2018 IL App (1st) 160276-U

No. 1-16-0276

Order filed on December 4, 2018.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 6002 (02)
	)	
JEFFREY LOVING,	)	The Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for armed robbery with a firearm and armed habitual criminal are affirmed where: the trial court's failure to advise potential jurors regarding defendant's decision to forego testifying did not constitute plain error under the closely-balanced evidence test; and the trial court did not deny defendant his right to self-representation because, after initially seeking to act *pro se*, he elected to proceed with his attorney's assistance. The mittimus is corrected to reflect that defendant is eligible to receive day-for-day good-conduct credit toward his armed robbery sentence because there was no finding of great bodily harm by the court.

¶ 2 Following a jury trial, defendant Jeffrey Loving was convicted of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012) and being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)). Defendant was sentenced to respective, concurrent terms of 31 years and 20 years in prison. On appeal, defendant contends: (1) the trial court's failure to ask the jury venire whether they understood and accepted the principle that his decision not to testify could not be held against him constituted plain error under the "closely balanced" prong of that doctrine; (2) his constitutional right to self-representation for posttrial motions and sentencing was thwarted when the trial court did not consider the relevant factors in denying his request to act as his own counsel; and (3) because the trial court made no finding of great bodily harm, the mittimus should be corrected to indicate he is eligible for day-for-day (50%) good time credit toward his sentence for armed robbery with a firearm. We affirm and correct the mittimus.

¶ 3 Defendant was charged with armed robbery with a firearm, being an armed habitual criminal and with other weapons-related offenses. Defendant and his co-defendant, Antoine Hotchkiss, were tried simultaneously by separate juries. Both men were convicted of the armed robbery of Timothy Armstead with a firearm.[1] At the time of the offense, defendant and Hotchkiss were being driven in a car by Joannie Rivera, who was charged with armed robbery and testified for the prosecution pursuant to a plea deal.

¶ 4 At the outset of his testimony, Armstead acknowledged pleading guilty in 2007 to possession of a controlled substance. Armstead testified he was raised in Chicago and was in the city visiting family on March 1, 2013. About 9:30 p.m., he was walking alone on St. Louis Avenue to the Blue Line train station at Homan Avenue and Congress Parkway. Armstead had $220 in his hand and was retrieving the correct amount to buy a train ticket. As he did so, a four-

[1]Hotchkiss's appeal is being addressed by this court in case No. 1-15-3554.

door Chrysler sport-utility vehicle drove alongside him and stopped at a stop sign. Armstead testified that defendant "jumped out of the back seat" with a gun, pointed the gun at Armstead's stomach and told him not to move. Defendant patted Armstead down, took the $220 from his hand and got back in the car.

¶ 5 Hotchkiss got out of the Chrysler and patted Armstead down and took a "flip"-style cell phone from Armstead's coat pocket. Armstead said Hotchkiss was "real close" and "in my face." Hotchkiss dropped the phone on the ground, and defendant told Hotchkiss to hurry up. Hotchkiss got in the car, and the car drove away.

¶ 6 A van containing two men Armstead knew from the neighborhood then pulled up next to him. Armstead told them he had just been robbed and got in their van to pursue the robbers. The van pulled up to the passenger side of the Chrysler at a red light at Jackson Boulevard and Central Park Avenue. Armstead opened the van's sliding door and shouted to defendant, who sat in the passenger seat of the Chrysler, that he would remember defendant's face.

¶ 7 A police vehicle pulled in front of the Chrysler and the van, and an officer asked what was happening. Armstead pointed at the Chrysler and said he had been robbed. The Chrysler drove away when the light turned green, and police pursued the vehicle. The officers eventually apprehended defendant, Hotchkiss and Rivera.

