SECOND DIVISION
April 14, 2015

No. 1-13-0383

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.
	)	
v.	)	No. 12 CR 7769
	)	
CALVIN JACKSON,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's jury waiver was valid. Offense of aggravated unlawful use of a weapon is not unconstitutional when State charges and proves that defendant has a prior felony conviction. Sentence of five years' imprisonment for said offense not excessive.

¶ 2 Following a bench trial, defendant Calvin Jackson was convicted of aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon (UUWF) and sentenced to five years' imprisonment for AUUW. On appeal, defendant contends that his jury waiver was invalid, that the offense of AUUW is unconstitutional, and that his sentence is excessive.

¶ 3 Defendant was charged with various counts of AUUW and one count of UUWF for, on or about December 23, 2011, carrying an uncased, loaded, and accessible firearm in a vehicle on a public street (163rd Street and Park Avenue, in Markham) outside of his own land, abode or place of business while under 21 years old and not having a valid firearm owner's identification card (FOID). The UUWF count and every AUUW count alleged that defendant was previously convicted of aggravated robbery in case 08CR8031. Defendant was also charged with aggravated fleeing or attempt to elude a peace officer allegedly committed on the same date.

¶ 4 On the day of trial, defendant filed a signed jury waiver, stating that he did "hereby waive jury trial and submit the above entitled cause to the Court for hearing." Just before trial, the court told defendant "you are entitled to a jury trial. You know what a jury trial is?" but (according to the transcript) immediately asked "State, do you wish to make an opening statement?" with no indication of a reply by defendant in between. The State waived an opening statement, as did defense counsel.

¶ 5 The evidence at trial was that, at about 4 a.m. on the night in question, Markham police officers were responding to a report of a man with a gun at a night club on 163rd Street when a car fled the night club parking lot. The car drove on at high speed – covering several blocks in about 25 seconds – and did not stop despite being followed by a marked police car with active emergency lights and siren and despite encountering intersections with a red signal and a stop sign respectively. The latter intersection was a "T" crossing where 163rd Street terminates at Park Avenue, but the car was going too fast to turn and crashed. Defendant was the sole occupant of the car, and he dropped a hard object (judging by sound) to the ground before running away; an officer found a loaded gun four feet from the car. Defendant was arrested nearby and identified

as the man who fled the car. The parties stipulated to defendant's 2009 aggravated robbery conviction in 08CR8031 and that he did not have a FOID on the day in question. Defendant waived his right to testify and, after closing arguments, was found guilty of AUUW and UUWF.

¶ 6 The pre-sentencing investigation report (PSI) stated that defendant was born in November 1991 and had juvenile dispositions of probation for theft and two offenses of possession of a stolen motor vehicle (PSMV). He also had a criminal conviction for aggravated robbery upon a 2009 guilty plea, for which he received impact incarceration or "boot camp." He was raised "mostly" by his grandmother, who works for the sheriff, though his parents have been married for 28 years, live at 163rd and Park in Markham, and are both employed. His father had a conviction for "a large drug possession" punished by probation, and his mother had been a drug abuser but "has been clean and sober for 12 years." He was not abused or neglected in his childhood and he has two younger brothers and a younger sister. He is single with no children, completed high school, and "recently enrolled" in college. He was employed "for most of 2012" in construction by his father, and previously worked in pizza delivery, in a store, and in a hair salon. He denied drug or alcohol use or street-gang membership, claimed good physical and mental health except for a 2009 gunshot wound, and stated that he attends a particular church.

