

to serve 85% of his sentence for the offense of aggravated discharge of a firearm; (2) the 14-year sentence for his conviction of aggravated discharge of a firearm was excessive; and (3) the mittimus should be corrected to accurately reflect the name of the offense for which he was convicted. For the following reasons, we affirm the judgment of the circuit court of Cook County, but direct the clerk of the circuit court to correct the mittimus to reflect an accurate description of the offense of aggravated discharge of a firearm.

¶ 3

BACKGROUND

¶ 4 On October 2, 2009, the defendant was arrested and later charged with two counts of attempted first-degree murder, one count of aggravated discharge of a firearm, and one count of UUWF.

¶ 5 On April 28, 2011, a bench trial commenced during which the victim, Andre Anthony, Jr. (Andre Jr.), who was a 16-year-old high school sophomore at the time of the crime, testified that on October 2, 2009, at approximately 11:15 a.m., he was waiting at a bus stop at the intersection of Cottage Grove Avenue and 40th Street in Chicago when he noticed a man who "kept staring" at him from a distance of about 50 feet away. The man then walked down the street and briefly spoke with a second man who was seated alone in a white Pontiac Grand Prix, after which the first man left. The white car then made a U-turn and drove towards Andre Jr., who walked in the opposite direction to avoid the car. However, the white car then made another U-turn to follow Andre Jr. Andre Jr. was able to see the driver of the vehicle, whom he identified in court as the defendant. Andre Jr. testified that he continued to change directions to evade the white car, which eventually made a total of three U-turns in an attempt to chase Andre Jr. As Andre Jr. ran towards home and the white car came within 10 feet behind him, he heard two gunshots directly behind him. However, he did not look back to see who fired the gunshots and did not see where

the bullets were directed. It is undisputed that none of the bullets struck Andre Jr. When Andre Jr. arrived safely at home, he called his father, who was at work, and his father came home within minutes with a coworker. They then called the police about the incident. As Andre Jr. and his father waited outside for the police, Andre Jr. again observed the white car in the neighborhood. Andre Jr. then alerted his father to the presence of the white car, after which his father and the coworker followed it in their own vehicle. When Andre Jr.'s father returned several minutes later, he, the coworker, and Andre Jr. drove to a grocery store on 30th Street, where the white car was located and where Andre Jr. observed the police arresting the defendant along with two other individuals. Subsequently, Andre Jr. viewed a police lineup and identified the defendant as the person who was driving the white car and another individual, who was later identified as Clifford Edwards (Edwards),¹ the pedestrian who had stared at him near the bus stop.

¶ 6 Andre Jr.'s father, Andre Anthony, Sr. (Andre Sr.), testified at trial that around noon on October 2, 2009, he received a telephone call from his son and immediately went home with his coworker. After arriving at home and speaking with his son, Andre Sr. called the police. As Andre Sr. and Andre Jr. waited outside their home for the police, Andre Jr. spotted the white car in the area. Andre Sr. testified that the white car contained a minimum of two people and that he wrote down the vehicle's license plate number and called the police a second time to report the information. Andre Sr., his coworker, and Andre Jr. then drove around the area until they located the white car at a nearby grocery store. They then telephoned the police for a third time, after which police officers arrived and arrested the defendant along with two other individuals.

¹ Edwards was deceased by the time of trial.

Subsequently, the police informed Andre Sr. that officers recovered the gun that was used to shoot at his son.

¶ 7 Derrick Williams (Derrick) testified that, at approximately 11:30 a.m. on October 2, 2009, after receiving a call from Edwards, he headed to the grocery store at issue. En route, Derrick was picked up in a car driven by the defendant. Edwards was a passenger in the vehicle. Derrick observed that the defendant had a gun on his lap, and that the gun had blue taping on the handle. The defendant then informed Derrick that they had "got[ten] into it with some guys and they just got through dumping at them." Derrick explained that "dumping" was a term for shooting. The trio then arrived at the grocery store, where Derrick was employed, and the defendant instructed Derrick to dispose of the gun. Derrick complied by dropping the gun into a garbage can in the men's restroom of the grocery store. Derrick then walked around the store until he was stopped by a police officer who asked him about the gun. Thereafter, Derrick led the police officer to the location of the gun. Although Derrick was taken into custody, he was later released without being charged.