¶ 8 Several Chicago police officers testified at trial regarding these events. Chicago police officer Pedro Barrera testified he and his partner were parked in a marked police vehicle near the edge of Garfield Park, at the intersection of Jackson and Central Park. Barrera saw Armstead standing next to a van, trying to get his attention. Barrera pulled into the intersection and Armstead pointed to the Chrysler and said he was robbed and they had a gun. Barrera, who was

between 10 and 15 feet away from the Chrysler, saw defendant was the passenger and a woman was the driver.

¶ 9 The Chrysler drove around Barrera's vehicle and proceeded west toward Garfield Park. Barrera pursued the vehicle. Shortly thereafter, police detained the Chrysler and its occupants at a red light at Jackson and Independence, on the west side of Garfield Park. Barrera learned via police radio that a weapon had been recovered. On cross-examination, Barrera stated he did not see a gun being thrown from the car. Chicago police officer Luis Centeno testified he recovered $220 from defendant during a patdown search.

¶ 10 Chicago police sergeant Jeff Truhlar testified that at about 9:36 p.m., he received a radio report of an armed robbery suspect near Jackson and Central Park. A handgun with black tape wrapped around the handle was recovered from the north side of Jackson, approximately one or two blocks west of the corner of Jackson and Central Park. No fingerprints were recovered from the weapon, which was loaded.

¶ 11 Chicago police sergeant Adam Zelitzky testified he interviewed Armstead and the other men in the van. In separate show-up identifications, Armstead identified defendant as the man who robbed him, Hotchkiss as the second man in the Chrysler and Rivera as the driver.

¶ 12 Rivera was charged with armed robbery and testified against defendant and Hotchkiss pursuant to an agreement with the State in which she pled guilty to robbery and received a four-year prison sentence. In March 2013, Rivera and defendant had been dating for several months. On the morning of March 1, Rivera purchased a Chrysler vehicle and met defendant at about noon. Rivera drove defendant to his sister's house on the west side. Defendant called Hotchkiss, who came to the house. At 5 or 6 p.m., defendant asked Rivera to drive him and Hotchkiss

somewhere but did not tell her exactly where they would be going. Rivera testified that no one mentioned a robbery and she did not know defendant had a handgun.

¶ 13 Defendant got in the passenger seat of her car, and Hotchkiss got in the back seat. Rivera drove them around for about an hour, with defendant giving her directions. Defendant told Rivera to pull over and stop the car near Congress Parkway and St. Louis Avenue where Armstead and another man were walking down the street. Defendant got out of the car, and the man who was with Armstead ran away. Hotchkiss and Rivera remained in the car. Although defendant was on the sidewalk behind the vehicle, Rivera could see him in her side mirror.

¶ 14 Defendant approached Armstead, held a gun to Armstead's stomach and asked for money. Defendant searched Armstead's pockets and removed money. Hotchkiss then approached Armstead and searched the pockets of his jacket, removing a cell phone and throwing it to the ground. Rivera said she did not drive away because she was "in shock." Defendant and Hotchkiss ran back to the car, and defendant told Rivera, "Go, go, go." Rivera drove away as defendant counted money in the car.

¶ 15 Rivera stopped at a red light at Jackson and Central Park, with defendant again in the passenger seat and Hotchkiss in the back. Armstead was shouting at defendant from a blue van. When Armstead pointed the Chrysler out to police nearby, Rivera made a left turn and a police vehicle began following her car. Defendant passed the gun to Hotchkiss, who threw it out of the window. Rivera's car was detained by police at the next stoplight and all three were arrested.

¶ 16 Rivera identified the weapon recovered by police as the gun defendant used to rob Armstead and that Hotchkiss threw from the car window. On cross-examination, Rivera stated that before the robbery, she consumed beer they had purchased from a liquor store.

¶ 17 The parties stipulated that defendant had been previously convicted of two qualifying felony offenses to support the charge of being an armed habitual criminal. At the close of the State's case-in-chief, the defense moved for a directed verdict, which was denied. The defense presented no witnesses.

¶ 18 The jury found defendant guilty of armed robbery with a firearm and of being an armed habitual criminal. Defendant's motion for a new trial was denied.

