2019 IL App (1st) 171487-U

FIRST DIVISION
July 22, 2019

No. 1-17-1487

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. 15 CR 11858
	)	
EUGENIO MORALES,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Pierce and Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was sufficient to affirm defendant's conviction for aggravated discharge of a firearm. The court was not required to impose probation or a minimum term of years and did not improperly rely on a factor inherent in the offense itself in sentencing defendant. The case is remanded to the circuit court to allow defendant to file a motion addressing the imposition of several charges and their possible offset by his monetary presentence custody credit.

¶ 2 Following a bench trial, defendant Eugenio Morales was convicted of one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)) for firing shots at William Jennings-Verkhovykh (referred to at trial and in this order as Mr. Jennings) as Mr. Jennings stood on the street with Daniel Martinez and Donald Watson. Mr. Morales was

sentenced to six years in prison. On appeal, he contends that (1) the State did not prove his guilt beyond a reasonable doubt because its case relied largely on Mr. Jennings's testimony, which was contradicted by another witness, and no physical evidence corroborated this testimony; (2) his sentence should be reduced because the trial court did not consider probation and, in aggravation, the court improperly relied on a factor inherent in the offense; and (3) the fines and fees order should be corrected. We affirm Mr. Morales's conviction and remand as to the alleged errors regarding fines and fees.

¶ 3 I. BACKGROUND

¶ 4 Mr. Morales was charged with six counts of attempted murder (720 ILCS 5/9-1(a)(1) (West 2014)) and three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)) for firing a weapon at Mr. Jennings, Mr. Martinez, and Mr. Watson on June 30, 2015, on the 4400 block of North Drake Avenue in Chicago. He was charged with three counts as to each person: Mr. Jennings (Counts 1, 2 and 7), Mr. Martinez (Counts 5, 6 and 9), and Mr. Watson (Counts 3, 4 and 8).

¶ 5 At trial, Mr. Martinez testified that in June 2015, he was 18 years old and lived on the 4400 block of North Drake Avenue. Mr. Martinez had known Mr. Morales for about five years. Mr. Morales lived in an upper floor of a building at the end of the block.

¶ 6 Starting at about 6 p.m. and continuing into the early morning hours of June 30, 2015, Mr. Martinez and his best friend, Mr. Watson, played video games and smoked marijuana at Mr. Martinez's house. Mr. Morales joined them at midnight or 1 a.m., and the three men sat on the front porch. Mr. Morales drank alcohol while Mr. Martinez and Mr. Watson continued to smoke marijuana.

¶ 7 At about 3 a.m., Mr. Morales and Mr. Watson argued for about 10 minutes about who

owned a scale that Mr. Watson had been using. Mr. Morales asked Mr. Watson to follow him down the block toward his building and they no longer argued as they walked. Mr. Martinez followed Mr. Morales and Mr. Watson because he "felt like something was going to happen."

¶ 8 Mr. Morales went inside his building, and Mr. Martinez and Mr. Watson remained near a gate at the front of the building. A few minutes later, Mr. Morales stuck his head out of an upper window and pointed at Mr. Martinez and Mr. Watson while holding an object. Mr. Martinez thought the object might be a weapon but "could barely see because it was too dark" and he was not wearing his glasses.

¶ 9 After Mr. Morales left the window, Mr. Watson left the area, and Mr. Martinez went to Mr. Watson's home several houses away and sat on the front porch. Mr. Morales approached Mr. Martinez with what appeared to be a gun and waved it in Mr. Martinez's face, saying he was "looking for Donnie." Mr. Morales then walked back toward his own building. Mr. Martinez testified that when Mr. Morales was standing near his own building, he fired the gun "as far as [Mr. Martinez] kn[e]w." Mr. Martinez said he "heard two or three bullets." Then, when asked if Mr. Morales was standing in front of his own building when he fired, Mr. Martinez also said no and explained: "I didn't see him so I don't know where he was standing when he shot his weapon." Mr. Martinez did not see anyone else shoot a gun. Mr. Martinez saw Mr. Jennings nearby after Mr. Morales had walked away.

