

¶ 2 Following a bench trial, defendant Regalardo Smith was convicted of two counts of armed robbery, two counts of aggravated battery with a firearm, aggravated battery, armed violence, and aggravated unlawful use of a weapon (AUUW), and was sentenced to an aggregate 75 years' imprisonment. On appeal, defendant contends that (1) the State did not prove him guilty of AUUW, where no evidence established that he lacked a valid firearm owner's identification (FOID) card; (2) the State failed to prove him guilty of armed robbery of one victim, Tamer Tayeh, where the evidence showed that defendant did not take anything from Tayeh; (3) the State failed to prove him guilty of aggravated battery with a firearm to either Tayeh or the other victim, Ahmad Aburomi, where the evidence did not show that defendant knowingly or intentionally discharged a firearm against either victim; (4) defendant's sentencing enhancement for armed robbery of Aburomi should be reduced from 20 to 15 years where the evidence did not show that defendant personally discharged a firearm; and (5) defendant is entitled to day-to-day good conduct credit toward his sentence for armed robbery of Aburomi, where the trial court did not find that he suffered great bodily harm. We vacate defendant's convictions for AUUW and armed robbery of Tayeh, correct the mittimus to reflect day-to-day good conduct credit for defendant's conviction for armed robbery of Aburomi, and otherwise affirm the judgment of the trial court.

¶ 3 Defendant was charged with multiple counts of attempted first-degree murder, armed violence, aggravated battery with a firearm, aggravated battery, armed robbery, attempted armed robbery, vehicular invasion, and AUUW, arising from an incident that occurred in Chicago on May 2, 2009, involving the victims, Tayeh and Aburomi.

¶ 4 At trial, Tayeh testified that he and Aburomi were working at a store located at the corner of Roosevelt and Central Park on the night of the incident. At approximately 10:30 p.m., they closed the store and walked to the parking lot. Tayeh carried a bag of snacks. There were several streetlights, with "plenty of light to see," and Tayeh noticed defendant walking behind him as he entered the lot. Tayeh entered the passenger side of Aburomi's car and tried to close the door, but defendant "stuck most of his body into the car" and pointed a gun at Tayeh's head. Defendant repeatedly said, "[w]here's the money." Aburomi, who was in the driver's seat, took \$40 from the center console, removed his cell phone from his pocket, and offered defendant the money and phone. Defendant took both items and asked for "the rest of the money." He patted Tayeh's pockets, and with the gun in his right hand, poked through the bag of snacks.

¶ 5 Tayeh grabbed defendant's right wrist, forced him from the car, and fell on top of him, but released defendant on hearing footsteps from behind. Tayeh turned and saw a woman walking by. He told her that defendant had a gun and asked her to call the police, but she screamed and fled. Defendant tried to "make a run for it," but Tayeh grabbed defendant's right wrist or forearm and both men fell backwards. Tayeh landed beneath defendant and tried to "restrain" and disarm him. Tayeh held down defendant's right hand by the wrist, near his own pelvis, trying to "stop [defendant] from moving." After "a few seconds," Tayeh heard three gunshots. He denied touching the gun at any time. As Aburomi pulled defendant away, Tayeh felt a "hot sensation" and "went into shock." He ran into a nearby homeless shelter for less than one minute, then ran back to the parking lot and encountered police officers. He ran around the parking lot one more time, fell to his knees, and vomited. When he removed his hands from his stomach, he realized that he was "bleeding profusely" through his clothes.

¶ 6 An ambulance took Tayeh to the hospital, where he was treated for bullet wounds to his kidney, ureter, colon, and left thigh. He required a colostomy, reverse colostomy, colonoscopy, and additional surgery to remove kidney stents. Due to his injuries, Tayeh suffered bloody bowel movements and continuous pain, sustained a "foot long scar," and was left with one functioning kidney, which had been shot through the ureter. A bullet was lodged in his spine or vertebrae, and he also had a "graze wound" to his right ankle. Tayeh identified his injuries in photographs entered into evidence. While Tayeh was at the hospital, a police officer showed him a picture of a gun, which he identified as defendant's weapon. Tayeh identified the gun in the same photograph at trial, which was also entered into evidence.

