had he intended to kill Kelvin, he would not have waited until Kelvin had crossed the street to shoot at him.

¶ 19 On appeal, when the defendant challenges the sufficiency of the evidence, the reviewing

court must determine, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "A reviewing court affords great deference to the trier of facts and does not retry the defendant on appeal." *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). "A reviewing court must allow all reasonable inferences from the record in favor of the State." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *People v. Graham*, 392 Ill. App. 3d 1001, 1009 (2009).

¶ 20 "It is within the function of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *Id.* It is not the duty of the trier of fact to accept any possible explanation that favors the defendant's innocence and "elevate it to the status of reasonable doubt." *People v. Siguenza-Brito, 235 Ill. 2d 213, 229 (2009).* "A reviewing court will not substitute its judgment for that of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 21 To prove a defendant guilty of attempted murder, the State must prove: (1) that defendant performed an act that constituted a substantial step toward committing a murder; and (2) that he had the criminal intent to kill the victim. 720 ILCS 5/8-4 (West 2010); *People v. Carlisle*, 2015 IL App (1st) 13114. Here, defendant asserts that he did not have the specific intent to kill Kelvin when he fired his gun at him from across the street.

¶ 22 "The question of [a] defendant's state of mind at the time of the crime [is] a question of fact to be determined by the jury." *Id*. Intent to kill may be established from circumstances surrounding the crime and the character's conduct. *Id*. "These surrounding circumstances may include the character of the assault, the use of a deadly weapon, and the nature and extent of the

victim's injuries." *Id*; *People v. Green*, 339 Ill. App. 3d 443, 451 (2003). Intent to kill may also be "inferred if one willfully does an act, the direct and natural tendency of which is to destroy another's life." *People v. Cavazos*, 2015 IL App (2d) 120171.

¶ 23 In this case defendant's specific intent to commit murder may be inferred from his conduct and circumstances surrounding the incident. At trial, the evidence established that defendant pointed his gun at Kelvin and shot at him four times. The first shot missed Kelvin. The second shot entered into Kelvin's lower back. After he was already shot, and once Kelvin retreated to the parking lot between the buildings that Zandra and her mother lived in, defendant fired two more shots at Kelvin. Defendant ran after Kelvin, from across Wolf Road, and Kelvin "zig-zagg[ed]" in between the buildings. Defendant began "sneaking up" on Kelvin and Kelvin ran around a corner, through the parking lot and into Zandra's apartment building where he told Zandra that D.J. shot him. These are not the actions of a man trying to scare someone. These are the actions of a man shooting with the intent to kill. We find that the evidence at trial, viewed in the light most favorable to the State, established that defendant shot at Kelvin with the intent to kill. We have no doubt that the evidence was sufficient to establish that defendant intended to kill Kelvin and that defendant was proven guilty of attempt murder beyond a reasonable doubt.

¶ 24 Defendant next makes an as-applied constitutional challenge to the 25-year firearm add-on imposed at sentencing and argues that it violates both the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. Defendant argues that the imposition of the then-mandatory 25-year firearm add-on is particularly harsh and unconstitutionally disproportionate in violation of the eighth amendment and *Miller v. Alabama*, 132 S. Ct. 245, 2463 (2012), given that at the time of the offense in question, he was 17-years-old and had no criminal record.

¶ 25 The State responds that defendant has forfeited review of this issue because he failed to raise it in the trial court and cites to *People v. Thompson*, 2015 IL 118151 (2015), for support. In his reply brief, defendant acknowledges that he did not raise the issue in the trial court, but maintains that review here is proper, where the procedural posture of his claim differs from that in *Thompson*. Defendant claims that *Thompson* addressed forfeiture of the defendant's as-applied claim in the context of dismissal of a section 2-1401 petition and therefore *Thompson* is inapposite.

¶ 26 While defendant is correct the procedural posture of Thompson's as-applied challenge differs from that here, the *Thompson* court's reason for determining the argument was forfeited had little to do with its procedural posture. The *Thompson* court first distinguished between as-applied and on its face constitutional challenges to statutes and with respect to as-applied challenges and noted that such claims typically require some showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party. *Id*. The court concluded that with respect to such matters, it was necessary for the record to be sufficiently developed for purposes of appellate review. *Id*. at ¶ 37. The type of factual development necessary to adequately address a defendant's as-applied challenge, the court concluded, is a task best suited for the trial court and because the defendant failed to present it in the trial court, the issue was deemed to have been forfeited. *Id*. at ¶ 39. See also *In re John M*., 212 Ill 2d 253, 268 (2004) ("[A reviewing] court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. [Citation]. Without an evidentiary record, any finding that a statute is unconstitutional 'as applied' is premature.")