¶ 19 Defendant was sentenced to 31 years in prison for the armed robbery conviction and 20 years in prison for the armed habitual criminal conviction, with those terms to be served concurrently. Defendant filed a motion to reconsider sentence, which was denied.

¶ 20 On appeal, defendant first contends the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) by not asking the jury venire if they understood and accepted that defendant's decision not to testify could not be held against him.

¶ 21 Rule 431(b), which codifies the principles set out in *People v. Zehr*, 103 Ill. 2d 472, 477-78 (1984), requires the trial court to ask each juror if he or she understands and accepts each of the following four tenets: (1) the defendant is presumed innocent of the charge(s) against him; (2) before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his or her own behalf; and (4) if a defendant does not testify, it cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Even though Rule 431(b) does not contain a "precise formula for trial judges to use in ascertaining jurors' prejudices or attitudes," the rule requires trial courts to address each enumerated principle and "mandates a specific question and response process." *Thompson*, 238 Ill. 2d at 607; *People v. Emerson*, 122

Ill. 2d 411, 427 (1987). The court is required to ask each juror if he or she understands and accepts each of the principles set out in the rule. *Thompson*, 238 Ill. 2d at 607.

¶ 22 Here, the State concedes, and, after reviewing the record, we agree, that the trial court did not explain the fourth *Zehr* principle to the venire, namely that defendant's decision not to testify could not be held against him. The trial court's failure to advise the venire on this principle has been found to be error. *People v. Blanton*, 2011 IL App (4th) 080120 ¶ 19; *People v. Chester*, 409 Ill. App. 3d 442, 447 (2011).

¶ 23 Defendant acknowledges he did not preserve his objection to this alleged error by raising it during *voir dire* or including the issue in his posttrial motion, thus requiring its consideration under the plain-error rule. Under the doctrine of plain error, a reviewing court may exercise its discretion and excuse the party's procedural default if a clear or obvious error has occurred and either: (1) the evidence is "so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) 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. Staake*, 2017 IL 121755, ¶ 31 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 24 Invoking the first alternative, defendant argues the evidence in this case was closely balanced such that his decision not to testify could have affected the jury's consideration of his guilt. Our supreme court recently, in *People v. Sebby*, 2017 IL 119445, ¶ 72, reaffirmed that a "clear Rule 431(b) violation is cognizable under the first prong of the plain error doctrine."

¶ 25 Thus, it is necessary to consider whether the evidence in this case was closely balanced. A closely balanced" case is "one where the outcome of the case would have to be different had the impropriety not occurred." *People v. Pierce*, 262 Ill. App. 3d 859, 865 (1992). "In

determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. This inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id*.

¶ 26 The consideration of whether evidence is closely balanced is distinct from the sufficiency of the evidence to withstand a reasonable doubt challenge. *Id*. ¶ 60 (framing the issue as "the closeness of sufficient evidence" rather than "the sufficiency of close evidence"); *Piatkowski*, 225 Ill. 2d at 566. The closely balanced standard errs on the side of fairness and grants a defendant a new trial even if the evidence was otherwise sufficient to sustain a conviction. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 75. However, the burden of persuasion that the closely balanced nature of the evidence contributed to the outcome is on the defendant. *Piatkowski*, 225 Ill. 2d at 565.

¶ 27 In arguing the evidence in this case was closely balanced, defendant contends the accounts of Armstead and Rivera were improbable and inconsistent from each other. Specifically, defendant notes that in contrast to Armstead's testimony, Rivera stated that another person was with Armstead when defendant approached him, that defendant took the money from Armstead's pocket and not his hand, as Armstead had testified. In addition, Rivera testified that defendant and Hotchkiss were out of the car at the same time confronting the victim, in contrast to Armstead's account that defendant got back in the car before Hotchkiss got out.

