2014 IL App (1st) 112869-U

FOURTH DIVISION
March 31, 2014

No. 1-11-2869

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 03 CR 1613
	)	
CRAIG CHARLES,	)	
	)	Honorable
	)	Thomas Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *HELD*: The trial court's imposition of an extended-term sentence on defendant's less-serious convictions of attempted disarming a peace officer and aggravated unlawful use of a weapon are affirmed as they arose out of unrelated courses of conduct, however, the extended-term sentence on defendant's less-serious conviction of aggravated battery is reversed as it arose out of conduct that was related to the armed robbery and defendant's sentence as to this conviction is reduced to 5

years, the maximum allowed under 730 ILCS 5/5-8-1(a)(6)(West 2002); defendant's Class 2 aggravated unlawful use of a weapon (AUUW) conviction is affirmed. Further, the clerk of the circuit court is directed to correct defendant's mittimus to reflect that defendant's conviction of attempt disarming a peace officer is a Class 3 offense, and not a Class 2 offense.

¶ 2 Following a guilty plea, defendant was convicted of the Class X offense of armed robbery, the Class 2 offense of aggravated unlawful use of a weapon, and the Class 3 offenses of attempted disarming a peace officer and aggravated battery, and subsequently sentenced to the following extended-term sentences: 34 years for armed robbery, 12 years for aggravated unlawful use of a weapon, 10 years for aggravated battery and 10 years for attempted disarming a peace officer. Defendant now appeals his conviction of aggravated unlawful use of a weapon, claiming that such a conviction is unconstitutional. Defendant also appeals the extended-term sentences imposed on his less serious offenses of aggravated unlawful use of a weapon, aggravated battery and attempted disarming a peace officer, claiming that it was improper for the trial court to impose extended-term sentences because those convictions were related to his armed robbery conviction. Defendant further requests that his mittimus be corrected to show that his attempted disarming a peace officer conviction was a Class 3 offense, rather than a Class 2 offense. For the reasons that follow, we affirm the defendant's Class 2

conviction of aggravated unlawful use of a weapon; affirm the trial court's imposition of an extended-term sentence on defendant's attempted disarming a peace officer and aggravated unlawful use of a weapon convictions, but reverse the trial court's imposition of an extended-term sentence on defendant's aggravated battery conviction; and direct the clerk of the circuit court to correct defendant's mittimus so that it shows that defendant's attempted disarming a peace officer conviction was a Class 3 offense, and not a Class 2 offense.

¶ 3 BACKGROUND

¶ 4 On January 6, 2003, a currency exchange was robbed by a man with a gun. Defendant was arrested later that day and charged with several offenses, which included armed robbery of the currency exchange.

¶ 5 Counsel for defendant filed a motion to quash defendant's arrest and suppress evidence, claiming that defendant was arrested without probable cause. The following evidence was elicited at the hearing on defendant's motions and is relevant to this appeal. On January 6, 2003, Chicago police officers Skalski and Findusz were in an unmarked police car near 6210 South Vernon at 10:30 a.m. when they saw defendant stopped at a red light driving a Ford vehicle. The license plate on the back of the Ford was pushed so far up that the officers could not read it,

which is illegal. The officers decided to conduct a traffic stop, and when the traffic light changed from red to green, Officer Skalski activated his emergency lights and directed defendant to pull over. Defendant, however, did not pull over and instead went the wrong way down Vernon, and a police chase ensued. Defendant eventually crashed into a building at 511 East 62nd Street, at which point he got out of the car and continued running. Defendant was repeatedly ordered to stop running, but refused. When the officers had defendant cornered in an alley, defendant ran toward Officer Skalski, who had his gun drawn. Officer Skalski ordered defendant to remain where he was, but defendant continued running toward Officer Skalski, stating "I want to die. I'm going to die" until he placed his hand on Officer Skalski's weapon. Officer Skalski knocked defendant to the ground and placed him into custody. Upon placing defendant in custody, the officers found bundles of currency that defendant had dropped during his on-foot chase, as well as additional bundles of currency in defendant's car along with a handgun and a stack of city of Chicago vehicle stickers. The officers later learned that about 20 minutes prior to the time that they conducted their traffic stop, the currency exchange located at 145 North Western had been robbed at gunpoint.

