THIRD DIVISION
November 9, 2016

No. 1-14-2093

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 18675
	)	
KENTRE NIXON,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment on defendant's convictions for aggravated discharge of a firearm and aggravated unlawful use of a weapon affirmed where his jury waiver was valid, his sentence is not excessive, and there is no conflict in the sentencing statute regarding the amount of good conduct credit he should receive; mittimus amended to reflect proper number of convictions.

¶ 2 Following a bench trial, defendant Kentre Nixon was convicted of aggravated discharge of a firearm and aggravated unlawful use of a weapon, and sentenced to concurrent prison terms of 12 years and 3 years, respectively. On appeal, defendant contends that his right to a jury trial was violated when the trial court failed to ensure that his jury waiver was knowingly and

voluntarily made. Defendant also contends that his sentence is excessive, and that there is a conflict in the sentencing statute regarding the amount of good time credit he should receive. In addition, defendant contends that his mittimus should be amended to reflect the proper number of convictions. We affirm and amend the mittimus.

¶ 3 Defendant was charged with four counts of attempted first degree murder, two counts of aggravated discharge of a firearm, and four counts of aggravated unlawful use of a weapon for firing a gunshot at a police officer on September 14, 2012. At a status hearing on May 23, 2013, the court asked defense counsel if they were in "trial mode," and counsel replied that the case could be set for trial. The court then asked what type of trial, and counsel responded "[w]e would ask for a bench trial." The parties and the court agreed to a trial date of July 29, 2013, and the following exchange then occurred:

> "THE COURT: Mr. Nixon, that's by agreement July 29th with subpoenas for trial.
>
> [DEFENSE COUNSEL]: Can we mark that with for bench.
>
> THE COURT: I did. I said with subpoenas for trial.
>
> [DEFENSE COUNSEL]: I don't think it's going to be a jury trial.
>
> THE COURT: You indicated bench trial.
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: All right."

¶ 4 On July 29, 2013, when the case was called, defense counsel stated "[i]t's here for bench trial." The case was then rescheduled due to an unrelated jury trial that had also been scheduled for that date. When rescheduling, the court asked "this is a jury?" and counsel replied "[n]o, this

is a bench." After selecting a date, the court stated "Mr. Nixon, that's by agreement August 21 with subpoenas for trial. And he is not going to be bumped by a jury."

¶ 5 The record shows that the trial date was repeatedly rescheduled over the next several months, and on every date, with defendant present, counsel indicated that it was going to be a bench trial. On November 27, 2013, counsel stated "[t]his is set for a bench trial." On December 18, 2013, counsel stated "[w]e were set for trial on a bench before Thanksgiving but [we] had to postpone it until today." At a January 6, 2014, status hearing to reset the trial date, the court again asked counsel what type of trial it would be, counsel replied "[b]ench trial," and the court asked the State "can we get a bench trial date that we can all agree on," noting that defendant's trial had been "bumped" four times. The State then asked defense counsel if it was a bench or jury trial, and counsel again replied "[b]ench." On February 13, 2014, defense counsel stated "[w]e're here for bench trial," but the trial was again rescheduled.

¶ 6 On April 2, 2014, when the trial court stated that the case was set for trial that day, counsel specified "[s]et for bench trial." The case was passed, and when later recalled, the court stated "[t]his matter is set for a bench trial," and counsel confirmed "[i]t is." Shortly thereafter, the following exchange occurred:

"THE COURT: All right. Mr. Nixon, do you know what a jury trial is?

DEFENDANT NIXON: Yes, ma'am.

THE COURT: You have a right to have that kind of trial. Are you giving up your right to have that kind of trial, Mr. Nixon?

DEFENDANT NIXON: Yes.

THE COURT: The Court accepts both your oral and your written waivers of your right to have a jury trial."

The record also contains a written jury waiver signed by defendant dated April 2, 2014.