¶ 28 Defendant further asserts both witnesses lacked credibility due to Armstead's prior conviction and Rivera's plea deal, and he argues Armstead's account of the men pulling up in the van immediately after he was robbed lacked plausibility. In addition, defendant argues that no

physical evidence connects him to the weapon that police recovered and that Officer Barrera admitted he did not see a weapon being thrown from the Chrysler. The State responds that Armstead and Rivera's testimony was credible and corroborated by the officers' accounts and additional evidence, such as the $220 recovered from defendant and Rivera's identification of the weapon retrieved by police.

¶ 29 Evidence has been found to be closely balanced where each side has presented credible witnesses or where the credible testimony of a witness is countered by evidence that casts doubt on his or her account. See *Sebby*, 2017 IL 119445, ¶ 63 (evidence is closely balanced where the outcome of the case turns on the resolution of a "contest of credibility" where both sides offer believable versions of events and neither version was supported by corroborating evidence); *People v. Evans*, 369 Ill. App. 3d 366, 376 (2006) (verdict was based on credibility determination of two expert witnesses who testified regarding competing theories); *People v. Wilson*, 199 Ill. App. 3d 792, 795 (2011) (victim's testimony, which was principal evidence against defendant was challenged by witness's testimony that victim had motive to lie). In contrast, evidence has been deemed to be not closely balanced when one witness's version of events was either implausible or it was corroborated by other evidence.. *People v. Daniel*, 2018 IL App (2d) 160018, ¶ 30 (and cases cited therein).

¶ 30 Applying those standards here, the evidence against defendant was not closely balanced. The defense did not present any witnesses to cast doubt on the accounts presented by Armstead, the police officers and Rivera. The need to determine the credibility of a witness where no competing witness or other evidence was presented does not render the evidence closely balanced. *People v. Hammonds*, 409 Ill. App. 3d 838, 861-62 (2011). Although defendant contends the inconsistencies between the testimony of Armstead and Rivera renders their

accounts unbelievable, their overall descriptions of the events were consistent with each other and were corroborated by other evidence, such as the amount of money recovered from defendant and the recovery of the weapon from the vicinity where Rivera said it had been discarded by Hotchkiss. The absence of physical evidence against a defendant does not preclude a finding that the other evidence that was presented was not closely balanced. See *Cosmano*, 2011 IL App (1st) 101196, ¶ 76. Accordingly, because the evidence against defendant was not closely balanced, he cannot obtain relief under the plain error doctrine.

¶ 31 Defendant next contends he was denied his constitutional right to self-representation during his posttrial proceedings and sentencing. He asserts that the trial court erred in not granting a continuance to allow him time to decide whether to keep his trial counsel or act as his own attorney.

¶ 32 As a threshold matter, the State asserts plain-error review of this issue is required because defendant did not object during the proceedings or raise the issue in his posttrial motion. Defendant responds that his contentions relate to the trial court's conduct, which warrants relaxation of the forfeiture rule here. He also asserts that a claim involving a constitutional violation is not subject to forfeiture. The initial step in a plain-error analysis is to determine whether the claim presented actually amounts to a clear and obvious error, because without error, there can be no finding of plain error. *People v. Hood*, 2016 IL 118581, ¶ 18; *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. This assessment requires a substantive review of the issue. *People v. Walker*, 232 Ill. 2d 113, 125 (2009). Therefore, under either party's position, our analysis is the same.

¶ 33 A defendant has a constitutional right to self-representation. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *Faretta v. California*, 422 U.S. 806, 819 (1975). To invoke that right, a

defendant must make an unequivocal request to represent himself and must knowingly and intelligently relinquish the right to counsel. *People v. Baez*, 241 Ill. 2d 44, 116 (2011). The defendant's demand to represent himself must be articulate and unmistakable, not ambiguous. *Id*.; *People v. Burton*, 184 Ill. 2d 1, 21 (1998).