¶ 6 On May 17, 2003, the parties engaged in a Illinois Supreme

Court Rule 402 conference (see Ill. S. Ct. R (eff. July 1, 1970)); however, defendant did not accept the offer made by the trial court judge. The discussions during the Illinois Supreme Court Rule 402 conference were not made a part of the record. The trial court then set the matter for trial for the following day.

¶ 7 On the following day, May 18, 2003, defendant's counsel informed the judge that defendant wanted to enter a blind plea agreement so long as a sentencing hearing in aggravation and mitigation was held. Defendant then entered into an open plea of guilty to counts I, II, VII and XII in the indictment, namely, armed robbery, aggravated unlawful use of a weapon, aggravated battery and attempted disarming a peace officer. The following exchanges occurred at the time the guilty plea was entered:

> "THE COURT: All right. So that the record is clear, there was an earlier attempt, I suppose, to reach a negotiated disposition between the defendant and the Court and the State.
>
> A [Rule] 402 conference was held where I did indicate a sentence that I would impose if he wished to accept that, and clearly it's his right and I do not hold it against him

that he could choose to proceed in that fashion.

So this plea is taken with no agreement, and he is asking for a hearing in aggravation and mitigation. So with that understanding, I will proceed and accept the pleas to the enumerated courts, again, if that is what he chooses to do, and I will continue this for a hearing in aggravation and mitigation so I can hear from both sides as to what an appropriate sentence might be.

You're charged in case 03 CR 1613, which is a multiple count indictment. In count I, it's stated on January 3, 2003, within Cook County, you committed the offense of armed robbery in that you knowingly took United States currency from the person or presence of Delilah Jiminez, by the use of force or threatening the imminent use of force in that you carried on or about your presence or were otherwise armed with a firearm contrary to Illinois law. Armed robbery is a Class X felony.

In count II of the same indictment, it is stated that on the same date of January 6 of 2003, within Cook County, you committed the offense of aggravated unlawful use of a weapon in that you knowingly carried in a vehicle a firearm at a time when you were not on your land or abode or fixed place of business and the firearm was uncased, loaded and immediately accessible at the time of the offense, and that you had previously been convicted of a felony, to wit, murder in case number 84 C 6827, contrary to Illinois law. That charge is a Class 3 felony.

As to count VII of the same indictment, it states on the same date of January 6 of 2003, within Cook County, you committed the offense of aggravated battery in that you intentionally or knowingly, without legal justification, caused bodily harm to Jack Walker, a person of the age of 60 years or older, to wit, you pushed him on the ground contrary to the Illinois law. That charge is a Class 3 felony.

And finally, in count XII it states on the same date, you committed the offense of attempt disarming of a peace officer in that you, without lawful justification and with the intent to disarm a peace officer, to wit, Chicago Police Officer Thomas Skalski, while he was engaged in the execution of his official duties and you knew him to be a peace officer, you grabbed and touched his gun while it was on the person of Thomas Skalski without his consent, which constituted a substantial step towards the commission of the offense of disarming a peace officer contrary to Illinois law. That charge is also a Class 3 felony.

* * *

Mr. Charles, what that means is that on the charge of armed robbery, given a review of your previous criminal history, upon conviction, you would not be eligible for probation, you could receive a penitentiary sentence of not less than six nor more than 60 years. You would have to serve a period

of mandatory supervised release, which used to be called parol, for a period of three years.

On the aggravated unlawful use of a weapon, Class 2 charge, that means upon conviction, you would not be eligible for probation, you could receive an extended term penitentiary sentence of not less than three nor more than 14 years. You would have to serve a period of mandatory supervised release or parole for two years as to that charge.

On the aggravated battery charge, a Class 3 felony, and attempt disarming of a peace officer charge, also a Class 3 felony, means upon conviction you could receive probation on an extended term sentence of not less than two nor more than ten years. You would have to serve a period of mandatory supervised release or parole for a period of one year as to those two offenses.

Do you understand what you're charged with in these counts that I've recited to you

as well as the possible penalties?

THE DEFENDANT: Yes, sir.

THE COURT: By pleading guilty, you give up and waive certain of your constitutional rights, the foremost of which is your right to a jury trial.

Do you know what a jury trial is?

THE DEFENDANT: Yes, sir.

