2019 IL App (1st) 163132-U

No. 1-16-3132

Order filed October 11, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 18842
	)	
MARIO GIBBS,	)	Honorable
	)	Thomas V. Gainer Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated discharge of a firearm is affirmed over his challenge to the sufficiency of the evidence. Defendant's 14-year sentence is not excessive where the court appropriately weighed the factors in aggravation and mitigation, and did not rely on a factor implicit in the charge.

¶ 2 Following a bench trial, defendant Mario Gibbs was found guilty of one count of aggravated discharge of a firearm and sentenced to 14 years' imprisonment. On appeal, defendant contends the State did not prove his guilt beyond a reasonable doubt where the

witnesses lacked a sufficient opportunity to identify him and provided conflicting testimony, and no physical evidence or inculpatory statement connected him to the shooting. Additionally, defendant argues that his sentence was excessive because the trial court did not appropriately weigh his prior felony conviction and rehabilitative potential, and relied on a factor implicit in the charge as aggravation. We affirm.

¶ 3 Defendant was charged by information with one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)) arising from an incident in Chicago on October 9, 2011.

¶ 4 Ronald Brize testified that he was working as a security guard at an apartment complex on 51st Street and King Drive (King Drive complex) on October 9, 2011. At 6 p.m., Brize and his partner, James Rogers, heard a disturbance and went to the courtyard, where they saw six individuals watching television and playing a game. The group included defendant, whom Brize identified in court. It was daylight and nothing obstructed Brize's view of defendant, who wore jeans and a jacket. Brize smelled marijuana, and requested the individuals position themselves along a wall to be searched. They complied, but when Rogers reached defendant, he stated "you're not searching me" and ran up a flight of stairs. Brize and Rogers followed defendant, but he closed a door behind him. The guards returned to the courtyard and finished searching the other individuals, but did not find marijuana.

¶ 5 Around 8 p.m., Brize and Rogers were in the front of the King Drive complex with their supervisor, Alexander Broadway, and saw defendant exit a nearby door. Nothing obstructed defendant's face, and although it was dark, the area was "well lit" from the building's lights and street lights. Rogers asked defendant to approach, but he backpedaled, turned, and fled. Brize,

Rogers, and Broadway followed defendant across King Drive, with Brize to the left, Broadway directly behind defendant, and Rogers to the right. Defendant ran to a vacant lot between two buildings. He slipped and fell, then continued running through the lot. Brize went to the left of one of the buildings, and when he was half way around, he heard a gunshot. Afterwards, Brize joined Rogers and Broadway on Calumet Avenue, located across the vacant lot, and searched the area without finding defendant. Police officers arrived, and later that evening, Brize went to the police station. On October 14, 2011, Brize returned to the police station and identified defendant in a physical lineup.

¶ 6 On cross-examination, Brize stated that when he entered the courtyard, defendant and the other individuals were four or five feet away, but he did not immediately "memoriz[e] any of their faces." He had not seen defendant before. Later, when defendant exited the King Drive complex, it was dark and Brize had a "short" time to view him. Brize added that, before he viewed the lineup on October 14, 2011, the police and Rogers might have told him defendant's name. On redirect examination, Brize testified that when defendant exited the King Drive complex, he stood at the doorway before fleeing. On recross-examination, Brize stated there was not a security camera in the courtyard at the King Drive complex.

¶ 7 Rogers testified that he was imprisoned for a felony traffic offense at the time of trial. His description of the events in the courtyard tracked Brize's testimony, although he added that the men gathered there were also drinking and he saw defendant smoking marijuana. Rogers identified defendant as the man who fled the courtyard before being searched.

¶ 8 At 8 p.m., Rogers was in front of the King Drive complex with Brize and Broadway, and saw defendant leave the building wearing blue jeans and a jacket. It was dusk, but the area was

lit and nothing obscured defendant's face. Rogers asked defendant to stop, but he looked in Rogers's direction and fled across King Drive. Rogers, Brize, and Broadway chased defendant to a vacant lot, where defendant fell and got back up. Defendant turned clockwise, and Rogers "saw a muzzle light and heard a gunshot." Rogers did not recall how far defendant turned, but the muzzle light was not pointed at Rogers. On hearing the shot, Rogers and Brize "went to the ground," and Rogers saw defendant running faster. Rogers went to the right and met Brize and Broadway on Calumet, but they did not find defendant. That night, Rogers went to the police station, provided defendant's description, and identified him in a photo array. On October 14, 2011, Rogers returned to the police station and identified defendant in a physical lineup.