¶ 10 On cross-examination, Mr. Martinez acknowledged he previously told a detective that Mr. Morales fired a gun out the window but said he "was confused about what was happening." Mr. Martinez said he intended to help Mr. Watson if a fight started; however, he and Mr. Watson did not want to call the police because Mr. Morales was their friend. Mr. Morales was shouting when he was at the window and when he came out of the building. Mr. Martinez denied telling

police Mr. Morales said he was "going to kill all you n***."

¶ 11 On redirect examination, Mr. Martinez said he and Mr. Watson did not want to cooperate with police after the shooting because they did not want Mr. Morales to "get in trouble for what happened that night." Mr. Martinez said he did not see Mr. Morales fire a gun.

¶ 12 Mr. Jennings also testified and acknowledged having a felony conviction in 2009 for aggravated driving under the influence and a misdemeanor conviction in 2013 for retail theft. On June 30, 2015, Mr. Jennings also lived on the 4400 block of North Drake with his wife, who is Mr. Watson's sister. Mr. Watson lived upstairs in the same building.

¶ 13 Mr. Jennings awoke at about 2:45 a.m. and heard Mr. Watson arguing with someone outside. He walked down the block to where Mr. Watson, Mr. Martinez, and Mr. Morales were arguing. Mr. Jennings described those three as "all buddies" and said Mr. Morales was about 30 years old while Mr. Martinez and Mr. Watson were 18 and 16 years old, respectively.

¶ 14 During the argument, Mr. Jennings heard Mr. Morales say, "I'm going to kill all you n***." Mr. Morales went to his own building after letting himself in a security gate. Mr. Jennings saw a man approaching them from across the street and told that man to "get lost." That unidentified man left the area.

¶ 15 Mr. Morales leaned out of a second-floor window and aimed a gun at Mr. Jennings, Mr. Martinez, and Mr. Watson. Mr. Jennings was about 20 feet away from Mr. Morales and his view of Mr. Morales was unobstructed. While in the window, Mr. Morales fired the weapon at them twice. Mr. Jennings saw a flash and heard the first bullet "hit the ground next to [his] foot."

¶ 16 Mr. Jennings grabbed Mr. Martinez and Mr. Watson and "started moving them up the sidewalk" toward the house where he and Mr. Watson lived. When they got there, Mr. Jennings told Mr. Watson to "get lost," and Mr. Watson left. Mr. Martinez sat on the front steps while Mr.

Jennings called 9-1-1. While Mr. Jennings was on the phone, he saw Mr. Morales approaching the house. Mr. Morales pointed the gun at Mr. Martinez's face, stating, "What else up now?" The gun was about three inches away from Mr. Martinez's face.

¶ 17 Mr. Jennings ended his 9-1-1 call and ran out onto the porch toward Mr. Morales and Mr. Martinez. Mr. Jennings had grabbed a piece of wood that he kept near his front door. After seeing Mr. Jennings, Mr. Morales backed away while Mr. Martinez remained seated on the front steps. When he was standing about eight feet away from Mr. Jennings and Mr. Martinez, Mr. Morales fired two shots at Mr. Jennings. One bullet struck the house, and the other bullet struck a fence and made a spark.

¶ 18 Mr. Jennings got Mr. Martinez inside the house and called 9-1-1 again. Mr. Jennings was shown a shirt and pants in open court, and he testified they resembled the clothes Mr. Morales wore that night; he remembered Mr. Morales's pants because "they were way too big for him."

¶ 19 On cross-examination, Mr. Jennings said he heard Mr. Morales, Mr. Martinez, and Mr. Watson swearing but did not know the subject of the argument. When he saw the unidentified man near Mr. Morales's building before Mr. Morales fired shots from the window, he thought the man was a friend of Mr. Morales and would harm Mr. Martinez and Mr. Watson.