¶ 8 Detective Robert Distasio (Detective Distasio) testified that at 5:30 p.m. on October 2, 2009, he interviewed the defendant at the police station after he was arrested and advised of his *Miranda* rights. The defendant agreed to speak with the police and initially informed Detective Distasio and Detective Kienzle that he fired his gun into the air to scare Andre Jr. at the bus stop. Upon further questioning, however, the defendant stated that he fired two gunshots at Andre Jr. at the behest of Edwards, who did not like Andre Jr. The defendant informed Detective Distasio that he later gave the firearm to Derrick for the purpose of hiding it in the supermarket. The defendant declined to memorialize his incriminating statement to the police. Detective Distasio

further testified that he conducted a police lineup with Andre Jr., who identified the defendant as the driver of the white car who shot at him.

¶ 9 At trial, the parties stipulated that the defendant had a prior felony conviction. By stipulation, the parties agreed that Officer Sylvia Broadway (Officer Broadway), if called to testify, would testified that she arrested the defendant and Edwards in the parking lot of the grocery store at issue, and that she arrested Derrick inside the store. Officer Broadway would testify that Derrick directed her to the wastebasket in the men's restroom of the grocery store, where she recovered a 32-caliber handgun which was loaded with five 32-caliber cartridge rounds. Officer Broadway would testify that the handgun was subsequently inventoried and forwarded to the Illinois State Police crime laboratory for testing and analysis. The parties further stipulated that Forensic Scientist Eleanor Giacometti (Giacometti) received the firearm in a sealed condition, and that, based on her latent fingerprint analysis testing, neither the firearm nor the five cartridges revealed any latent impressions suitable for comparison. Further, the parties stipulated that no gunshot residue testing was performed on the defendant during the investigation of this case as a result of the amount of time that had elapsed between the shooting and the apprehension of the defendant.

¶ 10 The State then rested and the defendant made a motion for directed finding, which the trial court denied. Following closing arguments, the trial court found the defendant not guilty of the two counts of attempted first-degree murder, and found him guilty of the charges of aggravated discharge of a firearm and UUWF.

¶ 11 On May 6, 2011, defense counsel filed a motion for a new trial on behalf of the defendant. On May 19, 2011, the defendant filed a *pro se* motion for a new trial, alleging ineffective assistance of defense counsel. On June 7, 2011, the trial court conducted a *Krankel*

inquiry and found that no further action was necessary. The trial court then denied the May 6, 2011 motion for a new trial that was filed by defense counsel and proceeded to sentencing. At the sentencing hearing, the trial court heard the defendant speak in allocution, and indicated that it considered the defendant's comments, the factors in aggravation and mitigation, the pre-sentence investigation report, the nature and circumstances of the offense, and the financial impact of incarceration on the defendant's family. The trial court noted that imprisonment was mandatory and appropriate in this case in light of the defendant's criminal history. The trial court then sentenced the defendant to concurrent terms of 14 years of imprisonment for aggravated discharge of a firearm and 7 years of imprisonment for UUWF, noting that the defendant was mandated by statute to serve 85% of his sentence. Thereafter, the trial court denied the defendant's motion to reconsider sentence.

¶ 12 On June 7, 2011, the defendant filed a notice of appeal. On August 23, 2012, this court granted the defendant's motion to amend the notice of appeal to reflect the correct judgment date and sentence.

¶ 13 ANALYSIS

¶ 14 We determine the following issues on appeal: (1) whether the trial court improperly ordered the defendant to serve 85% of his sentence for the offense of aggravated discharge of a firearm; (2) whether the defendant's 14-year sentence for his conviction of aggravated discharge of a firearm was excessive; and (3) whether the mittimus should be corrected to reflect a change in the name of the offense.