¶ 7 In his unsuccessful post-trial motion, defendant argued only insufficiency of the evidence. At sentencing, the court stated that it read the PSI and the parties made no changes to the PSI. The State argued that defendant was eligible for an extended sentence based on his juvenile dispositions on two offenses of PSMV. Defense counsel argued that defendant has an employment history, attended school regularly and was in college, and has a family that supports him, and that his offense entailed "no violence." Defendant asked the court for "another chance"

and the court ascertained from defendant that he was 21 years old as of sentencing, graduated from high school, and was attending college. The court found that defendant "may be eligible to be extended" but chose not to impose an extended sentence. The court noted that defendant has "been given the opportunity many times. I'm not the first judge, I am sure, that you have asked for a chance to redeem yourself." The court opined that "there is really no reason why" defendant commits crimes with "a very supportive family" so that "living this type of lifestyle" was "your choices. Nobody else." The court sentenced defendant to five years' imprisonment for one count of AUUW. Defense counsel asked for a sentence of "boot camp" but the court denied it because defendant already received that sentence. This appeal timely followed.

¶ 8 On appeal, defendant first contends that his jury waiver was invalid.

¶ 9 Defendant acknowledges that he did not raise this issue in the trial court but argues that we can consider the claim as a matter of plain error. The plain error doctrine allows this court to consider an otherwise-forfeited claim where there is a clear or obvious error and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Eppinger*, 2013 IL 114121, ¶ 18; *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). The State correctly notes that the first step in plain error analysis is determining whether an error occurred at all. *Eppinger*, 2013 IL 114121, ¶ 19; *Bannister*, 232 Ill. 2d at 65. As stated below, we find no error.

¶ 10 A criminal defendant has the constitutional right to a trial by jury but may waive that right knowingly and voluntarily. *Bannister*, 232 Ill. 2d at 65. While the trial court must ensure that a defendant is waiving this right expressly and understandingly, the court need not give any

specific admonition or advice for a jury waiver to be valid. *Bannister*, 232 Ill. 2d at 66. Thus, it is preferable but not required that the court apprise a defendant that he has a right to a jury trial. *People v. Rincon*, 387 Ill. App. 3d 708, 718 (2008). Waiver need not be made by defendant personally and affirmatively; an oral waiver by defense counsel in open court is valid if made in the defendant's presence without his objection, and something in the discussion indicates that the defendant's right to a jury trial is being waived. *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 16, citing *People v. Murrell*, 60 Ill. 2d 287, 290 (1975); *Rincon*, 387 Ill. App. 3d at 718. A written jury waiver memorializes a defendant's decision and allows this court to review the record to ascertain whether a jury waiver was made understandingly, but is not requisite for a valid waiver nor by itself shows a valid waiver. *Bannister*, 232 Ill. 2d at 66; *Rincon*, 387 Ill. App. 3d at 718. The pivotal knowledge that a defendant must understand, along with the consequences thereof, is that the facts of his case will be determined by a judge and not a jury. *Bannister*, 232 Ill. 2d at 69. Determination of a jury waiver's validity rests not on any precise formula but on the facts and circumstances of the particular case. *Bannister*, 232 Ill. 2d at 66. Such circumstances include that the defendant has prior experience with the criminal justice system and so is familiar with his right to a jury trial and knows that he would receive a bench trial if he waives that right. *Bannister*, 232 Ill. 2d at 71. A defendant challenging his jury waiver bears the burden of establishing that the waiver was invalid. *People v. Gibson*, 304 Ill. App. 3d 923, 930 (1999).

¶ 11 Here, the court told defendant just before trial that he had a right to a jury trial, and defendant signed and filed on the day of trial a jury waiver. After the clear statement that he had a right to a jury trial, defendant did not object (either personally or through counsel) to the case proceeding directly to a bench trial. The admonishment shows that he was made aware of his

right to a jury trial and the written waiver shows the key knowledge that his case would be heard by the court and not a jury. His knowledge of the right to a jury trial is also shown by his previous felony conviction by guilty plea, when presumably he was admonished upon and waived his right to jury trial. Under the circumstances, we find that defendant has not shown that his jury waiver was invalid, and thus find no error and certainly no plain error.

¶ 12 Defendant also contends that the offense of AUUW, section 24-1.6 of the Criminal Code (720 ILCS 5/24-1.6 (West 2012)), is unconstitutional.