¶ 7 The State entered a stipulation between the parties that if called to testify, Dr. Michelle Holevar would testify that Tayeh was admitted to the emergency room on May 2, 2009, and discharged on May 18, 2009. Holevar would testify that Tayeh sustained a "continuous gunshot wound with entry and exit through his left thigh." He also sustained a gunshot wound to his left abdomen that pierced his colon "through and through." The bullet lodged against his lower spine, causing a minor fracture. Another bullet fragment was found near his spine, and neither the bullet nor the fragment was removed. Tayeh required multiple surgeries, including an ostomy and loop ileostomy. Additionally, Tayeh had a "graze wound" on his right ankle.

¶ 8 Aburomi testified that on the night of the incident he closed the store with Tayeh and walked with him to the parking lot. The lighting was "not too bright" but "not too dark." Aburomi entered the driver's seat of his car and Tayeh entered the passenger side a minute later. Defendant leaned into Tayeh's side of the car, holding a gun in his right hand. He pointed the gun at Aburomi and Tayeh and demanded money, so Aburomi offered defendant his cell phone,

which was in his hand, and \$40 dollars from a compartment in the car. Defendant took the phone and money, and looked through Tayeh's bag but did not take anything else.

¶ 9 Tayeh grabbed defendant's right hand, pushed him away, and exited the car. Aburomi followed, heard two gunshots, and saw defendant on top of Tayeh. The gun was in defendant's hand, and Tayeh's hand was "on top of it," with "both hand [*sic*] still on [the] gun." Aburomi put his left arm around defendant's neck and pulled him off Tayeh, then placed his hand on top of defendant's hand that held the gun. Aburomi positioned himself behind defendant, "holding his hand and the gun down straight." Aburomi heard another gunshot but did not feel anything.

¶ 10 On direct examination, Aburomi testified that he tried to drag defendant toward the homeless shelter and defendant bit his right hand, which was still "on top" of defendant's hand that held the gun. When "police lights" appeared, defendant fled and the gun "stayed in" Aburomi's hand. On cross-examination, Aburomi testified that as he dragged defendant toward the homeless shelter, he was "holding the gun, and holding the gun down with [defendant]." Defendant bit Aburomi, who grabbed the gun as defendant fled.

¶ 11 Aburomi further testified that a police car followed defendant to a fence, which defendant "jumped." Officers took the gun from Aburomi and brought defendant back to the parking lot, where Aburomi identified him, along with the phone and the \$40. Tayeh and Aburomi went to the hospital in separate ambulances, but officers met Aburomi at the hospital and brought him to the police station before he saw a doctor. In photographs entered into evidence, Aburomi identified his hand with a bandage where defendant had bit him, his pants and a sock with a bullet hole, and a "burn" on his leg from a bullet. Aburomi also identified a photograph of defendant's gun.

¶ 12 Officer Granville testified that he heard gunshots near Roosevelt and Central Park at approximately 10:30 p.m. on the night of the incident. He drove to the parking lot and saw Tayeh, who was on the ground, Aburomi, who was "standing up [and] yelling," and defendant, who was running through the lot. Granville drove behind defendant until he climbed over a fence, and issued a flash message describing his clothing. Granville recovered a gun from Aburomi, which he inventoried and identified in a photograph at trial. Other officers brought defendant back to the parking lot and Granville identified him.

¶ 13 Officer Sandoval testified that he also heard gunshots near Roosevelt and Central Park at approximately 10:30 p.m. He received Granville's flash message, saw defendant running, and eventually found him "crouched down" in an outdoor stairwell of a nearby house. Defendant fled and Sandoval observed something "fall from his person." Other officers detained defendant, and Sandoval directed an officer to recover the items that defendant had dropped, determined to be two \$20 bills. Sandoval also recovered a cell phone from defendant, who was taken to the parking lot and identified by Aburomi and Granville. Aburomi identified the cell phone as "part of the proceeds that were taken."

¶ 14 Officer Nomellini testified that he recovered and inventoried the two \$20 bills found at the scene of defendant's arrest.