THE COURT: Is that your signature on this document entitled 'jury waiver' that your attorney had prepared and handed me?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand that by signing that document and tendering it to this Court, you were giving up and waiving your right to a trial by jury, and by pleading guilty, there will be no trial by jury or jury of any kind?

THE DEFENDANT: Yes, sir.

THE COURT: And that is your wish?

THE DEFENDANT: Yes, sir.

THE COURT: I will accept your written jury waiver and spread it of record.

In addition, by pleading guilty you give up and waive certain other constitutional rights that you have as well. The [S]tate's [A]ttorney will not be calling or presenting any witnesses to testify against you here in open court to establish your guilty beyond a reasonable doubt. You will not be able to see and confront the witnesses as they would be testifying against you. Your lawyer would not be able to cross-examine them or ask them any questions. You would not have the opportunity of presenting any evidence in your behalf.

You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty to these charges on your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone promised you anything at all with regard to the sentence in this case to cause you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone threatened you in

any way to cause you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Do both sides stipulate and agree there is a sufficient factual basis to support these four charges as contained in the indictment?

MS. WEINBERG [Assistant State's Attorney]: So stipulated.

MR. GOLDBERG [defense attorney]: So stipulated from the facts adduced at the 402 conference.

THE COURT: And the Court would note that at the [Rule] 402 conference held at the defendant's request, the Court heard the facts that would be presented should the matter proceed to trial.

I will accept you plea of guilty, find you guilty, entered a judgment of conviction on counts I, II, VII and XII. I find that you were advised of your rights and you understand them, you understand the nature of the charges, the possible penalties, your plea is voluntary and there is a factual

basis sufficient to support your plea.

¶ 8 The matter was then set over for a sentencing hearing. Upon resentencing,[1] the parties submitted evidence in aggravation and mitigation in the matter, and defendant was sentenced to the following extended-term sentences: 34 years for armed robbery, 12 years for aggravated use of a weapon, 10 years for aggravated battery and 10 years for attempted disarming a peace officer. In imposing these sentences, the trial court judge recognized defendant's past convictions of armed robbery and murder in 1984, as well as all the other evidence that was presented at the hearing and in relation to the case. Although defendant has made several attempts to vacate his guilty plea and challenge his sentences since the time the guilty plea was entered, each of those attempts has been unsuccessful.[2]

¶ 9 Defendant appeals his conviction of aggravated unlawful use of a weapon, claiming that it is unconstitutional, and further

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[1] Defendant was originally sentenced to 40 years for armed robbery, 12 years for aggravated unlawful use of a weapon, 10 years for aggravated battery, and 10 years for attempted disarming a peace officer. However, on appeal, defendant was granted a new sentencing hearing, which resulted in a six-year sentence reduction on his armed robbery conviction.

[2] Defendant also requested several fitness examinations throughout the course of this litigation. However, the court ultimately found that defendant was fit to stand trial, legally sane at the time of the offense, and possessed the ability to understand his *Miranda* rights.

appeals the sentences imposed against him on his less serious offenses of aggravated unlawful use of a weapon, aggravated battery and attempted disarming a peace officer, claiming that it was improper for the trial court to impose extended-term sentences on those convictions because they were part of the same course of conduct as his more serious offense of armed robbery. Defendant further requests that his mittimus be corrected to show that his attempted disarming a peace officer conviction was a Class 3 offense, and not a Class 2 offense.

¶ 10 This court initially filed a Rule 23 Order in this matter on December 26, 2013, wherein we vacated defendant's AUUW conviction based upon our supreme court's ruling in *People v. Aguilar*, 2013 IL 112116. The State then filed a petition for rehearing, and we withdrew our December 26, 2013 Rule 23 Order and filed a new Rule 23 Order on February 6, 2014 upon denying the petition for rehearing. We subsequently vacated our February 6, 2014 order and requested that the parties file an answer and reply to the previously filed petition for rehearing. In light of our supreme court's modification in *Aguilar* and the briefs submitted with respect to the petition for rehearing, we readdress this issue herein and file a new Rule 23 Order in the matter. For the reasons that follow, we affirm defendant's conviction of aggravated unlawful use of a weapon based upon our supreme

court's modified ruling in *Aguilar*; affirm the trial court's imposition of an extended-term sentence on defendant's attempted disarming a peace officer conviction, but reverse the trial court's imposition of an extended-term sentence on defendant's aggravated battery conviction; and direct the clerk of the circuit court to correct defendant's mittimus so that it shows that defendant's attempted disarming a peace officer conviction was a Class 3 offense, and not a Class 2 offense.