¶ 20 Mr. Jennings said the first shot that Mr. Morales fired from the window struck the sidewalk but did not cause visible damage; he could not recall if he showed police where another shot struck his house. Mr. Jennings could not tell what type of gun Mr. Morales used. When asked why he told Mr. Watson, who was his brother-in-law, to leave the area rather than seek shelter inside, Mr. Jennings stated, "[Y]ou know, you are getting a gun fired at you and I am trying to protect two people no matter who they were. I really can't say what was going through my mind for words at the moment[.]"

¶ 21 Mr. Jennings testified that the second time he called 9-1-1, he hung up "[b]ecause I was getting nowhere with the operator. *** [The 9-1-1 operator] started telling me not to tell her what to do because I kept telling her send the police." Later on June 30, 2015, Mr. Jennings gave a statement to Chicago police detective Jerry Pentimone and an assistant state's attorney.

¶ 22 Chicago police officer Paul Amelio testified that at 3 a.m. on June 30, 2015, he arrived on North Drake as part of a SWAT team dispatched to a second-floor apartment following a report that a gunman had barricaded himself inside. Mr. Morales surrendered at about 7 a.m. He wore a light-colored T-shirt and blue jeans.

¶ 23 Mr. Morales was transported to the Area North police headquarters. Chicago police detective Marc Leavitt testified that he assisted Detective Pentimone with the investigation and collected Mr. Morales's clothing to be tested for gunshot residue. While Detective Leavitt could not specifically recall how he handled Mr. Morales's clothing, he testified that he usually wears gloves to prevent contaminating the items with anything that may be on his hands, puts the clothing inside a paper bag, and seals and inventories the bag.

¶ 24 Ellen Chapman, an Illinois State Police forensic scientist, testified as an expert in microscopy and trace evidence. Ms. Chapman testified that to be considered gunshot residue, a single particle must contain three metal components: lead, barium, and antimony. Tests on Mr. Morales's T-shirt and jeans revealed "high levels of lead" particles on both clothing items, but no other components of gunshot residue. According to Ms. Chapman, the presence of those lead particles meant the clothing "may have contacted primer gunshot residue, may have been in the environment of a discharged firearm or may have received those particles from an environmental source." On cross-examination, Ms. Chapman said lead could be detected on the clothing of someone who repaired automobile brakes or worked in battery assembly or lead smelting.

¶ 25 At the close of the State's case-in-chief, several exhibits were admitted into evidence, including Mr. Morales's clothing and the results of the gunshot residue analysis. The defense moved for a directed finding, and the court granted Mr. Morales's motion as to the six counts relating to Mr. Watson and Mr. Martinez. The court denied Mr. Morales's motion for a directed verdict as to the three counts relating to Mr. Jennings.

¶ 26 For the defense, Detective Pentimone testified that he investigated the shooting and spoke to several witnesses, including Mr. Jennings. Mr. Jennings told Detective Pentimone he was standing in front of his residence when he saw Mr. Morales fire the first shot from a second-story apartment. He ran away after Mr. Morales fired the first shot and was running when Mr. Morales fired the second shot. Mr. Jennings said three shots were fired. Detective Pentimone conducted a "systematic search" of the scene but did not see evidence of bullets. Detective Pentimone ordered Mr. Morales's clothing be collected for gunshot residue testing but did not request swabs of Mr. Morales's hands, neck, or face, or ask that the area near the window be tested.

¶ 27 The trial court found Mr. Morales knowingly discharged a firearm in the direction of Mr. Jennings and thus was guilty of aggravated discharge of a firearm (count 7). The court found Mr. Morales not guilty of attempted first degree murder (counts 1 and 2). In finding Mr. Morales guilty of aggravated discharge of a firearm as to Mr. Jennings, the trial court acknowledged "some minor inconsistencies" and "minor impeachment" of Mr. Jennings's account by Detective Pentimone's testimony. The court noted that a bullet fired from an upper window would not always leave a mark on a sidewalk and if it did, it could not always be determined what damage, if any, could be attributed to that bullet.

