2020 IL App (1st) 163251-U

SIXTH DIVISION
FEBRUARY 28, 2020

No. 1-16-3251

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 15 CR 5200
	)	
DAVID OCHOA,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's convictions for aggravated battery with a firearm and aggravated discharge of a firearm affirmed where evidence was sufficient to sustain the convictions, any error in admission of evidence did not amount to plain error, court's *ex parte* communication with jury was harmless error, and court did not abuse its discretion in sentencing.

¶ 2 Following a jury trial, defendant-appellant David Ochoa was convicted of aggravated battery with a firearm and aggravated discharge of a firearm when he fired his gun into a group of people. He was sentenced to 28 years' imprisonment. On appeal, the defendant argues that (1) the testimony of two eyewitnesses was insufficient to sustain his conviction where it did not satisfy

the *Biggers* factors; (2) the trial court erroneously admitted certain evidence; (3) the trial court engaged in improper *ex parte* communication with the jury; and (4) the trial court abused its discretion in sentencing. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On January 23, 2015, Jennifer Carrillo was leaving a liquor store in Chicago with her sister, Carmen Carrillo, and their friends, Lizbeth Gomez, Raul Carmago, Gabriela Barron, and Christopher Castillo. It was approximately 10:20 p.m. as the group was walking back to Jennifer's house when a black SUV pulled alongside them. The passenger side window rolled down and the man inside began yelling before reaching behind him inside the car. The group fled as gunshots rang out. Jennifer was shot in her leg and Gabriela was grazed with a bullet. Gabriela refused medical attention and ultimately signed a refusal to prosecute.

¶ 5 At the August 2016 jury trial, Jennifer, Carmen, Christopher, and Gabriela all testified. All four agreed that the SUV pulled up near Jennifer, Christopher and Gabriela, who were walking next to each other on the sidewalk while the remaining group members walked ahead of them. However, each disputed the order in which they were walking. According to Christopher, Jennifer was closest to the street, while Jennifer testified that Christopher was closest. And Gabriela and Carmen both testified that Gabriela was closest to the street and Christopher was furthest. Of the four, only Jennifer and Christopher were able to identify the shooter.

¶ 6 Jennifer testified that although it was dark, she saw the shooter's face because he put it "a little bit" outside of the car, which was 8 to 10 feet in front of her. She testified that she saw the shooter's "cheek area" and could tell the shooter was light skinned. She also saw something "black" and "big" around the shooter's left eye, although she could not see the color of his eyes.

Jennifer testified that the shooter was wearing a hoodie but that she could not tell if the hood was up or down and could not really see anything below his neck. The encounter only lasted seconds before he began shooting.

¶ 7 Three weeks following the shooting, on February 6, 2015, the police arrived at Jennifer's house and showed her a six-person photo array which included the defendant. Jennifer identified the defendant as the shooter although he did not have any tattoos on his face. She confirmed her identification of the defendant as the shooter in open court.

¶ 8 Christopher also testified that he could see the face of the shooter once the window was rolled down. The shooter was 10 feet away from him and Christopher could see that he was light skinned and he had a tattoo on the right side of his face. Because it was dark inside the car, he could not see the color or length of the shooter's hair or his eye color. Christopher also testified that there was no light in the immediate area by the sidewalk. In describing the length of time he saw the shooter, Christopher testified "I just turned real quick and looked away and that's it."

¶ 9 On March 6, 2015, the police met him in another state, where Christopher had moved following the shooting. At trial, the State produced a photo array and asked if it was identical to that which police had shown Christopher in March. Christopher said it was different and that he did not recognize the photo array. He did, however, identify the defendant as the shooter from the array presented at trial. Christopher also made an in-court identification of the defendant as the shooter and said he recognized him from "his face."

¶ 10 Chicago police officer Theodore Delis, an evidence technician for 10 years, also testified. According to his testimony, as an evidence technician, he received specific training in processing crime scenes, photographing victims, and collecting evidence. He was called to the scene of the shooting on January 23, where he observed a metal fragment. In his years as an evidence

technician, he had seen hundreds of metal fragments at crime scenes that were the result of bullets hitting an object nearby and landing on the street. The State asked Delis in his "expert opinion" to identify the metal fragment he recovered, and Delis responded that it looked like a fired bullet that had ricocheted off a nearby wrought iron fence, which showed some damage. On cross-examination, Delis admitted that he did not know when the metal fragment was placed at the scene or whether the fence was damaged before the shooting occurred.