¶ 11 ANALYSIS

¶ 12 Defendant's Aggravated Unlawful Use of a Weapon Conviction

¶ 13 Defendant claims that his conviction under the AUUW statute should be reversed because the AUUW statute is unconstitutional. Because we assume that a statute is constitutional, defendant has the burden of showing the constitutional violation. *People v. Sole*, 357 Ill. App. 3d 988, 991 (2005). Our review of the constitutionality of a statute is *de novo*. *People v. Davis*, 408 Ill. App. 3d 747, 749 (2011).

¶ 14 Defendant pled guilty to the following charge as written in the charging instrument:

> "In that he, knowingly carried in a vehicle a firearm, at a time when he was not on his own land or in his own abode or fixed place of business and the firearm was uncased, loaded

> and immediately accessible at the time of the offense, and he has previously been convicted of a felony, to wit: Murder, under case number 84 C 6827, in violation of Chapter 720 Act 5 Section 24-1.6(a)(1)/(3)(a) of the Illinois Compiled Statutes 2000 as amended."

Accordingly, defendant was convicted of aggravated unlawful use of a weapon (AUUW) pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (the Code). 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2002). His conviction was enhanced to a Class 2 felony due to his prior felony conviction of murder, and he was sentenced to 12 years in prison. The issue we address here is whether the Class 2 form of the AUUW statute violates the right to keep and bear arms as guaranteed in the second amendment of the United States Constitution. U.S. Const., amend. II. The AUUW statute provides in relevant part:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal

dwelling, or fixed place of business, any pistol, revolver, stun gun or taser or other firearm; or

(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own abode or fixed place of business, any pistol, revolver, stun gun or taser or other firearm; and

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded, and immediately accessible at the time of the offense[.]

* * *

(d) Sentence. Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for

> which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years." 720 ILCS 5/24-1.6 (West 2002).

¶ 15 Given our supreme court's modified ruling in *People v. Aguilar*, 2013 IL 112116, which held that the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the Code is facially unconstitutional, the State argues that defendant's conviction should be affirmed since he was convicted of the Class 2 form of section 24-1.6(a)(1), (a)(3)(A), (d). In light of our supreme court's modified ruling, we agree with the State and find that defendant's Class 2 conviction under the AUUW statute must be upheld. *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 366 Ill. App. 3d 730, 734 (2006) (all lower courts are bound to follow supreme court precedent).

¶ 16 In the modified ruling in *Aguilar*, our supreme court held 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, and therefore is unconstitutional. *Aguilar*, 2013 IL 112116, at ¶ 22.[3] The Court emphasized that its ruling was "specifically limited to the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute" (*id.* at n.3) because "the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) categorically prohibits the possession and use of an operable firearm for self-defense outside the home." *Id.* at ¶ 21.

¶ 17 In coming to its holding in the modified *Aguilar* opinion, the Court noted that "Illinois' 'flat ban on carrying ready-to-use guns outside the home,' as embodied in the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d), is unconstitutional on its face." *Id.* at ¶ 19 (citing *Moore v. Madigan*, 702 F.3d 933, 940 (2012)). However, the Court went on to recognize that "in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not

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[3] The Illinois Supreme Court initially held that the elements of section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute violated the second amendment right to keep and bear arms, however, within its modified opinion, the court limits its ruling by stating that the Class 4 form of the AUUW statute, section 24-1.6(a)(1), (a)(3)(A), (d) of the Code, violates the second amendment right to keep and bear arms. *Aguilar*, 2013 IL 112116, at ¶ 40.