¶ 34 A court must "indulge in every reasonable presumption against waiver" of the right to counsel. *People v. Perkins*, 2018 IL App (1st) 133981, ¶ 42 (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). Even if a defendant gave some indication that he wished to represent himself, he may later agree to representation by counsel by vacillating or abandoning his earlier request to act *pro se*. *Burton*, 184 Ill. 2d 23-24 (reviewing court may consider the defendant's conduct following his request to represent himself). Whether a defendant made an intelligent waiver of counsel and invoked his right of self-representation is reviewed for an abuse of discretion. *Baez*, 241 Ill. 2d at 116.

¶ 35 Defendant was represented at trial by two assistant Cook County public defenders. During posttrial proceedings on October 8, 2015, the following colloquy occurred:

> "THE COURT: Mr. Loving is here. He is represented actually by his attorney [naming one public defender], who stopped by the court yesterday and indicated he could not be here. So he requested the date of October 29th.
>
> DEFENDANT: I want to say something. I want to get rid of him. I want to go *pro se*.
>
> THE COURT: No. I'm not dealing with that. I'm not even going there. You'll be up October 29th."

¶ 36 The court asked defendant why he was in the custody of the Illinois Department of Corrections (IDOC) and not the Cook County Department of Corrections (CCDOC). Defendant responded that he had no law library access and "ain't got nothing." The court told defendant he

should talk to his attorney "first of all." Defendant responded, "I'm sick of him." The court continued the case until October 29.

¶ 37 On October 29, 2015, defendant was present and represented by counsel. The following exchange took place:

"DEFENSE COUNSEL: I received a presentence investigation. It's in my possession. I've been informed that Mr. Loving wishes to fire me and go *pro se*.

THE COURT: Is that correct, sir?

DEFENDANT: Yes, your Honor. I want to tell you why.

THE COURT: I'm just asking. I have to get first things first. So, sir, you know [*sic*] longer wish to have [named counsel] represent you in this matter?

DEFENDANT: No."

¶ 38 The court asked defendant about his education and legal experience and told him he was subject to the same standards as a licensed attorney. Defendant responded that he understood. The colloquy continued:

DEFENDANT: "The only reason I'm trying to do this, ma'am --

THE COURT: You could do what you want.

DEFENDANT: -- because I don't -- I asked for a copy of the pretrial motions so I could go over it. [] I don't even know what's on there. I want to make sure that --

THE COURT: You mean posttrial motions.

DEFENDANT: I just want to make sure all my issues [are] raised now, because if I don't raise them now, I can't raise them later.

THE COURT: Right. Did you show that to him?

DEFENSE COUNSEL: I have actually three times I've informed him, besides the two very specific things I would raise in my posttrial motions."

¶ 39 The court said it would pass the case to allow defense counsel to confer with defendant regarding the issues to be raised on appeal, and counsel said he had already filed a motion for a new trial. The court stated that it wanted defendant "to see everything, [g]o through everything."

¶ 40 After the case was passed and recalled, the court asked defendant if he had the opportunity to review the motion. Defendant responded he had done so.

¶ 41 Defendant requested a 60-day continuance. This exchange then occurred:

"THE COURT: No. No. Are you -- who's representing you. Is [counsel] representing you after you saw the motion, or are you representing yourself [?]

DEFENDANT: I would like to represent myself, but I need a copy. I'm talking about I wanted to go over [*sic*]. All he did was showed me. I mean --

THE COURT: He just went over it the third time, sir. So, here's the thing, either you want him or you don't want him. I'm not giving a 60-day continuance.

DEFENDANT: I want him then.

THE COURT: You want time to research some things?

DEFENDANT: Yes, sir [*sic*].

THE COURT: How's December 2nd?

DEFENSE COUNSEL: Let me take a look real quick.

THE COURT: I don't give 60-day dates.

DEFENDANT: I want you to know where I'm at. There's no law library there. I need to be shipped back to my joint.

THE COURT: I'll remand. CCDOC for one week. I'm not giving a 60-day date."

¶ 42 Based on that colloquy, defendant contends the trial court failed to consider his request to proceed *pro se* and "pressured" him into giving up his right to self-representation because the court refused to grant a 60-day continuance for him to prepare to act as his own attorney. We disagree.