¶ 28 The court continued:

> "Similarly, if there was a bullet that struck a fence and made a spark, it wouldn't

> necessarily have to be something that could definitely be determined to have been caused by a bullet. House, the same thing. The fact that those statements that he made weren't corroborated by observations made by the detective I don't find to be somehow fatal testimony [*sic*] of Mr. Jennings.
>
> I found him to be a rather credible witness, more than rather. I found him to be a very credible witness. He knows [Mr. Morales], knows him by his nickname, Geno. There's been absolutely zero evidence based on his testimony that in any way would lead me to believe that he had some sort of motive to testify falsely in this particular case."

¶ 29 Regarding other portions of Mr. Jennings's testimony, the court recounted Mr. Jennings's account that he told Mr. Watson to "get lost" after they reached Mr. Jennings's house, and the court attributed that statement to Mr. Jennings's desire that Mr. Watson not become involved in the argument.

¶ 30 The court found it reasonable that Mr. Jennings ran into his house to call police, stating "I couldn't imagine what other reason he would be calling 9-1-1 to get the police to come to his home." The court found Mr. Morales's refusal to leave his residence was "certainly evidence similar to flight" and the necessity of a SWAT team "to get him out seems to be a consciousness of guilt exhibited by [Mr. Morales]."

¶ 31 As to the scientific evidence presented of lead particles on Mr. Morales's clothing, the court found that evidence "corroborates the testimony of Mr. Jennings and in some ways it corroborates the testimony of [Mr. Martinez who] I think was trying to actually help" Mr. Morales.

¶ 32 The court further stated:

> "Even Mr. Martinez said at some point that [Mr. Morales] had a gun and he

> goofed up in his attempt to safe [*sic*] [Mr. Morales] and admitted that [Mr. Morales] did have a gun. He also testified that he and [Mr. Watson] and [Mr. Morales] are very close friends, et cetera. They didn't call the police. They weren't trying to get [Mr. Morales] in trouble. There are some issues."
>
> "Mr. Jennings is different. He is a married man and tries to take care of members of the family even if they don't choose to take care of themselves. Seems like he is the one person who did the right thing. He has a couple criminal convictions in his background and even taking those into consideration I don't believe [they] impeached his testimony."

¶ 33 Mr. Morales did not file a posttrial motion. At sentencing, the State recounted the circumstances of the shooting, noting Mr. Morales shot a weapon at Mr. Jennings and remained in his apartment until he was removed by a SWAT team. Mr. Morales had a prior conviction for possession of a controlled substance for which his probation was terminated satisfactorily in 2010 and also a prior conviction for driving under the influence in 2002.

¶ 34 In mitigation, defense counsel requested the minimum possible sentence, asserting that Mr. Morales did not use alcohol or drugs regularly and had no prior felony convictions. Counsel noted the satisfactory termination of Mr. Morales's probation for his most recent offense. Counsel also pointed out Mr. Morales had been continuously employed and helped to support a young child and also noted Mr. Morales's parents were present at all court dates. Counsel pointed out no one was injured in the instant offense.

¶ 35 In imposing sentence, the court noted it had reviewed the presentence investigation report and its notes from Mr. Morales's trial. The court stated Mr. Morales's "background is very positive based on the average person that comes before the court" and noted he had no prior

convictions for violent crimes. The court observed that Mr. Morales's previous offenses both related to alcohol or drugs and described the instant offense as involving "rather bizarre behavior" that "does seem rather out of character for [Mr. Morales]." The court also noted in mitigation that Mr. Morales has a high school degree, was employed, and had the support of his family.

¶ 36 Regarding the offense in this case, the court stated:

> "Obviously in aggravation for such an offense as this is the inherent risk to the community and the public when somebody actually produces a firearm and as a result of some sort of dispute between friends and then fires it. And the evidence seems to be overwhelming and clear that nobody else was armed with any kind of weapon whatsoever. It was only [Mr. Morales] that chose to bring a gun to the argument, so to speak, and then he fired it.
>
> Thank the Lord that nobody was injured here, because not only would that person have suffered, but [Mr. Morales] would be facing far more serious charges or would have been found guilty of the more serious charges.
>
> In any event, I believe that the appropriate sentence in [Mr. Morales's] case is six years in the Illinois Department of Corrections."