subject to meaningful regulation," and further cited the Supreme Court's statement in *District of Columbia v. Heller*, that " 'nothing in our opinion should be taken to cast doubt on the 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 law imposing conditions and qualifications on the commercial sale of arms.' " *Id.* at ¶ 26 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008)). Thus, while the Court in its modified *Aguilar* ruling held that the Class 4 form of the AUUW statute is unconstitutional, it still recognized and acknowledged the longstanding prohibitions on the possession of firearms by felons. As such, because defendant's AUUW conviction was enhanced to a Class 2 conviction because of his prior felony conviction of murder, and because our supreme court has held that the Class 4 form of the AUUW statute is unconstitutional and did not make any such ruling with respect to the Class 2 form of the AUUW statute, we affirm defendant's AUUW conviction here. See *Aguilar*, 2013 IL 112116; *People v. Burns*, 2013 IL App (1st) 120929, at ¶ 27 (holding that "the Class 2 form of the AUUW at issue merely regulates the possession of a firearm by a person who has been previously convicted of a felony" and, therefore, is not unconstitutional); *People v. Green*, 2014 IL App (4th) 120454,

at ¶ 13 (finding that *Aguilar* does not apply where defendant was convicted of the Class 2 form of AUUW.).

¶ 18 We take note of Justice Theis' dissent in *Aguilar* in which she expresses concern about the majority's choice to evaluate the constitutionality of the AUUW statute in light of the elements of the statute as well as the sentencing provisions contained in the statute. *Aguilar*, 2013 IL 112116, at ¶ 41-48 (J. Theis, dissenting). Such concerns are especially well taken given that the classification of an AUUW conviction only sets out the penalty that may be imposed (see 720 ILCS 24-1.6(d) (West 2002)), and given that in Illinois there is a separate statute that prohibits felons from possessing firearms, section 24-1.1 of the Code (720 ILCS 24-1.1 (West 2002)), which remains valid despite numerous constitutional challenges.[4] See *People v. Davis,* 408 Ill. App. 3d 747, 750–51 (2011); *People v. Williams,* 405 Ill. App. 3d 958, 964 (2010); see also *People v. Ross,* 407 Ill. App. 3d 931, 942 (2011). However, here, because defendant had a previous felony conviction, and because our courts and the Supreme Court of the United States have persistently recognized

[4] Defendant here was initially charged by indictment of two counts of possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1 (West 2002)) and three counts of AUUW (720 ILCS 5/24-1.6 (a)(1), (a)(3)(A) & (a)(2), (a)(3)(A) (West 2002)). However, defendant only pled guilty to one count of AUUW, which was enhanced to a Class 2 felony because of his prior murder conviction.

"longstanding prohibitions on the possession of firearms by felons" (*Heller*, 544 U.S. at 626-27; *Aguilar*, 2013 IL 112116, at ¶ 26), we find that defendant's conviction under the Class 2 form of the AUUW statute, to the extent that the statute restricts felons from possessing firearms, does not violate the second amendment right to keep and bear arms and, therefore, must be affirmed.

¶ 19 We also take note of defendant's argument that the AUUW statute was held to be facially unconstitutional and, therefore, cannot be applied to anyone as the Fourth District found in *People v. Campbell*, 2013 IL App. (4th) 120635. However, we find that *Campbell* failed to address the specific modifications our supreme court made in *Aguilar*, specifically that its ruling only held that the Class 4 form of the AUUW statute is unconstitutional. *Aguilar*, 2013 IL 112116, at n. 3, ¶ 21; *Burns*, 2013 IL App (1st) 120929, at ¶ 24 ("The modified opinion in *Aguilar*, however, specifies the decision 'is specifically limited to the Class 4 form of AUUW' " and, therefore, "left open the issue of whether any other section or subsection of the AUUW is unconstitutional.").

¶ 20 We also recognize defendant's argument that a statute's sentencing provision cannot be construed as an element of the offense based on *People v. Zimmerman*, 239 Ill. 2d 491 (2010).

However, while we find this to be a reasonable argument, our supreme court implicitly rejected this argument in its modified ruling in *Aguilar* when it found that only the Class 4 form of the AUUW statute was unconstitutional. *Aguilar*, 2013 IL 112116, at n. 3. Thus, because our courts and the Supreme Court of the United States have persistently recognized "longstanding prohibitions on the possession of firearms by felons" (*Heller*, 544 U.S. at 626-27; *Aguilar*, 2013 IL 112116, at ¶ 26), and because our hands are tied by our supreme court's precedent (*Rosewood Care Center, Inc.*, 366 Ill. App. 3d at 734 (all lower courts are bound to follow supreme court precedent), we must affirm defendant's conviction.