¶ 27 Most recently, in *People v. Holman*, 2017 IL 120655, ¶ 29, our supreme court, quoting *Thompson*, reiterated the difference between facial and as-applied constitutional claims. The *Holman* court stated that "*Thompson* instructs that a defendant must present an as-applied challenge to the trial court in order to create a sufficiently developed record." *Id*. The court noted however, that pursuant to *People v. Davis*, 2014 IL 115585, there is a "very narrow exception to that rule for an as-applied *Miller* claim for which the record is sufficiently developed for appellate review." *Id*. The *Holman* court further explained that "[l]ike the *Miller* claim in *Davis*, the *Miller* claim in this case does not require factual development. All of the facts and circumstances to decide the defendant's claim - that his sentencing hearing did not comply with *Miller* - are already in the record." *Holman*, 2017 IL 120655, ¶ 32.

¶ 28 The issue presently before this falls into the narrow *Davis* exception referred to in *Holman*. The record here is sufficiently developed for us to determine whether defendant's *Miller* claim has merit.

¶ 29 The eighth amendment, applicable to the states through the fourteenth amendment (*Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)), provides that " '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted' " (quoting U.S. Const., amend. VIII). The United States Supreme Court has interpreted the cruel and unusual punishment clause to prohibit "inherently barbaric punishments" as well as punishments which are "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59 (2010).

¶ 30 In *Miller*, the Supreme Court expanded on cases involving juvenile offenders which stand for the proposition that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 473-74 (discussing *Roper v. Simmons*, 543 U.S 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010)). The Court found

that sentencing schemes that impose mandatory life sentences on juvenile offenders violate the eighth amendment. *Id.* at 479. Before a state may impose a life sentence on a juvenile offender, the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

¶ 31 Despite defendant's argument to the contrary, *Miller* does not call defendant's sentence into question. Defendant did not receive an actual or *de facto* life sentence. See *People v. Hunter*, 2016 IL (1st) 141904, ¶ 55. Defendant was convicted of attempt first degree murder, a class X offense, punishable by a prison term of 6 to 30 years (720 ILCS 5/8-4(c)(1) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). He was also found to have personally discharged a firearm during the commission of the attempt murder that caused injury to Kelvin Greenfield and was subject to a 25-year sentencing enhancement (720 ILCS 5/8-4(c)(1) (West 2012)). The court could have sentenced defendant to an aggregate sentence of 55 years' imprisonment. However, defendant received the minimum statutory sentence that the court could impose at that time: 31 years' imprisonment, 6 years for attempt murder plus the mandatory 25-year add-on for discharging a firearm. Notwithstanding the fact that he received the minimum sentence allowed by law, defendant nevertheless argues that the statute is unconstitutional under the eighth amendment because "its mandatory nature precluded the judge from giving adequate consideration to [defendant's] youth and rehabilitative potential."

¶ 32 We rejected the same argument defendant makes here in *People v. Hunter*, 2016 IL App (1st) 141904. In *Hunter*, the defendant who was a juvenile at the time of the offenses, was convicted of armed robbery, aggravated kidnapping, and aggravated vehicular hijacking and was sentenced to 21 years' imprisonment, which included a 15-year enhancement for his use of a firearm. *Hunter*, 2016 IL App (1st) 141904, ¶5. On appeal, the defendant argued *inter alia* that

the mandatory firearm enhancement imposed violated the eighth amendment because it precluded the trial court from considering factors in mitigation when sentencing juvenile offenders.