¶ 11 After the State rested, the defendant moved for a directed verdict, which was denied. The defendant rested without testifying and without putting on any evidence. Following closing arguments and jury instructions, the jury retired to deliberate. At some point during the deliberations, the jury sent out a note reading "The Jury cannot come to a unanimous verdict." At 6:36 p.m., the court sent a signed response saying "Continue your deliberations." Later that evening, the jury returned a verdict finding the defendant guilty of aggravated discharge of a firearm and both counts of aggravated battery with a firearm.

¶ 12 At sentencing, the defendant argued in mitigation that he was raised by his grandmother beginning at the age of two, when his mother was murdered. In 2011, his grandmother died and he moved to a group home. The defendant mentioned that he had received his GED and was employed until the time of his arrest. Under these circumstances, the defendant urged the trial court to impose the minimum sentence.

¶ 13 The court ultimately sentenced the defendant to 28 years' imprisonment. In imposing sentence, the court stated "this was unprovoked by these victims and a firearm, two people harmed, a firearm." Following the denial of his motion to reconsider sentence, in which he argued in relevant part that the court "considered improper aggravating factors," the defendant timely appealed.

¶ 14 ANALYSIS

¶ 15 We note that we have jurisdiction to review this matter, as the defendant filed a timely notice of appeal following sentencing. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); Ill. S. Ct. R. 606 (eff. July 1, 2017).

¶ 16 I. Identification Testimony

¶ 17 On appeal, the defendant initially challenges the sufficiency of the evidence, specifically contending that the eyewitness identifications by Jennifer and Christopher were insufficient to convict him. A challenge to the sufficiency of the evidence requires the reviewing court to consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *People v. Newton*, 2018 IL 122958, ¶ 24. We will not substitute our judgment for that of the trier of fact, nor will we reverse a conviction unless the evidence is so improbable or unsatisfactory so as to raise a reasonable doubt of a defendant's guilt. *People v. Wright*, 2017 IL 119561, ¶ 70.

¶ 18 While the testimony of a single eyewitness has long been held sufficient to sustain a conviction (see, *e.g.*, *People v. Johnson*, 114 Ill. 2d 170, 189 (1986)), the defendant argues that the identification testimony of Jennifer and Christopher was too unreliable to support his conviction. Illinois courts evaluate eyewitness identification testimony using the following factors promulgated by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the opportunity of the witness to view the offender at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the witness's degree of certainty in identifying the defendant; and (5) the length of time between the offense and the identification. *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 22.

¶ 19 Application of the majority of the factors weighs in favor of the State. Both witnesses testified that they saw the defendant immediately prior to the shooting. We measure the opportunity a witness had to observe the offender by considering whether the witness was "close enough to the accused for a sufficient period of time under conditions adequate for observation." *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40 (quoting *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979)). Here, both Jennifer and Christopher testified that they were approximately 8 to 10 feet away from the shooter, who put his face outside the car, which allowed both witnesses to look at him. While it was dark, the witnesses were able to see the color of the shooter's skin (light) and identify a mark near his eye. To be sure, Jennifer and Christopher had only seconds to observe the defendant before he began shooting, but our supreme court has deemed an identification reliable under similar circumstances. See *People v. Herrett*, 137 Ill. 2d 195, 200, 204 (1990) (finding that victim had sufficient opportunity to see the defendant when victim testified he observed his assailant's face for "several seconds" in "dim" lighting); see also *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998) (though victims had only "several seconds" to identify attackers, this did not render their identifications "so fraught with doubt as to raise a reasonable doubt as to defendant's guilt").

¶ 20 With regard to Jennifer and Christopher's degree of attention, nothing in the record suggests that their attention to the defendant was compromised. Indeed, both Jennifer and Christopher had reason to pay attention to the defendant given that his car was immediately beside them and he was yelling in their direction before shooting. Likewise, the record does not indicate that either Jennifer or Christopher were uncertain in their identification; to the contrary, they both made an in-court identification of the defendant, who Christopher said he recognized "from his face." Nor was there an inordinate length of time between their encounter with the defendant and

the identification. Jennifer identified the defendant in a photo array three weeks following the shooting, and Christopher identified him six weeks after the shooting. Delays of this length—and much longer—have not been held against the State. *In re Keith C.*, 378 Ill. App. 3d 252, 259 (2007) (finding passage of 23 days between crime and line-up did not adversely affect identification); see also *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (finding identification reliable notwithstanding one year and four month delay between crime and identification of the defendant).