¶ 21 Defendant's Extended-term Sentences

¶ 22 Defendant was convicted of the Class X felony of armed robbery under section 18-2 (a)(2) of the Code (720 ILCS 5/18-2 (a)(2) (West 2002)), the Class 2 offense of AUUW under section 24-1.6(a)(1), (a)(3)(a) of the Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(a) (West 2002)) and the Class 3 offenses of attempted disarming a peace officer under section 31-1a of the Code (720 ILCS 5/8-4, 31-1a (West 2002)) and aggravated battery under section 12-4(b)(10) of the Code (720 ILCS 5/12-4(b)(10) (West 2002)). The trial court, upon resentencing, imposed extended terms on all of defendant's convictions requiring defendant to

serve 34 years for his armed robbery conviction, 12 years for his AUUW conviction, and 10 years for his aggravated batter and attempted disarming a peace officer. Defendant argues that the trial court improperly imposed extended-term sentences on all of his convictions because the convictions arose out of a related course of conduct. The State argues that the trial court properly imposed extended-term sentences because each of defendant's convictions arose from an unrelated course of conduct.[5]

¶ 23 The issue of whether the trial court has imposed an unauthorized sentence is a question of law which we will review *de novo.* *People v. Tooley,* 328 Ill. App. 3d 418, 423 (2002). Section 5–8–2(a) of the Unified Code of Corrections, which governs the imposition of an extended-term sentence, provides:

> "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5–8–1 for the

[5] The State also argued that defendant waived the right to challenge his extended-term sentences for his less serious offenses because those offense were not listed in his notice of appeal and because he never objected to the extended-term sentences previously. However, this court granted defendant leave to amend his notice of appeal to include language regarding his less serious offenses, and our supreme court has held that an improperly imposed extended-term sentence is not subject to waiver and may be challenged at any time. *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004).

> class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present." 730 ILCS 5/5-8-2(a) (West 2002).

In *People v. Jordan*, 103 Ill. 2d 192 (1984), the Illinois Supreme Court interpreted section 5-8-2(a) to mean that a defendant who is convicted of multiple offenses may be sentenced to an extended-term sentence only for those offenses that are within the most serious class. *Jordan,* 103 Ill. 2d at 205-06. However, in *People v. Coleman,* 166 Ill. 2d 247 (1995), the supreme court later clarified that extended-term sentences may be imposed "on separately charged, differing class offenses that arise from unrelated courses of conduct." *Coleman,* 166 Ill. 2d at 257.

¶ 24 In determining whether a defendant's multiple offenses arose from "unrelated courses of conduct" for purposes of section 5-8-2(a), courts should consider whether there was a substantial change in the nature of the defendant's criminal objective. *People v. Bell,* 196 Ill. 2d 343, 354 (2001). If there was a substantial change in the nature of the criminal objective, then the defendant's multiple offenses stem from unrelated courses of conduct and an extended-term sentence may be imposed on differing class offenses. *Id.* at 354-55. If, however, there was no

substantial change in the nature of the criminal objective, then the defendant's offenses are not unrelated courses of conduct but, rather, part of a single course of conduct. *Id.* at 355. When the defendant's offenses are part of a single course of conduct, an extended-term sentence may be imposed only on those offenses within the most serious class. *Id.*

¶ 25 Prior to assessing whether the imposition of extended-term sentences was appropriate for each of defendant's less serious convictions, we must first address defendant's argument that the issue of whether the convictions were related or unrelated for the purpose of imposing extended-term sentences should have been decided by a jury. While we recognize that a fact that increases the statutory maximum sentence must be submitted to a fact-finder and proven beyond a reasonable doubt pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000)--here, defendant pled guilty to all four charges, including the facts forming the basis of each charge and the possibility that extended-term sentences could be imposed on each charge. The trial court specifically advised defendant that extended terms could be imposed and even advised defendant of the maximum sentences he could receive based upon those extended terms. Thus, defendant pled guilty understanding the facts that formed the basis of the charges against him, the possibility that extended terms could be imposed, and what the

maximum sentence could be for each of the charges made against him.