¶ 9 On cross-examination, Rogers admitted that he had pled guilty to his traffic offense, driving while under the influence of alcohol, which occurred after October 9, 2011. He denied having an alcohol problem or drinking that day, and said the State did not offer him anything for testifying. The King Drive complex's courtyard had security cameras in "[c]ertain places" on October 9, 2011. There were also other cameras, including one facing the door that defendant used when he fled the building, but they did not always function and Rogers and Brize could not access them. Someone from the management company told Rogers she would look at the footage, but he did not know whether any videos were retrieved.

¶ 10 When Rogers chased defendant through the vacant lot, it was dusk and the lot was unlit. Rogers saw an object in defendant's hand when he fell and stood back up. Rogers was 35 feet away at the time of the gunshot, but did not know the direction of the firearm. When Rogers spoke with police that night, he identified defendant by his name, which Rogers knew because defendant "was known around there."

¶ 11 Alexander Broadway testified that he worked as a deputy sheriff for the Cook County Department of Corrections at the time of trial. Previously, he worked for the Illinois Department of Corrections and the Phoenix, Illinois police department. In October 2011, he worked part time as a field supervisor for the company that provided security for the King Drive complex.

¶ 12 At 8 p.m. on October 9, 2011, Broadway was outside the King Drive complex with Brize and Rogers. Although it was getting dark, there were street lights and lights above nearby doorways. Defendant, whom Broadway identified in court, exited one of the doors. Broadway stood five feet from defendant and had an unobstructed view of his face. Rogers said, "that's him," and ordered defendant to stop. Defendant paused, but fled as the guards approached.

¶ 13 Broadway followed defendant across King Drive and into the vacant lot without losing sight of him. The lot was "very well lit" from street lights and a CTA platform on Calumet. Broadway drew closer when defendant fell, but defendant stood up and continued running. As defendant was "reaching the sidewalk," he turned, looked in Broadway's direction, "pointed" a "dark colored" firearm that was in his right hand, and fired one shot toward Broadway from 20 to 25 feet away. Broadway dropped to the ground, drew his weapon, and lost sight of defendant.

¶ 14 Afterwards, Broadway continued to Calumet, called the police, and provided a description of defendant. When guards arrived, Broadway helped search for shell casings but did not find any. Broadway stated that, based on his firearms training, some firearms can fire without discharging a casing. Around 11 p.m., Broadway went to the police station, signed an advisory form, and identified defendant's photograph in an array. On October 14, 2011, Broadway returned to the police station and identified defendant in a physical lineup.

¶ 15 On cross-examination, Broadway stated that defendant had "one foot on the sidewalk and another in the vacant lot" when he fired the weapon. Defense counsel asked Broadway to describe the distance between himself and defendant when defendant fired the shot with reference to the courtroom, and Broadway estimated it was the distance from the witness stand to the doors, or between 45 and 50 feet. Broadway believed defendant fired in his direction because Broadway was "the only one that was chasing [defendant] straight off" and "there was no other person that [defendant] could have been firing at." Broadway explained that Rogers and Brize had gone to the right and left, respectively. Thus, Broadway "was the only one that was in [defendant's] sight," and aside from himself and defendant, "[n]o one was in the empty lot." However, Broadway explained that he "was concentrating on the defendant" at that time.

¶ 16 Following closing arguments, the trial court found defendant guilty of one count of aggravated discharge of a firearm. The court found the State's witnesses to be "clear and convincing," and noted that Broadway, who saw defendant fire the gunshot, was "obviously familiar with guns because of his past police jobs and correctional officer jobs." While Brize and Rogers had "different perspectives" during the chase, the court "believe[d]" Broadway's testimony "about the direction of fire." The court denied defendant's motion for a new trial, and the cause proceeded to a sentencing hearing.

¶ 17 Defendant's presentence investigation (PSI) report showed that he had been convicted of manufacturing or delivering more than one gram but less than 15 grams of heroin, and sentenced to four years' imprisonment. He also had two convictions for resisting a peace officer, for which he received conditional discharges, only one of which was terminated satisfactorily.