¶ 15 Officer Delis testified that he performed a gunshot residue (GSR) test on defendant after midnight on May 3, 2009. Delis collected and inventoried samples from defendant's right and left hands, and did not perform a GSR test on anyone else.

¶ 16 Scott Rochowicz, a forensic scientist with the Illinois State Police, testified that he analyzed the samples from defendant's GSR kit and found that the back of defendant's left hand

was positive for GSR. According to Rochowicz, this meant that defendant either "discharged a firearm, contacted a PGSR related item, [or] was in close proximity to a firearm when it was discharged." Defendant's right hand tested negative for GSR. Only one particle containing antimony, barium, and lead was found on defendant's right hand, and a minimum of three particles containing all three elements was needed for a "positive conclusion." Rochowicz further testified that GSR could be removed by "any physical activity done with the hands," including contact with another person's hands.

¶ 17 Joseph Wohrstein, a forensic scientist for the Illinois State Police, testified that he looked for "latent prints" on the pistol, cartridge cases, and magazine, but did not find any prints useable for comparison. Wohrstein stated that the fact no fingerprints are "lifted" from an item does not mean that a particular person did not touch it.

¶ 18 Defendant filed a motion for directed finding, arguing, *inter alia*, that the State had not proven "who actually discharged the firearm" during the incident. The court denied defendant's motion, stating that "the testimony was that neither Mr. Tia [*sic*] nor Mr. Abarami [*sic*] had their hand on the gun at all, but they had their hand on [defendant's] wrist or hand." The defense rested.

¶ 19 Following closing arguments, the court found defendant guilty of five counts of armed robbery, two counts of aggravated battery with a firearm, one count of armed violence, two counts of vehicular invasion, one count of attempted armed robbery, one count of aggravated battery, and two counts of AUUW. The court noted that Tayeh and Aburomi were "credible witnesses" and "weren't impeached in any way."

¶ 20 Defendant filed a motion for new trial, arguing, *inter alia*, that the evidence did not prove that defendant committed armed robbery of Tayeh or that defendant “personally discharged a firearm that proximately caused great bodily harm to Tayeh.” According to defendant, it was “unclear who discharged the firearm” because defendant and Tayeh “were struggling over the firearm when it was discharged.” The court denied defendant’s motion, noting that Tayeh had indicated “he did not have his hand on the gun,” and although there was a struggle, “defendant fired the gun *** three times *** into Mr. Tayad [*sic*].”

¶ 21 After merging certain counts and vacating one count of AUUW, the court sentenced defendant to an aggregate 95 years’ imprisonment. Subsequently, the court granted defendant’s motion for reconsideration of sentence and resented defendant to an aggregate 75 years’ imprisonment as follows: armed violence (15 years), aggravated battery with a firearm to Aburomi (eight years), armed robbery of Aburomi (10 years plus a 20-year enhancement for personally discharging a firearm), aggravated battery of Aburomi (five years), and AUUW (three years), all to be served concurrently; aggravated battery with a firearm to Tayeh (10 years), to be served consecutively; and armed robbery of Tayeh (10 years plus a 25-year enhancement), also to be served consecutively. Defendant filed a second motion to reconsider sentence, which the court denied.

¶ 22 Defendant raises five issues on appeal, four of which involve challenges to the sufficiency of the evidence. The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. The reviewing court will not retry the defendant or

substitute its judgment for that of the trier of fact on questions involving conflicts in the testimony, the credibility of witnesses, or the weight of the evidence. *Id.* To sustain a conviction, "[i]t is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *People v. Hall*, 194 Ill. 2d 305, 330 (2000). A defendant's conviction will be reversed only if the evidence is so unreasonable, improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 23 First, defendant contends that his conviction for AUUW must be vacated because the State did not present any evidence at trial that he lacked a valid FOID card. Alternatively, defendant argues that his conviction for AUUW violates the one-act, one-crime rule because it was based on the same physical conduct as his armed violence conviction. The State concedes, correctly, that the evidence presented at trial did not establish that defendant lacked a valid FOID card, and that defendant's conviction and sentence for AUUW should be vacated. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (defendant's conviction must be reversed if a court determines "the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt.").