¶ 26 Our supreme court has held that where a defendant pleads guilty with knowledge that the court could impose an extended-term sentence, the defendant has waived any *Apprendi*-based challenges on appeal. *People v. Jackson*, 199 Ill. 2d 286, 294-95 (2002) ("we find that by a guilty plea a criminal defendant does waive *Apprendi*-based sentencing objections on appeal, as our appellate court has for the most part concluded"). As explained in *Jackson*:

> "Every fact necessary to establish the range within which a defendant may be sentenced is an element of the crime and thus falls within the constitutional rights of a jury trial and proof beyond a reasonable doubt, made applicable to the states by the due process clause of the fourteenth amendment. But by pleading guilty, a defendant *waives exactly those rights.* A knowing relinquishment of the right to a trial by jury is the *sine qua non* of a guilty plea. Thus it is clear that *Apprendi*-based sentencing objections cannot be heard on appeal from a guilty plea."

(Emphasis in original.) *Jackson*, 199 Ill. 2d at 296.

As such, because defendant pled guilty to all four charges, and as part of the plea he acknowledged the basis of each charge and the possibility that an extended-term sentence could be imposed for each charge, we find that defendant has waived any *Apprendi*-based challenges on appeal.[6]

¶ 27 We also find that the trial court properly imposed extended-term sentences on defendant's aggravated unlawful use of a weapon and attempted disarming a peace officer convictions, but find that the trial court improperly imposed an extended-term sentence on defendant's aggravated battery conviction. Each lesser-class conviction is discussed separately below.

¶ 28 Extended-Term Sentence for Aggravated Battery

¶ 29 The record shows the defendant, upon entering the currency exchange, pushed and injured a elderly man (over the age of 60) prior to holding a gun to an employee at the currency exchange and robbing the currency exchange of thousands of dollars. For the act of injuring the elderly man, defendant was charged with, pled guilty to aggravated battery, and was given an extended-term

[6] Although we recognize that defendant made numerous challenges to try to vacate his guilty plea, none of those efforts were successful, and as the record stands before us, defendant's guilty plea was valid in all respects.

sentence of 10 years. For the reasons that follow, we find that the trial court erred in imposing an extended-term sentence on defendant's aggravated battery conviction.

¶ 30 When determining whether a less serious offense is related to the most serious offense, courts must look to the criminal objective of the defendant at the time each crime was committed and determine whether there was "a *substantial* change in the nature of the criminal objective." (Emphasis added.) *Bell,* 196 Ill. 2d at 354-55. Here, defendant's criminal objective was to enter a currency exchange with a gun and leave with money. Upon entering the currency exchange with a gun in hand, defendant pushed an elderly man to the floor. He then proceeded to rob the currency exchange at gun point. Pushing the elderly man was incidental to, and did not substantially change the nature of, defendant's criminal objective which was to rob the currency exchange. As such, we find that the trial court erred in imposing an extended-term sentence on defendant's aggravated battery conviction because there was not a substantial change in the nature of the defendant's criminal objective at the time he committed the aggravated robbery. As such, defendant's sentence for his aggravated battery conviction is to be reduced to 5 years, the maximum allowed under 730 ILCS 5/5-8-1(a)(6)(West 2002).

¶ 31 Extended-Term Sentence for Attempted Disarming a Peace Officer

¶ 32 From the record, after defendant robbed the currency exchange and drove for approximately 20 minutes, two police officers noticed that his license plate could not be seen and attempted to pull over defendant for a traffic violation. Upon signaling defendant to pull over, defendant sped away and a chase ensued. Defendant ultimately crashed into a building and continued evading the police officers on foot. When defendant stopped running, he approached one of the police officers stating "I want to die" and placed his hand on that officer's weapon. The police officers constrained defendant and placed him under arrest. For these acts, defendant was charged with, pled guilty to, and was convicted of attempted disarming a peace officer, and was given an extended-term sentence of 10 years. For the reasons that follow, we find that defendant's actions in attempting to disarm a peace officer were unrelated and separate from his armed robbery of the currency exchange, making defendant's extended-term sentence appropriate.