¶ 21 The sole factor that weighs in favor of the defendant is the accuracy of the witness' prior description of the defendant: both Jennifer and Christopher testified that the shooter had a face tattoo, but when viewing the photo array, they identified the defendant, who did not have a tattoo. But this inaccuracy while significant, is not necessarily dispositive as witnesses are not generally trained to be careful observers. See *People v. Bias*, 131 Ill. App. 3d 98, 104-05 (1985) ("minor discrepancies" in a victim's description, including presence or absence of tattoo "do not render an identification utterly inadmissible"). More importantly, this inconsistency was fully explored during cross-examination and it is the province of the jury, not the reviewing court, to resolve conflicts and inconsistencies in the evidence. See *People v. Branch*, 2018 IL App (1st) 150026, ¶ 29.

¶ 22 Under these circumstances, we conclude that the identifications by both witnesses was reliable under *Biggers* and therefore sufficient to sustain the defendant's convictions. To conclude otherwise would substitute our judgment for the jury's in regard to the weight or reliability of the identifications, which we cannot do. See *id.*

¶ 23 II. Admission of Evidence

¶ 24 The defendant next challenges the admission of certain evidence, beginning with the metal fragment recovered at the crime scene and the testimony of evidence technician Theodore Delis.

Specifically, the defendant argues that the metal fragment was not relevant to establish the facts at issue and that Delis, who was not qualified as an expert, improperly gave his "expert opinion" that the fragment was the remains of a fired bullet. Significantly, the defendant failed to object to the admission of both the fragment and the testimony at trial or in his posttrial motion. As such, he has forfeited these issues for review. See *People v. Owens*, 394 Ill. App. 3d 147, 152 (2009) (a defendant may forfeit review even of errors of constitutional magnitude by failing to make a timely objection at trial and including that objection in his posttrial motion).

¶ 25 Recognizing this, the defendant urges us to review this unpreserved (alleged) error for plain error, or, alternatively, as evidence of ineffective assistance of counsel. The plain error doctrine allows a reviewing court to consider an unpreserved error in two circumstances: (1) where a clear and obvious error occurred and 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) where a clear and obvious error occurred and the error itself is so serious that it affected the integrity of the trial, regardless of the closeness of the evidence. *People v. Harvey*, 2018 IL 122325, ¶ 15. The first step in plain error review is always to determine whether error occurred. *Id.*

¶ 26 With regard to the admission of the metal fragment, at the outset we note that all relevant evidence is admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Evidence is relevant if it has the tendency to make the existence of a fact more or less probable than it would be without the evidence. *Id.*; see also *People v. Sardin*, 2019 IL App (1st) 170544, ¶ 100. Physical evidence must be connected to both the defendant and the crime to be admissible. *People v. Allison*, 236 Ill. App. 3d 175, 192 (1992). While proof of the connection may be circumstantial (*id.*), physical evidence may be inadmissible if it has little probative value due to its "remoteness, uncertainty or

its possibly unfair prejudicial nature" (*People v. Pulliam*, 176 Ill. 2d 261, 276 (1997)). Importantly, it is not necessary to prove that the object admitted into evidence was actually used in the crime, but only that it was suitable for commission of the crime. *People v. Larson*, 82 Ill. App. 3d 129, 140 (1980).

¶ 27 Here, assuming, as the defendant does for purposes of this argument, that the metal fragment was identifiable as the fragment of a bullet, it was certainly suitable for the shooting. And given the other evidence that the defendant was present at the scene and fired a gun, the metal fragment was circumstantially connected to him as well. See *People v. Lee*, 242 Ill. App. 3d 40, 42-43 (1993) (hypothesizing that a weapon recovered at a crime scene would be admissible even absent evidence directly connecting it to the defendant). In arguing to the contrary, the defendant maintains that the fragment could have been a bullet from a previous shooting, given the many handgun related crimes reported in that neighborhood. But this goes to the weight of the evidence, not its admissibility. In any event, even if the admission of the fragment *was* erroneous, it does not entitle the defendant to a new trial, for the reasons discussed *infra*.