¶ 33 This court began by noting that the possible sentencing range, including the mandatory 15-year enhancement, for the crimes for which he was convicted was 21 to 45 years, and although the sentencing range was substantial, defendant was not subject to a penalty that was comparable to the sentence that was rejected in *Miller*. *Id*. at ¶ 55. Furthermore, the trial court received a detailed "presentence investigation (PSI) report containing information regarding defendant's age, childhood history of abuse and neglect, drug and alcohol use, mental health treatment, and prior juvenile criminal history." *Id*. at ¶ 56. In addition, the "State relied upon defendant's prior criminal history in aggravation in support of its request for a sentence above the minimum, while defense counsel stressed defendant's history of neglect in arguing for a minimum sentence." *Id*. As a result, the trial court was presented with and considered the mitigating factors, including defendant's youth, before imposing the minimum 21-year sentence for each offense. The *Hunter* court concluded that defendant's sentence did not violate the eighth amendment because the "mandatory firearm enhancement did not preclude the trial court from considering defendant's age in mitigation." *Id*.

¶ 34 Similar to *Hunter*, the 25-year mandatory firearm enhancement imposed here did not prelude the trial court from considering defendant's youth and rehabilitative potential. The record in the instant case shows that the trial court received a presentence investigation (PSI) report containing information regarding defendant's age, his upbringing, his marijuana use and his lack of criminal history. The court heard arguments in aggravation and in mitigation, including numerous letters written by defendant's family members to the court on defendant's

behalf. The record shows that the court considered all of the factors, including defendant's age and lack of criminal history before sentencing him to the minimum sentence allowed by law. We therefore find that defendant's sentence does not violate the eighth amendment.

¶ 35 We next consider defendant's as-applied constitutional challenge to the 25-year mandatory firearm enhancement under the proportionate penalties clause of the Illinois Constitution. The proportionate penalties clause provides that penalties must 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. A challenge under the proportionate penalties clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005).

¶ 36 This court has already upheld a mandatory firearm enhancement against a proportionate-penalties challenge by a juvenile offender in *People v. Banks*, 2015 IL App (1st) 130985 and *Hunter*, 2016 IL App (1st) 141904, ¶59-62. As we noted in *Hunter*, "in the present case, as in *Banks*, the mandatory firearm enhancement did not preclude the trial court from considering defendant's age as mitigation in its determination of defendant's sentence. Therefore, we find no violation of the proportionate penalties clause." *Hunter*, ¶ 59. We find no reason to depart from the holdings in *Banks* and *Hunter* and find no violation of the proportionate penalties clause here.

¶ 37 We are aware of this court's decision in *People v. Aikens*, 2016 IL App (1st) 133578. In *Aiken*s, the juvenile defendant was convicted of attempt first degree murder of a police officer, aggravated discharge of a firearm and aggravated unlawful use of a weapon after defendant fired multiple shots at an unmarked police car. The defendant was sentenced to 20 years in prison for the attempt murder conviction, plus another 20 years for personally discharging a firearm.

¶ 38 On appeal, the defendant advanced, *inter alia*, an as applied challenge to the 20-year

mandatory firearm enhancement under the proportionate penalties clause. *Id*. This court reversed and remanded for resentencing finding that the defendant's 40-year sentence violated the proportionate penalties clause as applied to him. In considering the defendant's challenge, this court noted the recent amendments to the Juvenile Court Act (Act) which changed the standards for juvenile offenders with respect to the way that juveniles are tried and sentenced. *Id*. ¶38 (citing See Pub. Act 99–69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105 (West 2014)); Pub. Act 99–258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805 (West 2014)). In crafting its holding, the court indicated that it was aware that these amendments to the Act were not intended to apply retroactively to the defendant's case, but the court nevertheless found these amendments to the Act to be "indicative of a changing moral compass in our society when it comes to trying and sentencing juveniles as adults." With this changing moral compass in mind, the court found that because the defendant was young, had no prior criminal history, had a troubling social history, was described by a mitigation specialist as full of potential and able to fully rehabilitate as a contributing member of society and because "[w]hile the crime was indeed serious, no one was injured in this particular instance," the defendant was entitled to resentencing in line with the new sentencing scheme, without imposition of the mandatory enhancement" despite the fact that the amendments were not retroactive. *Id*.

¶ 39 We agree with *Aikens* that the moral compass is changing with regard to juveniles in the justice system, but our legislature and our supreme court have made it clear that the amendments to the Act that affect juvenile sentencing are to be applied prospectively. Even so, we find *Aikens* distinguishable because unlike the defendant in *Aikens*, the defendant in this case shot at Kelvin Greenfield four times as Kelvin was running away from him, hitting Kelvin and severely injuring him.