¶ 33 Defendant argues that this conviction of attempted disarming a peace officer is related to his armed robbery conviction because it occurred while he was in the process of fleeing the currency exchange with the stolen money. We disagree with defendant's assertion, and find that at the time defendant

attempted to disarm a peace officer he was no loner attempting to flee the scene of the robbery--*i.e.*, the currency exchange. In *People v. Arrington,* 297 Ill. App. 3d 1 (1998), a case relied on by defendant, the court held that where a manager tried to block the defendant from fleeing the scene of the robbery and was injured by the defendant, that act was considered part of the defendant's original plan and, therefore, was related to his armed robbery conviction. However, in making this finding, the court noted:

> "We believe that inherent in any plan to rob a store is also an intention for the robbery to *escape from the premises* with the purloined proceeds. The evidence shows that defendant battered the manager only after he *blocked defendant's escape route*. Defendant's motivation for striking the manager was not a newly conceived intention to inflict harm, but an attempt to complete his original plan, namely, the robbery of and *escape from the store*." (Emphasis added.) *Arrington*, 297 Ill. App. 3d at 5.

¶ 34 Here, defendant had already escaped premises of the currency exchange with thousands of dollars, and by the time he

confronted the peace officer, it was more than 20 minutes after the robbery had occurred, blocks away from the currency exchange, and after a police chase on both wheels and foot had occurred as a result of defendant's unrelated traffic violation (that his license plate was not visible). Thus, when defendant attempted to disarm officer Skalski, the "nature of the defendant's criminal objective" was no longer robbing the currency exchange and escaping the premises (as those objectives had already been accomplished); rather, his criminal objective was to prevent the police officers from taking him into custody for engaging in a traffic violation and evading their office and command when they attempted to pull him over in his car and then chased after him on foot.[7] As such, we find that the trial court did not err in imposing an extended-term sentence on defendant's attempted disarming a peace officer conviction.

¶ 35 Extended-Term Sentence for
Aggravated Unlawful Use of a Weapon

¶ 36 Defendant's AUUW convicted is based upon the fact that a firearm was found in defendant's vehicle after the police officers had chased him down and arrested him. Defendant's possession of a firearm in his vehicle is unrelated to his armed

[7] Further, it would be illogical for this court to rule that the police officers, who were miles away from the currency exchange, were somehow trying to prevent defendant from escaping from the premises of where the robbery occurred.

burglary. While we realize that the firearm that was found in defendant's vehicle was likely the firearm that had been used in the armed robbery (although we do not know this for certain), the AUUW conviction is based upon defendant's criminal objective to possess a firearm in his vehicle, which is unrelated to defendant's criminal objective to rob and flee the currency exchange. Further, and as stated above, the police officers found defendant to be in possession of a firearm more than 20 minutes after the robbery had occurred, blocks away from where the robbery occurred, and after defendant was pulled over as a result of an unrelated traffic violation (that his license plate was not visible) and a police chase by both car and foot had ensued. The AUUW conviction was not based upon defendant's possession of a firearm at any time during the robbery. As such, defendant's AUUW conviction was unrelated to his armed robbery conviction, and the trial court did not err in imposing an extended sentence on his AUUW conviction.

¶ 37 Corrections in Defendant's Mittimus

¶ 38 Defendant requests that we correct his mittimus to state that his conviction for attempted disarming a peace officer is a Class 3 felony. Currently, defendant's mittimus states that his conviction of attempted disarming a peace officer is a Class 2 felony. The State agrees that defendant's mittimus should be

corrected.

¶ 39 As the trial court recognized and the statute states, attempted disarming a peace officer is a Class 3 felony. See 720 ILCS 5/8-4, 12-4(B)(10) (West 2002). As such, we order the clerk of the circuit court to correct defendant's mittimus to reflect that defendant's conviction of attempted disarming a peace officer is a Class 3 felony. See Ill. S. Ct. R. 615(b); see also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("Remandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections."); *People v. DeWeese*, 298 Ill. App. 3d 4, 13 (1998) (correcting mittimus so that it reflects the correct offense.).

¶ 40 CONCLUSION

¶ 41 For all the reasons stated above, we affirm defendant's Class 2 AUUW conviction; affirm the trial court's imposition of extended-term sentences on defendant's attempted disarming a peace officer and AUUW convictions, but reverse the trial court's imposition of an extended-term sentence on defendant's aggravated battery conviction and reduce that sentence to 5 years, the maximum allowed under 730 ILCS 5/5-8-1(a)(6)(West 2002); and direct the clerk of the circuit court to correct defendant's mittimus to show that defendant's conviction of attempted disarming a peace officer is a Class 3 felony.

¶ 42 Reversed in part and affirmed in part.