¶ 15 We first determine whether the trial court improperly ordered the defendant to serve 85% of his sentence for the offense of aggravated discharge of a firearm.

¶ 16 The defendant argues that the trial court erred in ordering him to serve 85% of his sentence for the offense of aggravated discharge of a firearm. He contends that because two provisions in the sentencing statute governing early release from imprisonment applied to his sentence, and that those two provisions contained terms which directly conflict each other, the trial court should have resolved the ambiguous statute in his favor under the rule of lenity. The defendant requests this court to correct the mittimus in order to reflect the "day-for-day good conduct credit" to which he was entitled.

¶ 17 The State counters that the defendant forfeited review of this issue on appeal because he failed to raise it before the trial court, and that the plain error doctrine did not apply to circumvent forfeiture. The State contends that the defendant's argument is based on a distortion and perversion of the statute's plain meaning, and that the plain language of the relevant statute at hand shows that the legislature clearly intended that a defendant who commits the offense of aggravated discharge of a firearm be required to serve 85% of his sentence regardless of whether the offender's conduct caused great bodily harm to the victim. The State further maintains that because the defendant's distorted interpretation of the statute rendered certain parts of the statute superfluous and meaningless, and that the plain language of the statute does not present any conflict or ambiguity, the rule of lenity was inapplicable in the case at bar.

¶ 18 As an initial matter, we note that because the defendant did not raise this sentencing issue at the sentencing hearing or in his motion to reconsider sentence, this issue would normally be forfeited for the purposes of appeal. See *People v. Heron*, 215 Ill. 2d 167, 175 (2005). However, "whether a defendant's sentence is properly imposed is generally a question which concerns the defendant's fundamental constitutional right to liberty." *People v. Fields*, 383 Ill. App. 3d 920, 921 (2008). It is well settled that a sentencing court cannot impose a penalty not

otherwise permitted by the legislature pursuant to the relevant statute in question. *Id.* Accordingly, we hold that this issue is reviewable under the plain error doctrine. *Id.* (holding that the plain error doctrine under Supreme Court Rule 615(a) applied to make reviewable the defendant's sentencing issue, where the issue concerned the defendant's constitutional right to liberty).

¶ 19 Turning to the merits of the case, we determine whether the trial court improperly ordered the defendant to serve 85% of his sentence for the offense of aggravated discharge of a firearm, which we review *de novo*. See *People v. Velez*, 2012 IL App (1st) 110801, ¶ 8 (statutory construction is a question of law warranting *de novo* review).

¶ 20 Section 3-6-3(a)(2) of the Unified Code of Corrections (the Code) provides in relevant part as follows:

"(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 home invasion, armed robbery, *aggravated discharge of a firearm*, or armed violence with a category I weapon or category II weapon, *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*

for the enumerated offense 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.*" (Emphases added.) 730 ILCS 5/3-6-3(a)(2) (West 2010).

¶ 21 Resolution of this issue involves statutory interpretation of section 3-6-3(a)(2) of the Code. A court's primary objective in construing a statute is to ascertain and give effect to the intention of the legislature. *Fields*, 383 Ill. App. 3d at 922. The best indicator of legislative intent is the plain and ordinary meaning of the language of the statute. *People v. Williams*, 239 Ill. 2d 503, 506 (2011). "Where that language is clear and unambiguous, we must apply the statute without further aids of statutory construction." *Id.* A court should view statutes as a whole, "construing words and phrases in light of other relevant statutory provisions and not in isolation." *People v. Gutman*, 2011 IL 110338, ¶ 12. "Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Id.* Further, "a court presumes that the legislature did not intend to create absurd, inconvenient, or unjust results." *Id.*

¶ 22 The defendant argues that both provisions (a)(2)(iii) and (a)(2)(iv) of the relevant early release sentencing statute applied to his sentence for aggravated discharge of a firearm. Specifically, he contends that because provision (a)(2)(iii) required a defendant to serve 85%