¶ 37 The trial court imposed various fines and fees and noted Mr. Morales had served 483 days in presentence custody that would be credited toward his sentence.

¶ 38 Defense counsel filed a motion to reconsider the sentence, arguing that a six-year prison term did not recognize Mr. Morales's limited criminal history, family situation, or education. The motion emphasized that no one "was struck or injured by the firearm discharge." Counsel asked that Mr. Morales's sentence be reduced to the minimum term of four years.

¶ 39 In denying Mr. Morales's motion, the court stated:

"The court certainly considered the minimum potential sentences here on this Class 1 felony. The decision that I made at that time reflected the very aggravating factor, not of the offense itself, but of the danger and inherent danger to the public in general, as well as the complaining witness, specifically by discharging a firearm at another individual. This was a somewhat aggravated situation as well by the fact that [Mr. Morales] created additional potential harm in the way he did not immediately cooperate with law enforcement authorities seeking to take him into custody based on the firing of his weapon at other people.

The court did [] not find him guilty of the far more serious charges which would have resulted in an extraordinarily lengthy period of incarceration if he had been found guilty of attempt murder by firing a weapon. *** [Mr. Morales] got the benefit of not being found guilty of the more serious offense in this particular case.

In any event, reviewing all the matters, I don't think reducing the sentence in any way is justified. He could have gotten as many as 15 years in the Illinois Department of Corrections. The sentence is much closer to the very minimum sentence to the Department of Corrections that he could have received than the maximum.

So his lack of a very serious felony background has already been taken into consideration. The fact that the sentence is at 85 percent is something that the legislator [*sic*] has determined as opposed to this court, but it is also taken into consideration of the sentence. If it were not an 85 percent sentence, I suspect that he might have actually received a longer sentence from this court."

¶ 40 II. JURISDICTION

¶ 41 The trial court denied Mr. Morales's motion to reconsider his sentence on May 12, 2017, and Mr. Morales timely filed his notice of appeal on June 5, 2017. This court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606 (eff. Feb. 6, 2013), governing appeals from final judgments of conviction in criminal cases.

¶ 42 III. ANALYSIS

¶ 43 On appeal, Mr. Morales first contends the State failed to prove beyond a reasonable doubt that he committed the offense of aggravated discharge of a firearm. He asserts the State based its case almost entirely on Mr. Jennings's testimony, which was contradicted by Mr. Martinez. Mr. Morales points out that the State did not introduce a confession of guilt, and he argues that no physical evidence, such as a firearm, bullet, or shell casing, was recovered, nor was gunshot residue detected on his clothing.

¶ 44 When a defendant challenges the sufficiency of the evidence to sustain a conviction, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense were established beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This court will not reverse a criminal conviction based on the insufficiency of the evidence unless the evidence is so improbable or unsatisfactory that a reasonable doubt exists as to the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 45 To sustain a conviction for aggravated discharge of a firearm as charged in this case, the State was required to prove that Mr. Morales knowingly or intentionally discharged a firearm in the direction of another person. See 720 ILCS 5/24-1.2(a)(2) (West 2014). The testimony of a

single witness, if it is positive and credible, is sufficient to sustain a conviction, even if it is contradicted by the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Mr. Morales's conviction in this case may be affirmed in the absence of physical evidence such as a firearm, bullets, shell casings, or gunshot residue. See *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 76; *In re M.I.*, 2011 IL App (1st) 100865, ¶ 43 (in light of credible testimony, the State was not required to recover a weapon, or present any other physical evidence, to prove the defendant committed aggravated discharge of a firearm).