¶ 7 At trial, Chicago police officer Martin Teresi testified that about 11:58 p.m. on September 14, 2012, he and his partner, Officer Kevin Kilroy, responded to a call from their sergeant regarding three men standing on the corner of 122nd Street and Normal Avenue, with one of those men wearing a white t-shirt and possibly being armed. When the police arrived at the scene, Officer Teresi saw defendant and two other men walking together on Normal Avenue, and defendant was wearing a white t-shirt. Officer Teresi exited his vehicle to conduct a field interview, and when he said "police," defendant fled down a gangway between two houses with Officer Teresi in pursuit. When defendant reached a six-foot tall chain-link fence at the rear of the house, he stopped and turned, pointed a gun at Officer Teresi and fired one gunshot. Officer Teresi dove to the ground to take cover, then kneeled and fired one gunshot in return as defendant climbed over the fence. Officer Teresi followed defendant over the fence, but lost sight of him in the alley behind the residence.

¶ 8 About one minute later, as Officer Teresi walked through the alley, he spotted defendant walking quickly on the sidewalk on the next block, Eggleston Avenue. From the alley, Officer Teresi walked parallel with defendant past four or five houses, then observed defendant attempt to hide behind part of a house. As a police car drove down Eggleston Avenue, Officer Teresi shined his flashlight at the vehicle, pointed out defendant's location, then told defendant "police, don't move." Defendant was then taken into custody by other officers.

¶ 9 Chicago police evidence technician William Buglio testified that when he arrived at the scene, he was directed to the rear of the residence at 12201 South Normal Avenue where he recovered a nine-millimeter semi-automatic pistol laying on the ground. An expended shell casing was jammed in the gun at the point of ejection, which indicated that a bullet had exited through the barrel, but the weapon jammed when it was fired. Officer Buglio also discovered one bullet hole in the front of a residence on Normal Avenue, directly across the street from the gangway, and a second bullet hole in the rear of a residence on Eggleston Avenue, across the alley from the gangway. Officer Buglio further testified that he swabbed both of defendant's hands to test for gunshot residue.

¶ 10 The State presented a stipulation that Chicago police officer Kelly Brogan would testify that when she arrived at the scene, she saw Officer Teresi running with his gun drawn, then heard two gunshots. She then drove to the mouth of the alley where she saw defendant discard a weapon as he ran through the alley. The State presented a second stipulation that forensic scientist Ryan Paulsen conducted DNA analysis on cellular material collected from the firearm and found that defendant could not be excluded as having contributed to the major human male DNA profile identified on that firearm. A third stipulation stated that forensic scientist Robert Berk analyzed the gunshot residue swabs taken from defendant and concluded that defendant had discharged a firearm, contacted a primer gunshot residue-related item, or had both hands in the environment of a discharged firearm. In addition, the State presented a certification from the Illinois State Police indicating that defendant was never issued a firearm owner's identification card.

¶ 11 Defendant testified that at the time in question, he was "hanging out" on the corner of 122nd Street and Normal Avenue with two of his friends when an unmarked police vehicle pulled up on the curb about seven steps away from him. Defendant then ran through a gangway to flee from the police because he had a loaded nine-millimeter weapon on his hip tucked inside his gym shorts. As defendant climbed over the fence, he heard a gunshot. After jumping the fence, he removed the gun from his shorts, ran into the alley, and placed the gun near the garbage. Defendant than ran to Eggleston Avenue where he was arrested. Defendant testified that he carried the gun for protection and denied ever firing it at anyone.

¶ 12 The trial court found defendant guilty of two counts of aggravated discharge of a firearm in the direction of a police officer (Counts 5 and 6) and two counts of aggravated unlawful use of a weapon (Counts 8 and 10). The court found defendant not guilty of attempted murder.

¶ 13 At sentencing, the State pointed out that defendant had no criminal history, but that the minimum sentence for aggravated discharge of a firearm was 10 years' imprisonment, with a maximum term of 45 years. The State argued that because defendant fired his gun at a police officer, his sentence should be in excess of the minimum term and he should not be rewarded for his poor marksmanship.

¶ 14 In mitigation, defense counsel noted that defendant was a high school graduate, had attended community college, and that he came from a loving and supportive family. Counsel asked the court to consider defendant's young age and potential for rehabilitation, and requested that the court impose the minimum term of 10 years' imprisonment.