(4.5 days of good conduct credit each month) of his sentence for the offense of aggravated discharge of a firearm (committed on or after June 19, 1998) only when a trial court has entered a finding of "great bodily harm," while provision (a)(2)(iv) required a defendant to serve 85% (4.5 days of good conduct credit each month) of his sentence for the same offense (committed on or after June 23, 2005) regardless of whether there was a finding of "great bodily harm," the two provisions directly contradicted each other. Because the trial court did not make a finding of "great bodily harm" in this case, the defendant maintains that, pursuant to the rule of lenity which allows ambiguous statutes to be construed in favor of the accused, the provision that operated in his favor (provision (a)(2)(iii)) should have been applied and that the trial court erred in ordering him to serve 85% of his sentence for aggravated discharge of a firearm.

¶ 23 We find that the defendant injects ambiguity into the statute in question where none exists. In the case at bar, the defendant committed the offense of aggravated discharge of a firearm on October 2, 2009, which only triggered the application of provision (a)(2)(iv). The plain language of provision (a)(2)(iv) of the statute shows 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 even if no finding of "great bodily harm" had been made by the trial court. We reject the defendant's contention that provision (a)(2)(iii) also applied in this case on the bases that it pertained to offenses of aggravated discharge of a firearm committed "on or after June 19, 1998," and there was no indication that provision (a)(2)(iii) was no longer applicable. To construe the statute as the defendant suggests would render superfluous and meaningless the entirety of provision (a)(2)(iv) in the statute. Rather, in construing the statute as a whole, we find that the enactment of provision (a)(2)(iv) with regard to aggravated discharge of a firearm offenses committed on or after June 23, 2005, highlighted the legislature's clear intent that only

aggravated discharge of a firearm offenses committed between June 19, 1998 and June 22, 2005 could be subjected to the terms of provision (a)(2)(iii). Because the defendant committed the offense in question on October 2, 2009 and thus could only be subjected to provision (a)(2)(iv) of the statute, we find the defendant's argument regarding the rule of lenity to be inapplicable to this case. See *Fields*, 383 Ill. App. 3d at 924 (declining to apply rule of lenity where the defendant was properly sentenced under the challenged statute). Accordingly, we conclude that the trial court did not err in ordering the defendant to serve 85% of his sentence for the offense of aggravated discharge of a firearm pursuant to provision (a)(2)(iv) under section 3-6-3 of the Code.

¶ 24 We next determine whether the defendant's 14-year sentence for his conviction of aggravated discharge of a firearm was excessive, which we review under an abuse of discretion standard. See *People v. Martin*, 2012 IL App (1st) 093506, ¶ 47. A sentence within the statutory limits will only constitute an abuse of discretion if " 'it is manifestly disproportionate to the nature of the offense.' " *Id.* (quoting *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007)). In making a sentencing decision, the trial court must strike a balance between the seriousness of the offense and the defendant's rehabilitative potential. *Martin*, 2012 IL App (1st) 093506, ¶ 47. Aggravated discharge of a firearm is a Class 1 offense punishable by 4 to 15 years of imprisonment. See 720 ILCS 5/24-1.2, 730 ILCS 5/5-4.5-30 (West 2010).

¶ 25 The defendant argues that the trial court's imposition of a 14-year sentence for his conviction of aggravated discharge of a firearm was excessive in light of his young age, his lack of a violent criminal history, his remorse for his actions at sentencing, his rehabilitative potential, and the lack of any physical harm to the victim as a result of the offense. He further maintains

that the trial court erred by affording little consideration for his potential for rehabilitation, and that his sentence was excessive because it was not proportionate to the offense.

¶ 26 The State counters that the defendant's 14-year sentence for aggravated discharge of a firearm should be affirmed, where it was based on the trial court's proper consideration of facts in aggravation and mitigation, and where it was within the statutory range. Specifically, the State contends that the trial court considered the defendant's statement of allocution at the sentencing hearing, along with factors such as his age and rehabilitative potential.