¶ 46 After viewing the evidence in the light most favorable to the State, we find it sufficient to support Mr. Morales's conviction for aggravated discharge of a firearm as to Mr. Jennings. Mr. Jennings, who was familiar with Mr. Morales, Mr. Martinez, and Mr. Watson, testified that Mr. Morales, while leaning out of a window, fired two shots at him, Mr. Martinez, and Mr. Watson. Mr. Morales followed Mr. Martinez and Mr. Jennings to Mr. Jennings's residence, pointed a gun at Mr. Martinez's face, and fired two shots at Mr. Jennings. In finding Mr. Morales guilty, the trial court noted Mr. Jennings was "a very credible witness" and there was "absolutely zero evidence" that he had a motive to testify falsely.

¶ 47 In addition, Mr. Morales's clothing tested positive for "high levels" of lead particles, which is one component of gunshot residue. The State's expert testified the presence of those particles meant that the clothing may have contacted primer gunshot residue or been in the environment of a discharged firearm. Moreover, Mr. Morales remained in his apartment for several hours after the shooting and was removed by a SWAT team. In finding Mr. Morales guilty, the court compared Mr. Morales's refusal to leave his residence akin to evidence of flight which demonstrated Mr. Morales's "consciousness of guilt."

¶ 48 Mr. Morales nevertheless argues that Mr. Jennings's testimony was contradicted by Mr.

Martinez and by Mr. Jennings's own statement to Detective Pentimone later on the day of the shooting. Contrary to Mr. Jennings's account that Mr. Morales fired shots while in the window, Mr. Martinez testified Mr. Morales did not shoot a weapon while in the window but only pointed an object at them that resembled a gun and that he heard shots later when sitting on the porch at Mr. Jennings's residence. Furthermore, Mr. Morales contends that Mr. Jennings's testimony was inherently unbelievable. Specifically, he points to Mr. Jennings's statements that he told Mr. Watson to "get lost" and that he hung up on the 9-1-1 operator during his second call when Mr. Morales was outside pointing a gun at Mr. Martinez.

¶ 49 However, it was the function of the trial court, as the trier of fact in this bench trial, to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Under this standard, the reviewing court draws all reasonable inferences in favor of the prosecution and does not substitute its judgment for that of the trier of fact on those issues. *People v. Hardman*, 2017 IL 121453, ¶ 37; *People v. Thigpen*, 2017 IL App (1st) 153151, ¶ 21. 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.

¶ 50 Contradictory evidence, or minor or collateral discrepancies in testimony, do not automatically render the totality of the testimony of a witness incredible. *Id*. ¶¶ 36, 47; *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67. That is true whether the court is considering contradictions or discrepancies within the testimony of a single witness or comparing one person's account to the testimony of another or to the other evidence presented. *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 101 (citing *Bazydio v. Volant*, 164 Ill. 2d 207, 215 (1995)).

¶ 51 Here, in finding the evidence sufficient to convict Mr. Morales of aggravated discharge of a firearm as to Mr. Jennings, the trial court noted "some minor inconsistencies" and "minor impeachment" of Mr. Jennings's trial testimony by his later statement to Detective Pentimone. Nevertheless, the court found Mr. Jennings to be "a very credible witness." The court specifically referred to Mr. Jennings's remark to Mr. Watson that he "get lost" after Mr. Morales began shooting and they fled to Mr. Jennings's house. However, the court found "absolutely zero evidence" that Mr. Jennings had a motive to testify falsely. The court also expressly found that Mr. Jennings's account was more believable than the slightly exculpatory testimony offered by Mr. Martinez, who acknowledged he did not want to cooperate with police after the shooting and did not want Mr. Morales to "get in trouble." Given the clear credibility findings by the trier of fact, as well as the additional evidence presented in support of Mr. Morales's conviction, we will not substitute our judgment for that of the trial court as to the sufficiency of the evidence.

¶ 52 Mr. Morales next challenges his six-year sentence. He first argues his sentence should be reduced because the trial court did not consider probation as an appropriate punishment and did not recognize his lack of a significant or violent criminal history. In addition, he asserts the court improperly relied on a factor in aggravation of his sentence that was inherent in the offense of aggravated discharge of a firearm.