¶ 15 In allocution, defendant claimed that the State failed to prove that he discharged the firearm and pointed out that the bullet was never recovered. Defendant stated that he was a goodhearted person with good intentions, and asked for the court's mercy and leniency.

¶ 16 The trial court acknowledged that defendant lacked a criminal background, but noted that he was involved with a gang at one point in his life. The court then stated:

> "You have potential for rehabilitation, which is great due to your age. And lack of background. You really can turn your life around, but you've got to take responsibility for your actions. You got to start by taking responsibility for your own actions. And I don't see that here. I don't see it at all."

The court then sentenced defendant to 12 years' imprisonment for the offense of aggravated discharge of a firearm, and a concurrent term of 3 years' imprisonment for aggravated unlawful use of a weapon. The court expressly stated that defendant was required to serve 85% of his sentence. The court also stated that the two counts of aggravated discharge of a firearm would merge (Counts 5 and 6), and the two counts of aggravated unlawful use of a weapon would also merge (Counts 8 and 10). The court subsequently denied defendant's motion to reduce the sentence.

¶ 17 On appeal, defendant first contends that his right to a jury trial was violated because the trial court accepted his jury waiver without admonishing him about the nature of a jury trial, and thus, failed to ensure that his waiver was knowingly and voluntarily made. Defendant acknowledges that he did not raise this issue in his posttrial motion, but argues that it is reviewable under the plain error doctrine.

¶ 18 The State responds that defendant forfeited the issue and that the plain error doctrine does not apply because no error occurred. The State argues that defendant was sufficiently admonished, that he waived his right to a jury both orally and in writing, and that he was present in court on several occasions when defense counsel indicated that it would be a bench trial. The State asserts that the record thereby shows that defendant understood what a jury trial was, and knowingly and voluntarily waived his right to a jury.

¶ 19 Although defendant failed to properly preserve this issue for review (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), our supreme court has found that because the right to a jury trial is a fundamental right guaranteed by our federal and state constitutions, a claim alleging a violation of that right may be considered under the plain error doctrine. *People v. Bracey*, 213 Ill. 2d 265, 269-70 (2004). In considering such a claim, this court reviews the trial record to determine if defendant understandingly waived his right to a jury trial. *People v. Tooles*, 177 Ill. 2d 462, 469 (1997). Because the facts surrounding defendant's jury waiver are not in dispute, the issue presents a question of law which we review *de novo*. *Bracey*, 213 Ill. 2d at 270.

¶ 20 The validity of a jury waiver is determined by analyzing the particular facts and circumstances of each case. *Id*. at 269. A written jury waiver, while not always dispositive, is one way to establish defendant's intent. *Id*. at 269-70. Although the trial court must ensure that a jury waiver is understandingly made, there are no specific admonishments or advice required for a waiver to be effective. *Tooles*, 177 Ill. 2d at 469. The court should determine if defendant understands what a jury trial is, but then only needs to ask if he understands that he is relinquishing his right to have a jury determine his case, and if that is what he wants to do. *People v. Marquez*, 324 Ill. App. 3d 711, 716 (2001). There is no requirement that the record

explicitly show that the court advised defendant of his right to a jury trial, or that defendant was advised about the consequences of waiving a jury. *Id*., citing *People v. Frey*, 103 Ill. 2d 327, 332 (1984). "Generally, a jury waiver is valid if it is made by defense counsel in defendant's presence in open court, without an objection by defendant." *Bracey*, 213 Ill. 2d at 270.

¶ 21 We find that the facts and circumstances in this case establish that defendant knowingly and understandingly waived his right to a jury trial. The record shows that in May 2013, with defendant present, counsel informed the court that the defense was requesting a bench trial and a trial date was set. When the case was called in July, in defendant's presence, counsel stated "[i]t's here for bench trial," but the trial was rescheduled. Over the next several months, the trial date was repeatedly rescheduled, and on every date, with defendant present, counsel indicated that it was going to be a bench trial. On April 2, 2014, when the case was called, counsel again confirmed that it was going to be a bench trial, and the following colloquy occurred:

> "THE COURT: All right. Mr. Nixon, do you know what a jury trial is?
>
> DEFENDANT NIXON: Yes, ma'am.
>
> THE COURT: You have a right to have that kind of trial. Are you giving up your right to have that kind of trial, Mr. Nixon?
>
> DEFENDANT NIXON: Yes.
>
> THE COURT: The Court accepts both your oral and your written waivers of your right to have a jury trial."