¶ 13 AUUW is generally a Class 4 felony but is a Class 2 felony where the defendant "has been previously convicted of a felony in this State or another jurisdiction." 720 ILCS 5/24-1.6(d)(1), (3) (West 2012). In *People v. Aguilar*, 2013 IL 112116, our supreme court found that "the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution" while it made "no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute." *Id.*, ¶ 22, n.3. The *Aguilar* court noted the United States Supreme Court's statement that " 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' " *Id.*, ¶ 26, quoting *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

¶ 14 Since *Aguilar*, this court has held that the Class 2 version of AUUW – that is, defendant's offense of AUUW by a convicted felon – is generally constitutional. *People v. Moore*, 2014 IL App (1st) 110793-B, ¶¶ 16-17; *People v. Soto*, 2014 IL App (1st) 121937, ¶¶ 12-14; *People v.*

Burns, 2013 IL App (1st) 120929, ¶¶ 22-27, *appeal allowed*, No. 117387 (May 28, 2014); but see *People v. Gayfield*, 2014 IL App (4th) 120216-B (elements of Class 2 and 4 AUUW are identical, as felon status is not elemental, so Class 2 AUUW is unconstitutional under *Aguilar*); *People v. Campbell*, 2013 IL App (4th) 120635, ¶¶ 12-16 (*Aguilar* found AUUW statute facially unconstitutional so entire statute is invalid including Class 2 version).[1] In light of the provisos in *Aguilar*, we see no reason not to follow the earlier opinions of this District and similarly find that defendant's conviction for the Class 2 convicted-felon version of AUUW is not unconstitutional.

¶ 15 Lastly, defendant contends that his five-year prison sentence is excessive.

¶ 16 AUUW committed by a person previously convicted of a felony is a Class 2 felony punishable by three to seven years' imprisonment, or an extended prison term of up to 14 years. 730 ILCS 5/ 5-4.5-35(a) (West 2012). A sentence within statutory limits is reviewed on an abuse of discretion standard, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the trial court does not consider incompetent evidence or improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable range. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56. This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Id.*, citing *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010).

[1] The Fourth District issued *Campbell* on December 24, 2013. The Supreme Court modified its decision in *Aguilar* on December 19, 2013, to expressly limit its decision to the Class 4 version of AUUW as stated above.

¶ 17 In imposing a sentence, the trial court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Id.*, citing *Alexander*, 239 Ill. 2d at 213. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, 2011 IL 111382, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id.*, citing *Alexander*, 239 Ill. 2d at 214.

¶ 18 Here, defendant was convicted of possessing a loaded firearm after a conviction for aggravated robbery, for which he received impact incarceration. Defendant also had juvenile dispositions for theft and PSMV, for which he received probation. While defendant argues that his prior offenses were "relatively minor," aggravated robbery – which involved defendant "indicating verbally or by his *** actions to the victim that he *** is presently armed with a firearm or other dangerous weapon" – is a Class 1 felony and his two offenses of PSMV are Class 2 felonies. 625 ILCS 5/4-103(b); 720 ILCS 5/18-5(a), (b) (West 2012). We see no abuse of discretion in imposing a sentence "substantially longer than any previous sentence imposed on" defendant (as he argues) when those prior sentences clearly reflect the court's efforts at leniency or rehabilitation that apparently did not bear fruit. We also note that, in the course of the instant offense, defendant drove for several blocks at high speed and ignored a stop signal and stop sign

before crashing his car. The potential for disaster from such recklessness, even in the early morning, is palpable. The court expressly considered defendant's family support, albeit not in mitigation as he argues but as an additional reason why he should have been, but was not, law-abiding. The court does not abuse its discretion by giving a factor a different weight than defendant would prefer. In sum, not only were all the factors now argued by defendant before the court for its consideration, many were expressly referenced by the court at sentencing. Under the circumstances, we cannot find that defendant's five-year prison sentence – squarely in the middle of the unextended range for his offense – is an abuse of the trial court's sound discretion.

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.