¶ 28 Turning then to the admission of Delis' testimony that the fragment was a bullet, the State concedes that insofar as Delis was explicitly asked to give his expert opinion, this was improper because Delis was not admitted as an expert. Nevertheless, the State maintains that Delis' testimony was admissible as lay opinion testimony despite the State's "inartful phrasing." This argument strikes us as disingenuous where, prior to eliciting Delis' testimony that the fragment was a bullet that had ricocheted off a nearby fence, the State engaged in a line of questioning as to Delis' years of experience as an evidence technician, his specialized training, and unique equipment. Clearly, at trial, the State sought to portray Delis as an expert and obtain his *expert* opinion. This was in error since the State made no attempt to qualify him as an expert.

¶ 29 But an error alone does not entitle the defendant to a new trial. Rather, we must determine whether the evidence at trial was closely balanced such that the error had a potentially dispositive effect on the result. *People v. Lee*, 2019 IL App (1st) 162563, ¶ 67. In determining whether the evidence was closely balanced, we evaluate the totality of the evidence and conduct a "qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53. This assessment requires us to review the evidence on the elements of the offense and the evidence regarding the witnesses' credibility. *Id.*

¶ 30 Here, the strongest evidence at trial was the eyewitness identification testimony of Jennifer and Christopher, which was uncontradicted. Neither Jennifer nor Christopher wavered in their identification of the defendant as the shooter. While the defendant repeats his earlier argument that the identification testimony was unreliable and incredible, these claims do not render the evidence closely balanced for purposes of plain error review. This was not a credibility contest where witnesses disputed each other's accounts. Instead, the witnesses' testimony was largely consistent with only minimal discrepancies, such as where each was standing in relation to the car. This is insufficient for us to find the evidence closely balanced. See, *e.g.*, *People v. Pike*, 2016 IL App (1st) 122626, ¶ 103 (holding that evidence was not closely balanced when two victims both identified the defendant).

¶ 31 The defendant next urges us to find the evidence closely balanced based on the fact that the jury sent out a note indicating that it could not reach a verdict. To be sure, this court has previously held that lengthy jury deliberations and notes indicating that the jury had reached an impasse suggest that the evidence was closely balanced. See, *e.g.*, *People v. Aguirre*, 291 Ill. App. 3d 1028, 1035 (1997) (impeachment of State's witnesses coupled with jury's multiple notes, including one indicating that it had been at "10-2" for three hours and did not anticipate a change,

led court to conclude that evidence was closely balanced for purposes of plain error review); *Lee*, 2019 IL App (1st) 162563, ¶ 71 (credibility contest between defendant and police officers along with three jury notes reflecting deadlock rendered evidence closely balanced). Here, notwithstanding the jury's single note indicating that it could not reach a verdict, the jury nevertheless reached a verdict the same day trial concluded. This, coupled with the strength of the evidence adduced at trial leads us to conclude that the evidence was not closely balanced.

¶ 32 We do not find that the admission of the bullet fragment or Delis' testimony amounted to ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance, the defendant must show that counsel's performance was objectively unreasonable and that there was a reasonable probability that, but for counsel's errors, the result of trial would be different. *People v. Manning*, 241 Ill. 2d 319, 326 (2011). In other words, just as with plain error, the defendant must prove prejudice. See *People v. White*, 2011 IL 109689, ¶ 133 ("[T]he closely-balanced-evidence prong of plain error is similar to an analysis of ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced ***."). If we conclude that the defendant was not prejudiced, we need not consider whether counsel's performance was deficient. See *People v. Scott*, 2011 IL App (1st) 100122, ¶ 27.

¶ 33 We cannot say that the result of the trial would have been different if counsel had objected to Delis' opinion testimony regarding the source of the metal fragment. The outcome of the trial necessarily turned on the jury's assessment of the credibility of the eyewitnesses. The physical evidence, such as it was, only circumstantially connected the defendant to the crime, and it was called into serious question on cross-examination when Delis admitted that he had no way of knowing whether the metal fragment was at the scene before the shooting occurred. Thus, there was no prejudice for purposes of the defendant's claim of ineffective assistance of counsel.