¶ 18 According to the PSI report, defendant was 25 years old at sentencing. His parents separated when he was 15 years old, but he reported a " 'good' " childhood. In eighth grade, he was treated by a mental health professional for a learning disability. Defendant was expelled from school in twelfth grade for "fighting and gang-banging," but earned his high school equivalency certificate. Defendant denied gang affiliation or alcohol abuse, but "previously used marijuana 'every day.' " At the time of the offense, he worked side jobs, helped people move, and earned money from gambling. He lived with his mother and a younger brother, and had been in a relationship for seven years.

¶ 19 The State called Chicago police officers Strazzante, Robert Jordan, and Cain,[1] as well as Broadway. Strazzante testified that on February 27, 2012, he observed defendant make an illegal turn and curbed his vehicle. When defendant exited the vehicle, Strazzante observed a small Ziploc bag containing a white powder near the inner handle of the driver's side door. Strazzante arrested defendant and sent the bag to the Illinois State Police Crime Lab, which determined the content tested positive for 0.2 grams of heroin.

¶ 20 Jordan testified that he worked as an officer at defendant's high school, and reported that defendant was then affiliated with two gangs. Defendant had "disciplinary problems," including verbal and physical altercations. On March 9, 2010, when defendant had already been expelled, Jordan noticed him across the street with other members of one of his gangs. As class was letting out, a student who belonged to a rival gang left the building and walked toward members of that gang. Defendant shot the student, and the rival gang returned fire. Defendant was arrested and tried, but was acquitted when the student did not "cooperate."

[1] Strazzante's and Cain's first names do not appear in the record.

¶ 21 On March 17, 2010, Jordan responded to a battery near 51st and King Drive, and found defendant in the custody of other officers. They told Jordan that defendant struck a victim's head and face with his fists. The victim was at the scene, and had bruises and blood on his head. Defendant was charged with the battery, but the case was "thrown out." Several days after the battery, the victim was murdered.

¶ 22 Cain testified that around 11 p.m. on September 8, 2012, he responded to a report of gunfire on a school playground. Cain saw defendant "loitering" with a group of people, ran his name, and learned that he had an active investigative alert from May 22, 2012, when officers observed him in possession of a firearm. Cain arrested defendant and he was charged with aggravated unlawful use of a weapon in a case that was pending at the time of the sentencing hearing. Defense counsel stipulated that defendant did not have a valid Firearm Owner's Identification card.

¶ 23 Broadway read a victim impact statement, wherein he stated that defendant "made decisions to destroy the community and the people in such a way that we all deserve to be protected from," and that defendant would "continue this lifestyle of crime and hurt as many people as he can until he is stopped or kills someone." Broadway asked that the court make defendant "reflect on the impact of shooting at someone to take that person's life." On cross-examination, Broadway stated that, when defendant shot at him, he "[d]id not see the weapon" but "saw the flash" pointed "straight towards me."

¶ 24 The State argued that defendant had a "negative impact" on his community, as the instant offense occurred in the same neighborhood as the offenses described by Strazzante, Jordan, and Cain. The State noted that defendant's actions threatened serious harm, he had a history of

delinquency, including a Class I felony drug conviction, and he committed the present crime while on conditional discharge. The State also argued that a strong sentence was necessary to deter "offenders shooting guns at people, certainly not at security guards." The State observed that defendant was subject to an extended sentencing range, and requested the maximum sentence of 30 years.

¶ 25 In mitigation, defense counsel maintained that the court should not consider the offenses for which defendant had been acquitted. Without those offenses, counsel submitted that defendant's criminal history only included a "supposed gun case" and another case involving "a small amount of heroin."

¶ 26 In allocution, defendant denied that he committed the present offense and claimed the security guards or police "framed" him because they did not like him.