The record also contains a written jury waiver signed by defendant dated April 2, 2014.

¶ 22 The record thus shows that for nearly a year, defense counsel, with defendant present, consistently and repeatedly requested a bench trial, and defendant never objected or expressed

disagreement. At no time did the defense ever suggest that defendant may be considering a jury trial. On the date of trial, pursuant to the court's questioning, defendant confirmed that he understood what a jury trial was, and that he was waiving his right to a jury trial. He also executed a written jury waiver to that effect. The trial court was not required to convey any specific admonishments or advice to defendant, or advise him of the implications of waiving his right. Based on this record, we find that the trial court's questioning in this case was sufficient for it to ensure that defendant's waiver of his right to a jury trial was understandingly made, and thus, the waiver was valid.

¶ 23 Defendant next contends that the trial court abused its discretion when it sentenced him to 12 years' imprisonment for aggravated discharge of a firearm because it failed to give adequate consideration to his mitigating evidence and great potential for rehabilitation which showed that he had no prior convictions, was only 21 years old, and was an employed high school graduate. Defendant asks this court to reduce his sentence to the minimum term of 10 years' imprisonment.

¶ 24 Aggravated discharge of a firearm in the direction of a peace officer is a Class X felony with a specialized statutory sentencing range of 10 to 45 years' imprisonment. 720 ILCS 5/24-1.2(a)(3), (b) (West 2012). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 25 Here, we find that defendant's sentence was not excessive and that the trial court did not abuse its discretion when it imposed the 12-year term. The trial court expressly found that defendant's potential for rehabilitation was "great" due to his age and lack of criminal history. The record shows, however, that the court was very concerned with defendant's failure to take responsibility for his actions. In allocution, defendant maintained his innocence and claimed that the State had failed to prove that he discharged the firearm. Thereafter, when imposing the sentence, the court told defendant "[y]ou really can turn your life around, but you've got to take responsibility for your actions. You got to start by taking responsibility for your own actions. And I don't see that here. I don't see it at all."

¶ 26 We observe that a sentencing court need not give defendant's potential for rehabilitation greater weight than the seriousness of the offense (*People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001)), and when the trial court determines that a more severe sentence is warranted, defendant's age has little import (*People v. Rivera*, 212 Ill. App. 3d 519, 526 (1991)). The record in this case demonstrates that the trial court balanced defendant's mitigating evidence against the seriousness of the offense and concluded that the minimum sentence of 10 years' imprisonment was not appropriate. The court then imposed a sentence at the low end of the statutory range just two years above the minimum term. This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court (*Alexander*, 239 Ill. 2d at 213), and based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *People v. Fern*, 189 Ill. 2d 48, 56 (1999).

¶ 27 Defendant next contends that that there is a conflict in the sentencing statute regarding the amount of good time credit he should receive and that the conflict should be resolved so that he receives day-for-day credit on his sentence rather than being required to serve 85% of the term. Defendant asserts that both subsections (a)(2)(iii) and (a)(2)(iv) of section 3-6-3 of the Unified Code of Corrections (Code) apply to his sentence for aggravated discharge of a firearm. 730 ILCS 5/3-6-3(a)(2) (West 2012). He argues that the two subsections contradict each other because subsection (a)(2)(iii) requires that when the offense is committed on or after June 19, 1998, a defendant must serve 85% of his sentence only when the trial court has entered a finding of great bodily harm, whereas subsection (a)(2)(iv) requires that when the offense is committed on or after June 23, 2005, a defendant must serve 85% of his sentence regardless of whether the court found great bodily harm. Defendant points out that the statute does not indicate that the provision that applies to offenses committed after June 19, 1998, is no long applicable, and therefore, both provisions apply to him. He argues that because the trial court did not find great bodily harm in this case, under the rule of lenity, the provision which is in his favor, subsection (a)(2)(iii), should have been applied entitling him to day-for-day credit.