¶ 34 The defendant also challenges the admission into evidence of the photo array from which Christopher identified the defendant at trial, as lacking foundation. The State concedes that because Christopher did not recognize the photo array as the same one shown to him by police officers in March 2015, it lacked an adequate foundation to be admitted into evidence. See *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 25 (State may lay foundation by having object identified by witnesses or establishing a chain of possession). However, as with his previous evidentiary challenge, the defendant failed to preserve this error for review. We have already determined that the evidence was not closely balanced so as to grant the defendant relief through the first prong of plain error review or to show prejudice for purposes of ineffective assistance of counsel. Nor do we believe that the error in admitting the photo array was sufficiently serious to satisfy the second prong of plain error review. See *Sebby*, 2017 IL 119445, ¶ 50 (second prong plain error limited to those that affect the fairness of the trial and challenge the integrity of the judicial process).

¶ 35 III. *Ex Parte* Communications

¶ 36 Next, the defendant challenges the court's *ex parte* response to the jury's note indicating that it could not reach a verdict. The record reflects that at some point on August 16, 2016, after the jury had retired to deliberate, the jury sent a note to the court reading "The jury cannot come to a unanimous verdict." The court sent a signed, handwritten response stating "Continue your deliberations" at 6:36 p.m. The defendant maintains that he was not made aware of this note or the court's response and that it therefore constituted an improper *ex parte* communication between the court and the jury.

¶ 37 Initially, the State argues that the record is silent as to whether the court informed either party about the jury's note or consulted with them before issuing a response. The State concludes that because the defendant bears the burden of proof, the record's silence on this issue should be

construed against him. For this proposition, the State cites *People v. Blalock*, 239 Ill. App. 3d 830, 841 (1993), which considered a similar issue and held that where the record did not indicate the presence of defendant or counsel when the judge responded to the jury's notes, it would resolve its doubts arising from the incompleteness of the record against defendant. However, our supreme court reached the opposite result in *People v. Kliner*, 185 Ill. 2d 81 (1998). There, the court concluded that an *ex parte* communication *had* occurred where the record contained only the jury's note and the court's response and "no indication [] that the trial judge conferred with defense counsel or defendant before answering the jury inquiries." *Id.* at 162. In other words, the court did *not* hold that the defendant had the burden to provide affirmative proof that the court had not communicated with him prior to responding to the jury's note. Insofar as *Blalock* and *Kliner* are inconsistent, we follow *Kliner* (see *People v. Loferski*, 235 Ill. App. 3d 675, 690 (1992) ("[i]t is the duty of this court to follow the decisions of our supreme court")), and similarly conclude that there was an *ex parte* communication in this case.

¶ 38 But an *ex parte* communication, standing alone, does not compel us to set aside a jury's verdict. To be sure, a criminal defendant has a constitutional right to be present and participate in all proceedings involving his "substantial rights." *People v. Childs*, 185 Ill. 2d 217, 227 (1994). A communication between the judge and the jury of which the defendant is not made aware and at which he is not present, deprives the defendant of his constitutional rights. *Id.* However, where no prejudice inures to the defendant as a result of his absence, the error will be deemed harmless. *Id.* It is the State's burden to prove that the court's response was harmless beyond a reasonable doubt.[1] *Id.*; see also *Kliner*, 185 Ill. 2d at 162.

[1] Because the defendant was not made aware of the trial court's communication with the jury until after trial, we find the defendant has not forfeited this argument and was not required to

¶ 39 Our supreme court has repeatedly held that a trial court's instruction to a deadlocked jury to "continue deliberating" is a proper response and not prejudicial to a defendant, even when that instruction is given *ex parte*. *People v. Kimble*, 2019 IL 122830, ¶ 44; see also *People v. Johnson*, 238 Ill. 2d 478, 489-90 (2010) (finding no plain error in trial court's nonprejudicial *ex parte* instruction to deadlocked jury to continue deliberating); *People v. McLaurin*, 235 Ill. 2d 478, 491-93 (2009) (same). Because the court's written response in this case was indisputably proper, we cannot conclude that the defendant was prejudiced by the court's failure to inform him of the jury's note.

¶ 40 IV. Sentencing

¶ 41 Finally, the defendant challenges his 28-year sentence on two grounds. First, the defendant argues that the trial court improperly considered a factor in aggravation—namely, that the defendant used a firearm to harm the victims—when that factor was an element inherent in the offense. And second, the defendant maintains that the court did not adequately consider his rehabilitative potential.

¶ 42 Because this issue turns on the trial court's statements at sentencing, it is helpful to begin by setting forth those statements in their entirety:

> "The Court imposed this [28-year] sentence considering the aggravation of this situation on the evening of this event the Court having presided over the jury trial and having heard the circumstances of this shooting, two unknown victims of the defendant; and considering the aggravation and your background you only have

invoke plain error review.