¶ 27 The trial court sentenced defendant to 14 years' imprisonment for aggravated discharge of a firearm. The court reviewed defendant's two encounters with the security guards on the date of the offense, and stated it was "reasonable" to infer that defendant fired at Broadway to prevent Broadway from catching him. In so holding, the court noted Broadway had an extensive history in law enforcement, and testified credibly concerning the direction in which defendant fired. The court noted that defendant's conduct threatened serious harm to Broadway and "anybody else who might have been straying by." Additionally, the court stated it considered defendant's "character," "attitude," and "prior history of criminality," and was "at a loss" to find applicable mitigating factors. According to the court, the circumstances of the offense were not unlikely to recur because Jordan had also seen defendant fire a weapon at another person and defendant had two convictions for resisting a peace officer. Consequently, defendant's sentence was necessary

to "deter others from committing the same crime," and because of the serious physical harm threatened to Broadway.

¶ 28 Defense counsel filed a motion to reconsider sentence. At the hearing, counsel reiterated that defendant had one drug conviction, had not been convicted of violent crimes, did not hurt anyone during the present offense, and may have "shot in the air." Thus, according to counsel, defendant's 14-year sentence, which was "one year under the maximum," was unreasonable. The court denied the motion, noting that "the maximum sentence was actually 30 years because [defendant] was subject to extended term sentencing," and a sentence that was "16 years less than the maximum" was not improper.

¶ 29 On appeal, defendant first argues that the State did not prove his guilt beyond a reasonable doubt where the witnesses lacked an adequate opportunity to identify him and contradicted each other, and no physical evidence or inculpatory statements connected him to the shooting.

¶ 30 When reviewing a challenge to the sufficiency of the evidence, the reviewing court must consider whether, viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted.) *People v. Belknap*, 2014 IL 117094, ¶ 67. "This standard of review does not allow the reviewing court to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses." *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). "[T]he testimony of a single witness, if positive and credible, is sufficient to convict." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The trier of fact is tasked with determining the credibility of witnesses, weighing the evidence and

drawing reasonable inferences therefrom, and resolving any conflicts in the evidence. *Id.* "A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Belknap*, 2014 IL 117094, ¶ 67.

¶ 31 Relevant here, a person commits aggravated discharge of a firearm when he knowingly or intentionally "[d]ischarges a firearm in the direction of another person." 720 ILCS 5/24-1.2(a)(2) (West 2010).

¶ 32 Initially, defendant contends that Broadway, Brize, and Rogers lacked a sufficient opportunity to identify him, as all three testified it was dark on the evening of October 9, 2011. Defendant argues that Broadway did not previously know him, did not clearly see the face of the person he was chasing, and was running between two unlit buildings when the shot was fired. Defendant also submits that Rogers did not personally know him, and Brize never saw defendant prior to that evening and observed him just briefly before the chase.

¶ 33 In evaluating the reliability of eyewitness identifications, courts consider the five factors set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). See *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). Those factors include (1) the witness's opportunity to view the defendant at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the level of certainty demonstrated by the identification, and (5) the length of time between the crime and the identification. *Biggers*, 409 U.S. at 199. Although the *Biggers* factors provide guidance, no single factor is dispositive and the reliability of an identification is based on the totality of the circumstances. *People v. Simmons*, 2016 IL

App (1st) 131300, ¶ 89. Whether a witness's identification is reliable is a question for the trier of fact. *Id.* ¶ 88.

¶ 34 We begin our analysis with Broadway's identification of defendant. Under the first *Biggers* factor, a witness's opportunity to view an offender depends on "whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation." (Internal quotation marks omitted.) *People v. Corral*, 2019 IL App 1st 171501, ¶ 77. Broadway testified that he was no more than five feet from defendant when defendant exited the King Drive complex. Broadway viewed defendant's face, did not lose sight of him during the chase, and saw his direction when he turned to shoot. The King Drive complex and the vacant lot were illuminated with nearby artificial lighting, and nothing obstructed Broadway's view. This was a sufficient opportunity to view defendant. See *People v. Reyes*, 108 Ill. App. 3d 911, 917 (1982) (witness had sufficient opportunity to identify defendant, whom she saw twice on the same night, including once from within five feet).