¶ 27 Based on our review of the record, we find that the defendant's 14-year sentence for aggravated discharge of a firearm was not excessive. At the sentencing hearing, the trial court heard arguments made by the State and defense counsel, as well as the defendant's statement of allocution. In imposing the sentence, the trial court noted that the presentence investigation report (PSI) was sufficient but lacked certain details, and made the following relevant comments:

"I have considered the financial impact of incarceration. A sentence in the penitentiary is mandatory in this case. And appropriate.

I have looked at the statute[,] *** the factors in aggravation and mitigation and arguments of [c]ounsel. I have considered the defendant's statement in allocution. Even though he is asking for probation, which is not available.

Most importantly, the nature and circumstances of the offense. In terms of mitigation, I don't agree regarding number five: Conduct was induced or facilitated by someone other than [d]efendant. I am not forgetting, despite his young age, he is only

21, about to turn 22 this weekend I believe. At that age there has to be a substantial chance for rehabilitation.

He is a young man who has his dad, his young daughter, people that care about him. So, it is not a situation where we can give up on [the defendant].

On the flip side of that, what I've got is a young man before me who, as he stands here, is a high school drop out [*sic*], never worked except to sell drugs, who is in a gang, and apparently loves his daughter, but I don't see how he can support his daughter. There is not enough information about that, unless he is selling drugs.

I have a young man who shoots [*sic*] at someone who is trying to take a bus to go to school. That's a young man that I have before me today for sentencing.

Part of my job is to protect [Andre Jr.]. As I stated, he is doing nothing more than standing at a bus stop, trying to do the right thing, trying to go to school ***. [The defendant], for whatever reason, decides he is someone who should be shot at, at minimum shot at. I gave him the benefit of the doubt on the first two counts [attempted first-degree murder counts].

A sentence to the penitentiary is mandatory. And appropriate in this case. The sentence is going to be fourteen years in the Illinois Department of Corrections. That will be a two-year

term of mandatory supervised release. Under the statute that has to be at eighty-five percent."

¶ 28 The record indicates that the defendant repeatedly chased after, and fired two gunshots at, an unarmed high school student, Andre Jr., who was waiting at a bus stop at approximately 11:15 a.m. on October 2, 2009. The defendant was 19 years old at the time of the offense and was 21 years old at the time of trial and sentencing. Here, the record clearly reveals that the trial court comprehensively took into account the pertinent factors in aggravation and mitigation. See 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2010) (factors in aggravation and mitigation). The trial court considered the defendant's age, his "substantial chance for rehabilitation," his statement in allocution, his familial relationships and financial impact of incarceration, but concluded that those mitigating factors did not outweigh aggravating factors such as the defendant's prior criminal history of drug-related convictions, gang affiliation, and the nature and circumstances of the offense. In imposing a 14-year sentence for aggravated discharge of a firearm, which was a Class 1 offense within the statutory range of 4 to 15 years of imprisonment (720 ILCS 5/24-1.2, 730 ILCS 5/5-4.5-30 (West 2010)), the trial court remarked that it was the court's job "to protect [Andre Jr.]" and that the court had already given the benefit of the doubt to the defendant by finding him not guilty on his attempted first-degree murder charges. The defendant argues that the trial court disregarded his young age and rehabilitative potential by imposing a lengthy sentence, and that because his criminal history consisted only of nonviolent offenses and he expressed remorse at the sentencing hearing, his 14-year sentence was excessive and should be reduced. We reject this contention and decline to substitute our judgment for that of the trial court simply because we may have weighed the factors differently. See *Martin*, 2012 IL App (1st) 093506, ¶ 53.