¶ 43 The record shows that at the October 8, 2015, proceeding, the court declined to rule on defendant's request to "go *pro se*." At the next date, the court heard argument from defendant and defense counsel and determined that defendant wanted additional time for the purpose of reviewing the posttrial motions filed by counsel. Defendant therefore acquiesced in the representation by counsel at that point. After counsel and defendant conferred, the court posed the choice to defendant of proceeding with counsel or without counsel. Defendant responded that he wanted the assistance of counsel. Therefore, defendant abandoned his request to act *pro se*, and the trial court did not abuse its discretion in denying his request for self-representation. See *People v. Rolphs*, 368 Ill. App. 3d 540, 545 (2006) (where the defendant vacillated between wanting to represent himself and seeking new counsel, and ultimately abandoned his request to act *pro se*, he did not unequivocally invoke his right to self-representation).

¶ 44 In reaching this conclusion, we are not persuaded by defendant's argument that the court pressured him into giving up his right to self-representation by refusing to grant him a 60-day continuance. The trial court has broad discretion to grant or deny a motion for a continuance, and this court will not set aside such a determination unless it amounts to an abuse of the trial court's discretion. See *People v. Long*, 2018 IL App (4th) 150919, ¶ 112 (trial court did not abuse its discretion in denying posttrial request of defense counsel to investigate whether a juror testified falsely in *voir dire*). Whether the trial court has abused its discretion depends on the facts and circumstances of each case, and there is "no mechanical test *** for determining the point at

which the denial of a continance in order to accelerate the judicial proceedings violates the substantive right of the accused to properly defend." (Internal quotation marks omitted.) *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 33 (quoting *People v. Lott*, 66 Ill. 2d 290, 297 (1977)).

¶ 45 Where it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, this court will reverse a defendant's resulting conviction. *Walker*, 232 Ill. 2d at 125. This court cannot find an abuse of discretion in the trial court's denial of a continuance without the defendant having shown he was prejudiced by the court's denial. *Fountain*, 2016 IL App (1st) 131474, ¶ 34.

¶ 46 Here, defendant sought a continuance to review the issues that he wished to raise in his posttrial motion. The record shows that, after agreeing to counsel's representation, defendant confirmed he wanted time to conduct research. The court granted him a continuance for that purpose. Under these circumstances, defendant cannot show that he was prejudiced by the trial court's refusal to grant him a 60-day continuance or pressured by the court into giving up his right to act *pro se*.

¶ 47 Defendant's remaining argument involves whether this court can amend the mittimus to reflect that he should receive day-for-day good-conduct credit toward his 31-year sentence for armed robbery with a firearm. Defendant asserts this is a question of law that this court may review *de novo*.

¶ 48 A defendant may normally receive day-for-day good-conduct credit, also known as "good-time credit," toward a sentence, meaning he may earn one day of credit toward his sentence for every day of good conduct, thus potentially reducing his period of imprisonment by 50%. 730 ILCS 5/3-6-3(a)(2.1) (West 2012); *People v. Davis*, 405 Ill. App. 3d 585, 602 (2010). Defendant was convicted of armed robbery with a firearm, for which he was sentenced to 31

years in prison, and with being an armed habitual criminal, for which he was sentenced to 20 years in prison, with those terms to be served concurrently. By statute, defendant must serve 85% of his armed habitual criminal sentence (730 ILCS 5/3-6-3(a)(2)(ii)(West 2012), and he does not challenge that sentence.

¶ 49 Defendant argues he should receive good-time credit toward his sentence for armed robbery with a firearm because the trial court did not make a finding that the offense resulted in great bodily harm. When the trial court sentences a defendant for armed robbery with a firearm, along with other enumerated offenses, the court shall make a finding as to whether the conduct leading to the conviction for that offense resulted in great bodily harm to a victim. 730 ILCS 5/5-4-1(c-1) (West 2012). The court shall enter that finding and the basis for that finding in the record. *Id*. Where the trial court makes a finding of great bodily harm, a defendant is required to serve 85% of the sentence. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2012). Where the trial court has made no finding of great bodily harm, a defendant shall be eligible for good-time credit. 730 ILCS 5/3-6-3(a)(2.1) (West 2012).