¶ 53 The Illinois Constitution provides that penalties are to be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, ' 11; *People v. Perrequet*, 68 Ill. 2d 149, 154-55 (1977). A sentence must be based on the particular circumstances of each case and depends on many factors, including the defendant's criminal history, his potential for reform, and the need to protect the public and provide a deterrent to crime. *People v. Saldivar*, 113 Ill. 2d 256, 268-69

(1986); *Perrequet*, 68 Ill. 2d at 154; *People v. Wilson*, 257 Ill. App. 3d 670, 704-05 (1993). The trial court has broad discretion to impose a sentence, and a sentence that is within statutory limits is reviewed for an abuse of that discretion. *People v. Contursi*, 2019 IL App (1st) 162894, ¶ 23. This court will not substitute its judgment for that of the trial court merely because we would have weighed the sentencing factors differently, and we will alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id*. (citing *People v. Snyder*, 2011 IL 111382, ¶ 36).

¶ 54 In this case, Mr. Morales was convicted of the Class 1 felony version of aggravated discharge of a firearm which is subject to a sentencing range of 4 to 15 years in prison. 720 ILCS 5/24-1.2(b) (West 2014); 730 ILCS 5/5-4.5-30(a) (West 2014). The trial court sentenced Mr. Morales to six years in prison. Thus, Mr. Morales's sentence was within the applicable range.

¶ 55 Mr. Morales contends that although his sentence was within statutory limits, the trial court abused its discretion in sentencing him to six years in prison because it had the option to impose either a term of probation or the minimum four-year sentence. He argues the offense of aggravated discharge of a firearm as committed in this case is not one of the enumerated offenses for which probation is prohibited by section 5-5-3(c)(2) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3(c)(2) (West 2014)), and he had no prior felony convictions. Thus, Mr. Morales argues he was eligible to receive, and should have been sentenced to, probation or the minimum 4-year term.

¶ 56 Mr. Morales asserts that the trial court failed to comply with section 5-6-1(a) of the Code, which provides, in pertinent part:

> "Except where specifically prohibited by other provision of this Code, the court shall impose a sentence of probation or conditional discharge upon an offender unless, having

> regard to the nature and circumstances of the offense and to the history, character and conviction of the offender, the court is of the opinion that:
>
> (1) his imprisonment or periodic imprisonment is necessary for the protection of the public; or
>
> (2) probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice." 730 ILCS 5/5-6-1 (a)(1), (2) (West 2014).

¶ 57 Mr. Morales maintains the record of his sentencing "affirmatively shows" the trial court did not consider the possibility of probation. The State replies, and Mr. Morales concedes in his reply brief, that a sentencing court is not required to expressly mention the option of probation when arriving at a sentence. Rather, "substantial compliance" with this provision can exist even if the court does not explicitly refer to the standards in section 5-6-1(a). *People v. Cox*, 82 Ill. 2d 268, 281 (1980).

¶ 58 Here, the record reflects "substantial compliance" with section 5-6-1(a). The trial court in this case stated at Mr. Morales's sentencing hearing that a risk to the community occurs when an individual shoots a firearm. Furthermore, in denying Mr. Morales's motion to reconsider the six-year term, the court stated that it "certainly considered the minimum potential sentences here on this Class 1 felony." The court also noted Mr. Morales's lack of a violent criminal history. We cannot say on this record that the court failed to follow section 5-6-1(a).

¶ 59 Mr. Morales also contends the trial court considered a factor inherent in the offense of aggravated discharge of a firearm as an aggravating factor. He points to the court's remark at sentencing that there exists an "inherent risk to the community and the public" when a weapon is fired. Mr. Morales further notes that in denying the motion to reconsider sentence, the court

stated: "The decision that I made at that time reflected the very aggravating factor, not of the offense itself, but of the danger and inherent danger to the public in general, as well as the complaining witness, specifically by discharging a firearm at another individual." Mr. Morales argues the court should not have considered the inherent danger or risk caused by firing a weapon as an aggravating factor because that risk was contemplated by the legislature in setting the sentencing range for a Class 1 felony.