¶ 35 Regarding the second *Biggers* factor, Broadway's testimony showed that he observed defendant with a high degree of attention. His testimony about what transpired between the time he observed defendant outside the King Drive complex and when he lost sight of defendant on the other side of the vacant lot was detailed and complete. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 33 (witnesses' "detailed descriptions of what they saw during [a] brief time" reflected "a high degree of attention to the incident"). As to the third factor, the accuracy of Broadway's prior descriptions, the record shows that he described defendant to police on the night of the offense, then identified defendant in a photo array and physical lineup. Turning to the fourth and fifth factors, Broadway's level of certainty and the time between the crime and

identification, Broadway viewed the photo array on the night of the incident, viewed the physical lineup five days later, also identified defendant in court, and expressed certainty in each identification. See *Corral*, 2019 IL App (1st) 171501, ¶ 81 (witness's identifications of offender in a photo array and physical lineup, which occurred 48 days and 62 days after the offense, were reliable). Thus, the relevant factors weigh in favor of finding Broadway's identification of defendant reliable.

¶ 36 Next, we consider Brize's and Rogers's identifications of defendant. Under the first *Biggers* factor, their opportunity to view defendant, Brize and Rogers testified they first saw defendant in the courtyard. It was daylight, there were only six individuals present, and nothing obstructed their view. Later, Brize and Rogers observed defendant exit the King Drive complex in a well-lit area. *People v. Branch*, 2018 IL App (1st) 150026, ¶ 26 (finding the witness had "ample opportunity" to view the defendant when they interacted face-to-face before a shooting). Therefore, Brize and Rogers had a sufficient opportunity to view defendant.

¶ 37 Turning to the second *Biggers* factor, Brize's and Rogers's testimony showed they observed defendant with a high degree of attention. In the courtyard, they focused on defendant because he refused to cooperate with the search. Brize noticed defendant wearing blue jeans and a jacket in the courtyard, and Rogers later noticed defendant wearing similar clothes outside the King Drive complex. As to factors three and four, the accuracy and certainty of Brize's and Rogers's identifications also weigh in favor of reliability. Both Brize and Rogers saw defendant twice on the day of incident, and identified him in a photo array, physical lineup, and at trial. Neither Brize nor Rogers vacillated in their identifications, and their account of the night's events was corroborated by Broadway. *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 33

(witnesses' identification of the same defendant in separate lineups "enhances and corroborates the accuracy of their respective identifications").

¶ 38 Finally, regarding the fifth factor, the time between the shooting and the identifications was brief. Brize and Rogers positively identified defendant when he exited the King Drive complex less than three hours after they saw him in the courtyard, identified defendant in a photo array that same night, and selected him in a physical lineup five days later. *People v. Brown*, 110 Ill. App. 3d 1125, 1128 (1982) (victim's identification of defendant held reliable though 36 hours had lapsed between the crime and the lineup). Thus, the *Biggers* factors weigh in favor of finding that Brize and Rogers provided reliable identifications.

¶ 39 Notwithstanding, defendant argues the State did not prove his guilt beyond a reasonable doubt because Brize, Rogers, and Broadway testified inconsistently regarding events in the courtyard and their locations when the weapon was fired during the chase.

¶ 40 As noted, the reviewing court determines whether a fact-finder "could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Gray*, 2017 IL 120958, ¶ 36. "Where the record is not such that the only inference reasonably drawn from flaws in the testimony is disbelief of the whole, a reviewing court should bear in mind that the fact finder had the benefit of watching the witness' demeanor." *People v. Cunningham*, 212 Ill. 2d 274, 284 (2004).

¶ 41 Contradictory evidence, or minor or collateral discrepancies in testimony, does not automatically render the totality of a witness's testimony incredible. *Gray*, 2017 IL 120958, ¶ 47; *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67. That is true whether the fact-finder is considering contradictions or discrepancies within the testimony of a single witness (*Gray*, 2017 IL 120958, ¶ 47), or comparing one person's account to the testimony of another (*Peoples*, 2015

IL App (1st) 121717, ¶ 67). Moreover, the trier of fact is not required to "accept or reject all of a witness' testimony but may attribute different weight to different portions of it." *People v. Billups*, 318 Ill. App. 3d 948, 954 (2001).