> the juvenile background – well, there is criminal trespass to residence, a felony which was – it's a sentence of one year conditional discharge as an adult.
>
> But you have a minimal – considering your minimal criminal background, the aggravation of this person being shot and harmed, it could have been a death. It really could have been a death and this would be a murder trial and the mitigation here – the most thing about your mitigation is your age. You have time. You're young enough to turn your life around, and it's senseless. This was senseless. This was unprovoked by these victims and a firearm, two people harmed, a firearm.
>
> So considering all of that, the aggravation, the mitigation, and your potential for rehabilitation I certainly hope you leave gang involvement behind if that was the case on that evening. * * * So that's your sentence, Mr. Ochoa."

¶ 43 Ordinarily, we will not modify a trial court's sentence absent an abuse of discretion. *People v. Jones*, 2019 IL App (1st) 170478, ¶ 50. A trial court abuses its discretion only where " 'the sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). In addition, the trial court may not consider a factor implicit in the offense as an aggravating factor. *People v. Shick*, 318 Ill. App. 3d 899, 909 (2001). Nevertheless, there remains a strong presumption that the trial court based its sentence on proper legal reasoning and so we review the court's sentencing decision with deference. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). In particular, a sentence within statutory guidelines,

such as the defendant's here,[2] is presumptively proper. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36.

¶ 44 We turn first to the defendant's contention that the trial court considered a factor inherent in the offense as an aggravating factor. The defendant was convicted of aggravated battery pursuant to section 12-3.05(e)(1) of the Criminal Code, which states that a person commits aggravated battery when, in committing a battery, he knowingly "[d]ischarges a firearm, other than a machine gun or a firearm equipped with a silencer, and causes any injury to another person." 720 ILCS 5/12-3.05(e)(1) (West 2014). Because the legislature presumptively considered the use of a firearm in setting the sentencing range for the offense, the court is generally prohibited from considering it as an aggravating factor. See *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004) (describing prohibition against double enhancement). However, the court may consider the nature and circumstances of the offense, " 'including the nature and extent of *each element of the offense as committed by the defendant*.' " *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986) (quoting *People v. Hunter*, 101 Ill. App. 3d 692, 694 (1981)) (emphasis added).

¶ 45 Viewing the court's comments in context, we do not agree that the court considered an improper aggravating factor in sentencing. To be sure, the court commented on "the aggravation of this person being shot and harmed," but the court immediately went on to say "it could have been a death." This suggests the court was considering the particular dangerousness of the defendant shooting multiple times from a car into a crowd of people; in other words, the court considered the *extent* of an element of the offense—discharging a firearm—as committed by the defendant in these particular circumstances. And the court's reference to "victims and a firearm,

[2] The sentencing range for the defendant's Class X offense is 6 to 30 years' imprisonment. 720 ILCS 5/12-3.05(h) (West 2014).

two people harmed, a firearm," merely recounted the elements of the offense, which is not improper. See *Raney*, 2014 IL App (4th) 130551, ¶ 36 (court's reference to victim's age, which was an element of the crime, was a comment on the nature and circumstances of offense and not considered as improper factor in aggravation).

¶ 46 Nor do we agree that the court failed to take into account mitigating factors. In particular, the defendant notes that his mother, who brought him to the United States when he was 18 months old, was murdered before his second birthday. He was raised by his grandmother until her death in 2011 and struggled with mental health issues and suicide attempts. At the time of the offense, the defendant was 20 years old and had only one non-violent adult conviction. But contrary to the defendant's contention, the trial court did not "disregard" these factors. Instead, the court specifically took into account the defendant's age and "minimal criminal background" and referenced the "potential for rehabilitation" in announcing its sentence. Because the trial court has the better opportunity to observe the defendant and the proceedings than this court, which must rely on the cold record, we will not substitute our judgment for the trial court on the issue of sentencing merely because we may have weighed the factors differently and imposed a different sentence. *Alexander*, 239 Ill. 2d at 213. Therefore, we cannot conclude that the trial court abused its discretion in imposing a 28-year sentence.

¶ 47 CONCLUSION

¶ 48 The defendant's convictions for aggravated battery with a firearm are affirmed.

¶ 49 Affirmed.