¶ 60 The Code sets forth factors in aggravation and mitigation that the trial court must consider when determining an appropriate sentence. 730 ILCS 5/5-5-3.1, 730 ILCS 5/5-3.2 (West 2014); *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 65. The defendant bears the burden of affirmatively establishing that a sentence was based on an improper factor, and this court will not reverse a sentence unless it is evident that the trial court in fact relied on an improper factor. *Hibbler*, 2019 IL App (4th) 160897, ¶ 65; *People v. Williams*, 2018 IL App (4th) 150759, ¶ 18. Whether a factor is improper to consider is a question of law that we review *de novo*. *Williams*, 2018 IL App (4th) 150759, ¶ 18.

¶ 61 Generally, a factor that is implicit or inherent in the offense for which a defendant is convicted cannot be used as an aggravating factor at sentencing. *People v. Kuntu*, 196 Ill. 2d 105, 131 (2001). Such use would constitute a double enhancement because it is presumed "that the legislature considered the factors inherent in the offense in determining the appropriate range of penalties for that offense." *Id*. (quoting *People v. Rissley*, 165 Ill. 2d 364, 390 (1995)).

¶ 62 "[T]he severity of a defendant's sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphases in original.) *Saldivar*, 113 Ill. 2d at 269. The

threat of serious harm is a statutory aggravating factor. 730 ILCS 5/5-5-3.2(a)(1) (West 2014). Thus, the court may consider a defendant's conduct to constitute an aggravating factor if that conduct "caused or threatened serious harm." *Id*.

¶ 63 The elements of aggravated discharge of a firearm are (1) the knowing or intentional discharge of a firearm (2) in the direction of another person. 720 ILCS 5/24-1.2(a)(2) (West 2014). This court has held that the threat of serious harm is not an inherent element of the offense of aggravated discharge of a firearm and, thus, the court can consider the threat of serious harm arising from the defendant's act as an aggravating factor at sentencing. *People v. Ellis*, 401 Ill. App. 3d 727, 731 (2010). Contrasting the situation of a "warning shot" that flies "six feet over someone's head to a shot that sends a bullet flying within an inch of someone's ear," the court in *Ellis* concluded that "not every aggravated discharge of a firearm threatens the same amount of harm." *Id*.; see also *People v. Torres*, 269 Ill. App. 3d 339, 350 (1995) (the intent to kill can support the finding of an aggravating factor of the threat of serious harm).

¶ 64 Here, we find the trial court did not consider an improper sentencing factor when it noted the inherent risk of firing a weapon in public. The record shows that Mr. Morales's acts of firing shots onto a street from a window on an upper floor and then firing two shots at Mr. Jennings from an estimated distance of eight feet demonstrate a threat of serious harm. Stated differently, this was not a situation where Mr. Morales fired a warning shot with little threat of serious harm. Rather, Mr. Morales fired multiple shots. The first shot hit the ground "next to" Mr. Jennings's foot. Mr. Morales then walked to Mr. Jennings's house and fired two more shots from a distance of eight feet. Accordingly, the trial court was free to consider the threat of harm arising from Mr. Morales's actions, and there is no basis to disturb Mr. Morales's six-year sentence.

¶ 65 Mr. Morales's remaining contention in this appeal requires remand. He argues that three

charges imposed as part of his sentence were improperly assessed because he was not convicted of a qualifying offense. He further asserts that several other charges should be offset by his monetary credit of $5 for each day he spent in custody prior to sentencing.

¶ 66 On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the imposition of fines and fees and the application of *per diem* credit against those charges. Ill. S. Ct. R. 472(a)(1)(2) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that "[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Therefore, pursuant to Rule 472, we remand to the circuit court to allow Mr. Morales to file a motion pursuant to this rule, raising the alleged error regarding the imposition of fines and fees and the application of *per diem* credit against those charges. Ill. S. Ct. R. 472(e) (eff. May 17, 2019); *People v. Whittenburg*, 2019 IL App (1st) 163267.

¶ 67 The judgment is affirmed in all other respects.

¶ 68 Affirmed and remanded.