¶ 42 At trial, both Brize and Rogers testified they first observed defendant in the courtyard with several other people. Defendant notes Rogers testified that defendant and others were drinking and smoking marijuana while Brize only smelled marijuana, and that Brize stated there were "no" security cameras in the courtyard while Rogers stated that cameras were installed in "[c]ertain places." To the extent Brize's and Rogers's testimony conflicts, the trial court was charged with resolving the conflicts (*People v. McCann*, 2016 IL App (1st) 142136, ¶ 15), and was not required to reject either witness's testimony as a whole (*Gray*, 2017 IL 120958, ¶ 47). Moreover, the inconsistencies identified by defendant are inconsequential to whether Brize and Rogers reliably identified him as the shooter. In reaching this conclusion, we note, as does defendant, that Rogers was a convicted felon at the time of trial. However, the trial court had the benefit of evaluating his demeanor and reliability, and did not find him incredible. See *People v. Phillips*, 127 Ill. 2d 499, 510 (1989) (the trier of fact is charged with weighing the credibility of witnesses, including felons).

¶ 43 Defendant also argues that Brize, Rogers, and Broadway testified inconsistently regarding their location when the weapon was fired. Specifically, defendant notes that Rogers testified that he saw the muzzle flash and viewed Brize dropping to the ground, indicating that both witnesses were in the vacant lot at that time, whereas Brize testified that he was on the other side of a building when he heard the gunshot. Additionally, defendant argues that Broadway testified that he did not know Rogers's location when the weapon was fired, and testified

inconsistently about whether defendant fired the shot while he was still in the lot or when he reached Calumet. However, all these events occurred in quick succession, while the witnesses chased defendant and he fired a weapon. The trial court could reasonably accept any discrepancies in the testimony as a product of the chaotic situation. Further, none of the discrepancies bear on Rogers's, Brize's, or Broadway's identifications of defendant.

¶ 44 Viewing the evidence in the light most favorable to the state, the facts showed that Brize, Rogers, and Broadway testified consistently in all material aspects and in their identifications of defendant. Where, as here, "identification testimony is positive, precise consistency as to collateral matters is not required to establish guilt beyond a reasonable doubt." *Peoples*, 2015 IL App (1st) 121717, ¶ 67. Because Brize's, Rogers's, and Broadway's testimony was sufficient to establish defendant's guilt, we reject his further argument that the absence of physical evidence or an inculpatory statement is fatal to his conviction. *People v. Daheya*, 2013 IL App (1st) 122333, ¶¶ 75-76 (in light of credible testimony, the State is not required to present a weapon or physical evidence to prove a defendant committed aggravated discharge of a firearm). Therefore, defendant's claim of error fails.

¶ 45 Defendant next argues his 14-year sentence was excessive because the trial court (1) failed to appropriately weigh his sole prior felony conviction and rehabilitative potential, and (2) impermissibly relied on a factor implicit in the offense, namely, that his conduct threatened serious physical harm.

¶ 46 The Illinois Constitution requires that all sentences be imposed according to the seriousness of the offense and the purpose of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. Rizzo*, 2016 IL 118599, ¶ 28. A trial court has broad

discretionary powers in fashioning a sentence, and its decision is entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Because the trial court is best positioned to evaluate the defendant's credibility, habits, age, demeanor, and general moral character, a reviewing court will not substitute its own judgment merely because it would have weighed the factors differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Moreover, a sentence within the statutory guidelines is presumed proper (*People v. Knox*, 2014 IL App (1st) 120349, ¶ 46), and will not be reduced unless the trial court abused its discretion (*Alexander*, 239 Ill. 2d at 212). A sentence constitutes an abuse of discretion when it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210.

¶ 47 Aggravated discharge of a firearm is a Class 1 felony (720 ILCS 5/24-1.2(b) (West 2010)), with a sentencing range of 4 to 15 years (730 ILCS 5/5-4.5-30(a) (West (2010)). Defendant's prior conviction for manufacture or delivery of 1 gram or more but less than 15 grams of heroin, a Class I felony (720 ILCS 570/401(c)(1) (West 2010)), made him eligible for an extended-term sentence of 15 to 30 years (730 ILCS 5/5-4.5-30(a) (West 2010); 730 ILCS 5/5-5-3.2(b)(1) (West Supp. 2011)).