¶ 40 Finally, defendant argues that in the alternative, regardless of whether his sentence is unconstitutional as applied to him, he is entitled to a new sentencing hearing under section 5-4.5-105(b) because that section is retroactive to cases pending on direct appeal. Section 5-4.5-105(b) provides that the court has the discretion to decline to impose the applicable sentencing enhancement based on the possession of a firearm. 730 ILCS 5/5-4.5-105(a), (b) (West 2016). Defendant argues that at a new sentencing hearing, the "circuit court would have the discretion not to apply the firearm sentencing enhancements."

¶ 41 Our supreme court has expressly rejected the argument that section 5-4.5-105(b) applies retroactively in *People v. Hunter*, 2017 IL 121306. With respect to subsection (b), the supreme court stated "under section 4 [of the Statute on Statutes], subsection (b) of the new statute cannot apply to [defendants], who were sentenced before the statute took effect. *Hunter*, 2017 IL 121306, ¶ 52. The court also noted that defendants made no claim that error occurred in the trial court that would require vacatur of their sentences and remand for resentencing, thus giving them the option to be sentenced under subsection (b). *Hunter*, 2017 IL 121306, ¶ 55.

¶ 42 There is no dispute that the defendant's commission of the attempted murder and his sentencing in this case took place prior to the effective date of January 1, 2016. Defendant makes no claim of error that would entitle him to a new sentencing hearing. Therefore, defendant is not entitled to a new sentencing hearing, and we affirm the judgment of the trial court.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 45 Affirmed.

¶ 46 Mikva, J., dissenting in part:

¶ 47 I join in all aspects of the court's opinion except one. I would find the 25-year mandatory firearm enhancement unconstitutional under the proportionate penalties clause of the Illinois Constitution, as applied to Mr. Witherspoon. The court acknowledges (*infra* ¶¶ 39-41) the similarities between this case and our decision in *People v. Aikens*, 2016 IL App (1st) 133578. In that case, we reversed a sentence that had been imposed on a 17-year-old defendant that included a 20-year mandatory firearm enhancement and remanded for resentencing in line with the 2016 sentencing scheme, which does not require mandatory enhancement for defendants who were under the age of 18 years at the time of the crime. *Id.* ¶ 38.

¶ 48 Mr. Witherspoon was barely 17 years old at the time of this shooting and had no record of juvenile adjudications or adult convictions. At sentencing, the judge noted that he had received 10 or 11 letters from family and others saying how much they cared for Mr. Witherspoon, what a "very decent young man," he was, and how he'd helped people "in many respects." The judge stated it was "clear" that this was "probably a onetime incident." He noted that he had "no alternative" but to impose the 25-year firearm enhancement. At the motion to reconsider the sentence, the trial court reflected: "Unfortunately, until and unless it is changed, it does require the enhancement."

¶ 49 While the trial judge's unhappiness with a mandatory sentence does not, in itself, render that sentencing provision unconstitutional as applied, it does reflect the disconnect between a mandatory 25-year firearm enhancement and our constitution's requirement that we consider the possibility of rehabilitation for juvenile offenders. As the court notes, our supreme court has held that section 5-4.5-105(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-105(b) (West 2016)), which eliminates mandatory enhancements for juveniles, does not apply to defendants like Mr. Witherspoon who happen to have been sentenced before the statute took effect.

However, as we noted in *Aikens*, even if these provisions do not apply, they are "indicative of a changing moral compass in our society when it comes to trying and sentencing juveniles as adults." *Id.* ¶ 38.

¶ 50 I do not think the distinction that the court draws (*infra* ¶ 41) between this case and *Aikens* is determinative. In this case, Mr. Witherspoon shot at the victim and wounded him. In *Aikens*, the defendant shot at a police car four or five times, admittedly *trying* to shoot the police, and it was just by chance that none of the shots hit any of the intended victims. *Aikens*, 2016 IL App (1st) 133578, ¶ 5. Here, as in *Aikens*, the mandatory firearm enhancement required the trial court to impose a sentence that failed to account for the defendant's criminal history and rehabilitative potential. I would follow *Aikens* and remand for resentencing.