¶ 28 Defendant acknowledges that the same argument he presents here was previously rejected by this court in *People v. Williams*, 2015 IL App (1st) 130097. He argues, however, that the holding in *Williams*, which found no conflict or ambiguity in the statute, was incorrect and should not be followed. The State responds that *Williams* correctly held that there is no conflict in the statute, and in this case, the trial court properly followed the clear language of the statute when it stated that defendant was required to serve 85% of his sentence.

¶ 29 The interpretation of the language of a statute in a question of law which we review *de novo*. *People v. Lloyd*, 2013 IL 113510, ¶ 25. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *People v. McClure*, 218 Ill. 2d 375, 381 (2006). The best indicator of legislative intent is the language of the statute, and where possible, the court should give that language its plain and ordinary meaning. *Id*. at 382. When determining the plain meaning of a statute, the court considers the subject the statue addresses and the legislature's purpose in enacting it. *Lloyd*, 2013 IL 113510, ¶ 25. The court must construe a statute as a whole so that no part is rendered meaningless or superfluous, and the court should not depart from the language of the statute by reading into it limitations, exceptions or conditions that conflict with the intent of the legislature. *McClure*, 218 Ill. 2d at 382.

¶ 30 Section 3-6-3(a)(2) of the Code provides, in relevant part:

> "(2) The rules and regulations on early release shall provide, with respect to offenses listed in clause (i), (ii), or (iii) of this paragraph (2) committed on or after June 19, 1998 or with respect to the offense listed in clause (iv) of this paragraph (2) committed on or after June 23, 2005 (the effective date of Public Act 94-71) ***, the following:
>
> * * *
>
> (iii) that a prisoner serving a sentence for *** aggravated discharge of a firearm *** when the court has made and entered a finding, pursuant to subsection (c-1) of Section 5-4-1 of this Code, that the conduct leading to conviction *** resulted in great bodily harm to a victim, shall receive no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment;

> (iv) that a prisoner serving a sentence for aggravated discharge of a firearm, whether or not the conduct leading to conviction for the offense resulted in great bodily harm to the victim, shall 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) (West 2008).

Here, defendant committed the offense of aggravated discharge of a firearm on September 14, 2012, which only triggered the application of subsection (a)(2)(iv). Officer Teresi was not hit by the bullet and suffered no physical injury. In *Williams*, this court found:

> "The plain language of subsection (a)(2)(iv) reveals the legislature's intent that a defendant who commits the offense of aggravated discharge of a firearm *after* June 23, 2005 must serve at least 85% of his sentence regardless of whether the conduct resulted in "great bodily harm" to a victim. Clear from the language in subsection (a)(2)(iv) is that the legislature deemed this offense to be of such a serious nature, that it sought to enhance the time served provision regardless of bodily harm to a victim. Accordingly, we find no ambiguity in the statute[.]" *Williams*, 2015 IL App (1st) 130097, ¶ 63.

We decline to depart from our reasoning in *Williams* and again hold that there is no ambiguity or conflict in the statute. Pursuant to the statute, defendant is required to serve 85% of his sentence, and thus, the trial court did not err in making that finding.

¶ 31 Finally, defendant contends that his mittimus should be amended by vacating Counts 6 and 10 because the trial court merged these two convictions into Counts 5 and 8. In response, the State agrees that the mittimus should be amended, but also points out that an indication towards the bottom of the mittimus states that Counts 5 and 6 merge, and Counts 8 and 10 merge.

¶ 32 Under the one-act, one-crime rule, a defendant cannot be convicted of multiple offenses that are based upon the same single physical act, and where he is, the convictions for the less serious offenses must be vacated. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). When the trial court merges convictions, the merged counts typically do not appear on the mittimus where they may be mistaken for multiple offenses. Accordingly, pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we direct the clerk of the circuit court to amend the mittimus by vacating Counts 6 and 10.

¶ 33 For these reasons, we affirm the judgment of the circuit court of Cook County and amend the mittimus.

¶ 34 Affirmed; mittimus amended.