¶ 24 To sustain a conviction for AUUW, the State must establish that a defendant carried a firearm on or about his or person, while he or she was outside his or her land, abode, legal dwelling, or fixed place of business, and the person "has not been issued a currently valid Firearm Owner's Identification Card." 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2008). Our review of the record shows that the State presented no evidence that defendant lacked a valid

FOID card. Therefore, defendant was not proven guilty of AUUW beyond a reasonable doubt, and his conviction and sentence must be vacated.

¶ 25 Next, defendant contends, and the State correctly concedes, that his conviction for armed robbery of Tayeh should be vacated because no evidence established that defendant took property from Tayeh. A person commits armed robbery when he or she knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force while carrying a firearm. 720 ILCS 5/18-1, 18-2 (West 2008). To sustain a conviction for armed robbery, the evidence must show that the stolen property was “taken from the victim of the robbery.” See *People v. Gaines*, 88 Ill. 2d 342, 368 (1981) (reversing conviction for armed robbery where no evidence showed that defendant took anything from the victim). “Multiple armed robbery convictions cannot lie when there is a single taking of property, even when multiple individuals are present and threatened.” *People v. Scott*, 2015 IL App (1st) 133180, ¶ 16.

¶ 26 In this case, no evidence established that property was taken from Tayeh. Aburomi and Tayeh both testified that Aburomi gave defendant his cell phone and \$40. According to Aburomi, defendant did not take anything else. According to Tayeh, defendant patted his pockets and poked through the bag of snacks. However, Tayeh did not testify that defendant took anything from him. Consequently, the evidence did not support defendant’s conviction for armed robbery of Tayeh, and his conviction and sentence must be vacated. *Woods*, 214 Ill. 2d at 470.

¶ 27 Next, defendant contends that the State failed to prove his guilt of aggravated battery with a firearm to either Tayeh or Aburomi where the evidence did not establish that defendant knowingly or intentionally injured either victim. According to defendant, Tayeh and Aburomi’s

testimony showed only that both victims were shot while struggling for control of the gun. Regarding Tayeh's shooting, defendant submits that Tayeh was shot while trying to "restrain and disarm" defendant, and was holding defendant's hand that held the gun when it discharged. Additionally, defendant notes that Aburomi saw both defendant and Tayeh's hands on the gun after the shooting. Regarding Aburomi's shooting, defendant argues that Aburomi was shot while he controlled the direction of defendant's gun-wielding hand, and exercised enough control over the gun to eventually grab it from defendant. Thus, according to defendant, it is unclear how the gun was discharged or who possessed the gun at that time. Moreover, because Aburomi was standing behind defendant, with his left arm around defendant's neck and his right hand on the hand that held the gun, defendant argues that "[i]t would have been almost impossible" for him to shoot Aburomi without endangering his own life. Consequently, defendant submits that the evidence failed to establish that he knew his actions during the struggle created a "practical certainty" of injuring either Tayeh or Aburomi.

¶ 28 The State responds that defendant's argument amounts to an improper request for this court to reweigh the evidence on appeal. According to the State, defendant knew or intended that his conduct would harm Tayeh and Aburomi where he pointed a gun at them during the robbery, fired the gun in an attempt "to fight off the victims and escape," and indicated his consciousness of guilt by fleeing the scene.

¶ 29 Defendant, in reply, contends that his use of the gun during the robbery has no bearing on whether he knew a shooting would occur, as Tayeh's conduct in grabbing defendant and forcing him from the car constituted a "supervening event." Defendant submits that his flight was a

"natural response" where a gun had been fired as he struggled with two people, and does not show that he knew that he would injure the victims.