¶ 48 In this case, the trial court did not impose an extended-term sentence for aggravated discharge of a firearm, but instead, sentenced defendant to a non-extended term of 14 years. The sentence is within the non-extended range, and therefore, presumed proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46. The court was apprised that defendant had a single felony drug conviction and was 25 years old at sentencing, and that the PSI report showed he earned his high school equivalency certificate and worked side jobs. *People v. Sauseda*, 2016 IL App (1st) 140134,

¶¶ 19-20 (the trial court is presumed to consider mitigating evidence, including information in the PSI report). However, defendant also had two convictions for resisting a peace officer, and committed the present crime while on conditional discharge. Officers Strazzante, Jordan, and Cain testified about defendant's involvement with drug activity, gang-related shootings near schools, and a violent incident in the neighborhood where the present offense occurred. In allocution, defendant did not accept responsibility for the offense, and alleged that the witnesses framed him because they did not like him.

¶ 49 The trial court was charged with "balanc[ing] the interests of society against the ability of *** defendant to be rehabilitated" (*People v. Gutierrez*, 402 Ill. App. 3d 866, 902 (2010)), and was "not required to give defendant's rehabilitative potential greater weight than the seriousness of the offense" (*People v. Pearson*, 2018 IL App (1st) 142819, ¶ 56). Here, the court expressly addressed defendant' character, attitude, and criminal history. Based on these considerations, the court reasonably concluded that the aggravating factors outweighed defendant's rehabilitative potential, and that his 14-year sentence was necessary to deter him and others from committing similar crimes. We may not substitute our judgment for that of the trial court merely because we may have weighed the factors differently. *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 50 Defendant next contends the trial court relied on an aggravating factor implicit in the offense, namely, that defendant threatened serious physical harm to Broadway and any passersby.

¶ 51 Preliminarily, the State contends that defendant forfeited this claim because he failed to raise it at sentencing or in his motion to reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (both a contemporaneous objection and a written postsentencing motion are

required to preserve a sentencing issue for review). The State further notes that defendant's initial brief on appeal neither addresses the forfeiture nor requests this court to review his claim pursuant to the plain error doctrine, which allows review of a clear or obvious error when (1) "the evidence at the sentencing hearing was closely balanced," or (2) "the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* Our supreme court has explained that "when a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Id.* at 545-46; see also *People v. Polk*, 2014 IL App (1st) 122017, ¶ 46 ("where a defendant forfeits an issue on appeal by failing to properly preserve it in the trial court, appellate review of the issue under the plain-error rubric is likewise forfeited unless the defendant specifically sets forth on appeal the grounds establishing plain error"). Under these circumstances, defendant has forfeited both his argument regarding the aggravating factors at sentencing and plain error review. Forfeiture aside, however, we find that no error occurred.

¶ 52 Sentencing courts cannot use a factor inherent in a criminal offense as an aggravating factor, *i.e.*, a "double enhancement." *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). The rule against double enhancement prohibits a single factor from being both an element of an offense and a ground for imposing a harsher sentence than might otherwise be imposed. *Id.* at 12. However, sentencing courts may consider the nature of the offense, including the circumstances and extent of each element as committed. *People v. Bowman*, 357 Ill. App. 3d 290, 304 (2005). "[T]he determination of whether the trial court made a double enhancement error is a question of law reviewed *de novo*." *People v. Shanklin*, 2014 IL App (1st) 120084, ¶ 91.

¶ 53 Although defendant's offense of aggravated discharge of a firearm inherently involved firing a weapon toward another person (see 720 ILCS 5/24-1.2(a)(2) (West 2010)), the trial court could properly consider the aggravating nature and circumstances of his conduct, including that he "caused or threatened serious harm" (730 ILCS 5/5-5-3.2(a)(1) (West Supp. 2011)); see also *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986) ("the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm"). Defendant fired at Broadway at night, while running through an open lot situated between the King Drive complex and Calumet. It was not unreasonable for the trial court to infer that this conduct threatened serious harm not only to Broadway, but also to the other security guards who were nearby and anyone else who may have been on the street or near the residential building. See *People v. Ellis*, 401 Ill. App. 3d 727, 730-31 (2010) (the fact that gunfire threatened multiple people "was not an inherent element" of aggravated discharge of a firearm). Under these circumstances, defendant's sentence did not result from improper double enhancement.

¶ 54 In sum, there was sufficient evidence for the trial court to find beyond a reasonable doubt that defendant committed aggravated discharge of a firearm. The court did not abuse its discretion in sentencing defendant or consider a factor inherent in the offense. Therefore the judgment of the trial court is affirmed.

¶ 55 Affirmed.