¶ 50 Here, defendant asserts, and our review of the record confirms, that the trial court did not make a finding of great bodily harm. The State does not dispute the applicability of good-time credit to defendant's armed robbery sentence. We conclude that in the absence of a finding of great bodily harm by the trial court, defendant is entitled to good-time credit toward his sentence for armed robbery with a firearm.

¶ 51 Defendant contends that because the mittimus "is silent as to what percentage of his sentence must be served," the mittimus must be amended to indicate his armed robbery sentence is to be served at 50%. Defendant asks this court to take judicial notice of his record on the

IDOC website, which, in his estimation, reflects that he should serve 85% of his sentence for armed robbery with a firearm.

¶ 52 A review of defendant's IDOC inmate status record reveals that record does not indicate what percentage of that sentence, or any other sentence, defendant is required to serve. Rather, defendant's IDOC inmate status record lists his convictions and sentences and states a projected discharge date of July 7, 2042.[2] Based on that discharge date, defendant (who was admitted to the IDOC on April 18, 2014) calculates that he is being required to serve 85% of his sentence for armed robbery with a firearm, which, at 31 years, is the longest sentence imposed against him in this case.

¶ 53 The State contends that no amendment or correction is required because there was no error in the trial court's oral pronouncement of defendant's sentence or in the mittimus. The State maintains that for defendant to obtain the relief he requests, he must institute litigation that names the IDOC as a party. We are not persuaded by the State's argument.

¶ 54 The applicability of good-time credit occurs by operation of statute where no finding of great bodily harm is made, *i.e.*, in the absence of a finding by the trial court. See 730 ILCS 5/3-6-3(a)(2.1) (West 2012). Thus, the lack of an express pronouncement by the trial court or an "error" in a pronouncement by the trial court is not dispositive. Rather, defendant's request for relief is based on the operation of the statute where there is no finding of great bodily harm and, thus, is not based on an explicit error made by the trial court.

¶ 55 Accordingly, because defendant was entitled to good-time credit toward his sentence for armed robbery with a firearm based on the absence of a finding of great bodily harm, we amend

[2]https://www.illinois.gov/IDOC/OFFENDER/Pages/InmateSearch.aspx (last visited Nov. 9, 2018). This court may take judicial notice of information appearing on the IDOC website. *People v. Ware*, 2014 IL App (1st) 120485, ¶ 29.

the mittimus to reflect that fact. This court may correct the mittimus without remanding the case pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999). This court may correct or amend a mittimus so that a defendant's sentence will be served according to the facts and the law of the particular case. See, *e.g.*, *People v. Bailey*, 307 Ill. App. 3d 226, 231 (1999); *People v. Bashaw*, 304 Ill. App. 3d 257, 259 (1999) (correcting the mittimus to reflect that the defendant was eligible to receive day-for-day good-conduct credit after a prior sentencing law was found unconstitutional). We note that the ultimate earning of such credit "is contingent upon a defendant's behavior in prison and there is no guarantee that the defendant will receive any credit." *Davis*, 405 Ill. App. 3d at 603 (noting it is at the discretion of the Department of Corrections to calculate what credit a defendant will receive). See also *People v. Thomas*, 402 Ill. App. 3d 1129, 1132 (2010) (the correction of the mittimus "is a ministerial act that does not change the underlying sentence"); *Rogers v. Prisoner Review Board*, 181 Ill. App. 3d 1039, 1044 (1989) (credit toward a sentence "does not accrue or vest until the prisoner actually serves the applicable time with good behavior").

¶ 56 For the reasons stated, the judgment of the trial court is affirmed and the mittimus is corrected as indicated above.

¶ 57 Affirmed; mittimus corrected.