¶ 30 In order to sustain a charge of aggravated battery with a firearm, the State must prove that the defendant “knowingly or intentionally” caused injury to another person by means of discharging a firearm. 720 ILCS 5/12-4.2(a) (West 2008). A person acts knowingly if he is consciously aware that his conduct is practically certain to cause injury. 720 ILCS 5/4-5(b) (West 2004); *People v. Vazquez*, 315 Ill. App. 3d 1131, 1133 (2000). A defendant's mental state may be inferred from circumstantial evidence, including the actions of the accused and the surrounding circumstances. *People v. Wehrwein*, 209 Ill. App. 3d 71, 81 (1990). “[W]hen the facts in a case give rise to more than one inference, a reviewing court should not substitute its judgment for that of the trier of fact unless the inference accepted by the trier of fact is inherently impossible or unreasonable.” *Id.*

¶ 31 In this case, the evidence viewed in the light most favorable to the State established that defendant entered Aburomi’s car and pointed a gun at Aburomi and Tayeh. Tayeh forced defendant from the car, briefly released him, then grabbed him again and pulled him down. Defendant fell onto Tayeh, who kept his hand on top of defendant's hand that held the gun. Tayeh was shot three times and denied touching the gun. Aburomi pulled defendant away, placed his hand on top of defendant's hand that held the gun, and angled the gun downward when it discharged again. After Aburomi was shot, defendant bit him and fled, leaving Aburomi with the gun. Based on this evidence, the trier of fact reasonably could conclude that defendant fired the gun at Aburomi and Tayeh, knowing or intending that both victims would be injured, when they grabbed at his hand that held the gun and tried to prevent his escape.

¶ 32 Relying on *People v. Hamilton*, 48 Ill. App. 3d 456 (1977), however, defendant submits that his struggle with the victims for control of the gun does not support a finding that defendant knowingly or intentionally shot either victim. In *Hamilton*, the defendant contended that the victim attacked him, and, in the course of the attack, a loaded gun was knocked to the floor. *Id.* at 457. The defendant grabbed the gun, a struggle ensued, and the victim was shot. *Id.* The defendant reported the incident to the police, cooperated with them in their investigation, and at all times maintained that the weapon accidentally discharged during a struggle over its possession. *Id.* On appeal, the court reversed defendant's conviction for voluntary manslaughter because the evidence failed to disprove a "reasonable hypothesis of innocence," namely, that "the weapon was accidentally discharged during a struggle over its possession." *Id.*

¶ 33 Defendant's reliance on *Hamilton* is misplaced, as our supreme court has abolished the reasonable hypothesis of innocence standard of review for all cases, whether the evidence is direct or circumstantial. *People v. Pintos*, 133 Ill. 2d 286, 291 (1989). Moreover, defendant's mental state was a question for the trier of fact (*People v. DiVencenzo*, 183 Ill. 2d 239, 253 (1998)), which was not required to accept explanations consistent with defendant's innocence or to disregard inferences flowing normally from the evidence (*People v. Lee*, 2015 IL App (1st) 132059, ¶ 50). Here, the evidence viewed in the light most favorable to the State was sufficient to establish defendant's intent or knowledge that his actions would injure the victims.

¶ 34 We also reject defendant's argument that the reasonable doubt standard was not satisfied because no GSR was found on his right hand. Rochowicz, a forensic scientist, explained that GSR could be removed by contact with another person's hands, and in this case, Tayeh and Aburomi both testified that their hands were on top of defendant's right hand during the struggle.

Weighed against the victims' testimony, the absence of GSR on defendant's right hand is not "so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 35 Defendant next argues that the firearm enhancement on his sentence for armed robbery of Aburomi must be reduced where the State failed to prove beyond a reasonable doubt that defendant personally discharged the gun. According to defendant, Aburomi's testimony only showed that the gun "went off" while the men struggled, but did not establish that defendant fired it. In support of this theory, defendant incorporates the same arguments introduced in his challenge to the sufficiency of the evidence that he knowingly or intentionally injured Aburomi.

¶ 36 Where an offender "personally discharges" a firearm while committing an armed robbery, a 20-year enhancement is added to the sentence imposed by the court. 720 ILCS 5/18-2(a)(3), 18-2(b) (West 2008). However, where an offender only "carries" a firearm while committing an armed robbery, a 15-year enhancement is added. 720 ILCS 5/18-2(a)(2), 18-2(b) (West 2008).