¶ 29 The defendant also seems to suggest that although courts may normally consider as an aggravated factor in sentencing whether a defendant's conduct "caused or threatened serious harm" (730 ILCS 5/5-5-3.2 (West 2010)), this factor was improperly considered by the trial court in the instant case because it was a factor inherent in the offense of aggravated discharge of a firearm. We reject this contention. In imposing a sentence on a defendant, the trial court may not consider facts implicit in the underlying offense for which the defendant was convicted. *People v. Brewster*, 2013 IL App (1st) 072821, ¶ 55. However, the court may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant. *Id.* In the case at bar, while the trial court remarked during sentencing that the defendant "shot at" Andre Jr., our review of the entirety of the sentencing record leads us to conclude that the purpose of the trial court's comments pertained to its review of the nature and circumstances of the offense, rather than review of a factor inherent in the underlying offense for improper purposes. Further, despite the fact that Andre Jr. was not physically struck by the gunshots fired by the defendant, it was within the trial court's discretion in imposing the sentence to consider the threat of serious harm posed by the defendant's conduct and determine that other aggravating factors outweighed any mitigating reasons. We find that the defendant's sentence was well within the statutory range for aggravated discharge of a firearm, and the existence of mitigating factors did not mandate the imposition of the minimum sentence nor preclude imposition of the maximum sentence had the trial court chosen to do so. See *id.* ¶ 57. In light of the crimes charged, the defendant's criminal history, and factors in aggravation and mitigation, we cannot say that the defendant's sentence was manifestly disproportionate to the nature of the offense. Accordingly, we find that the trial court did not

abuse its discretion in imposing a 14-year sentence for the defendant's conviction of aggravated discharge of a firearm.

¶ 30 We next determine whether the mittimus should be corrected to reflect a change in the name of the offense.

¶ 31 The defendant argues that the mittimus should be corrected to accurately reflect the name of the defendant's conviction for aggravated discharge of a firearm. Specifically, he points out that the "order of commitment and sentence" correctly indicates that he was convicted of violating 720 ILCS 5/24-1.2(a)(2), but inaccurately describes the offense as "AGG DISCHARGE FIREARM/OCC VEH." He maintains that, because he was charged and convicted of aggravated discharge of a firearm *in the direction of another person* and not in the direction of an occupied vehicle under the same paragraph of the statute, this court should order that the mittimus be corrected to reflect the correct name of the offense for which he was convicted.

¶ 32 The State disagrees and argues that the mittimus properly reflects the offense for which the defendant was convicted. The State maintains that because the mittimus correctly cites 720 ILCS 5/24-1.2(a)(2) as the statutory provision under which the defendant was convicted, the description "AGG DISCHARGE FIREARM/OCC VEH" is simply a shortened title for the offense and does not reflect the defendant's exact conduct. The State points to the "Information/Indictment Return Sheet" containing the exact description in question, as evidence that the description is "the accepted and commonly utilized description" of the offense for which the defendant was charged.

¶ 33 Section 24-1.2(a)(2) of the Criminal Code of 1961 provides that a person commits aggravated discharge of a firearm when he knowingly or intentionally "[d]ischarges a firearm in

the direction of another person or in the direction of a vehicle he *** knows or reasonably should know to be occupied by a person." 720 ILCS 5/24-1.2(a)(2) (West 2010). While the mittimus contains the correct statutory citation and any facial correction to the description in question would have no practical consequences to the defendant, we agree with the defendant that the description in the mittimus should be corrected to accurately reflect the conduct for which the defendant was convicted. See *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008) (appellate court has authority to correct a defendant's mittimus without remanding the matter to the trial court). Therefore, we order that the description in the mittimus be corrected to read: "AGG DISCHARGE FIREARM/ANOTHER PERSON."

¶ 34 For the foregoing reasons, we affirm the defendant's judgment and sentence of the circuit court of Cook County, and direct the clerk of the circuit court to correct "Count 003" of the mittimus to reflect an offense description of "AGG DISCHARGE FIREARM/ANOTHER PERSON."

¶ 35 Affirmed; mittimus corrected.