Whether the State proved beyond a reasonable doubt the facts qualifying a defendant for a statutory sentencing enhancement is a question for the trier of fact. *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 57 (citing *People v. Thurow*, 2013 Ill. 2d 352, 360 (2003)).

¶ 37 We cannot say the evidence was insufficient to establish that defendant personally discharged the gun while robbing Aburomi. Viewed in the light most favorable to the State, the evidence showed that Aburomi pulled defendant off Tayeh and positioned his hand on top of defendant's hand that held the gun. Although Aburomi controlled the gun's direction, the gun remained in defendant's hand throughout the incident, including when the gun discharged.

Rochowicz, a forensic scientist, explained that GSR could be removed by contact with another

person's hands. Based on this evidence, a rational trier of fact could conclude that defendant personally discharged the gun. *Wehrwein*, 209 Ill. App. 3d at 81 (reviewing court defers to inferences accepted by the trier of fact unless inherently impossible or unreasonable).

Consequently, we cannot say that the trial court erred in imposing a 20-year enhancement on defendant's sentence for armed robbery of Aburomi, where the evidence showed that defendant personally discharged a gun.

¶ 38 Finally, defendant contends that his sentencing order for armed robbery of Aburomi must be amended to reflect that he is eligible to receive day-for-day good conduct credit, as the trial court did not find that Aburomi suffered great bodily harm and the evidence showed that no great bodily harm occurred.

¶ 39 Initially, we note that defendant did not raise this issue before the trial court, and therefore, forfeiture applies. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant submits that this court should consider the matter under the first or second prong of plain error review. In the sentencing context, we may consider forfeited errors where the evidence is closely balanced or the error is so fundamental it may have deprived defendant of a fair sentencing hearing. *Id.* at 545. However, the first inquiry before determining whether there was a plain error is to determine whether there was a clear and obvious error. *People v. Eppinger*, 2013 IL 113121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Id.* For the following reasons, the trial court erred in sentencing defendant.

¶ 40 Day-for-day good conduct credit is generally available for a defendant serving a term of imprisonment for armed robbery. 730 ILCS 5/3-6-3(a)(2.1) (West 2008). However, where the trial court finds that the defendant's conduct caused great bodily harm to a victim, the defendant

may receive no more than 4.5 days of good-conduct credit for each month of his or her sentence of imprisonment. 730 ILCS 5/3-6-3(a)(2)(iii), 5-4-1(c-1) (West 2008). That is, the defendant must serve at least 85% of his or her sentence and does not receive normal day-for-day good-conduct credit. *People ex rel. v. Roe*, 201 Ill. 2d 552, 556 (2002). Whether an injury constitutes great bodily harm is a question for the trier of fact (*People v. Crespo*, 203 Ill. 2d 335, 344 (2001)), but whether a sentence conforms to statutory requirements is an issue of law that we review *de novo* (*People v. Thompson*, 209 Ill. 2d 19, 22 (2004)).

¶ 41 In this case, the State concedes, correctly, that the trial court erred in sentencing defendant to serve 85% of his sentence for armed robbery of Aburomi. The court did not make and enter a finding that the conduct leading to defendant's conviction resulted in great bodily harm to Aburomi, and moreover, the evidence did not show that Aburomi sustained great bodily harm. As the court's misapplication of the sentencing law "affected defendant's fundamental right to liberty," plain error occurred and we may consider the error despite defendant's forfeiture of the issue. *People v. Smith*, 2016 IL App (1st) 140496, ¶ 15. Consequently, defendant's mittimus must be corrected to show that he is entitled to receive day-for-day credit on his sentence. 730 ILCS 5/3-6-3(a)(2.1) (West 2008). Because we find plain error, we need not consider defendant's alternate contention that trial counsel was ineffective for failing to object to the improper sentencing.

¶ 42 For all the foregoing reasons, we vacate defendant's convictions for AUUW and armed robbery of Tayeh, modify the mittimus to reflect day-to-day good conduct credit for defendant's conviction for armed robbery of Aburomi, and otherwise affirm the judgment of the trial court.

¶ 43 Affirmed as modified; mittimus corrected.