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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CR-12719
	)	
OSVALDO SALAZAR,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* The judgment of the circuit court was affirmed, as modified, where the defendant's insufficiency-of-the-evidence argument failed; his constitutional attacks on various provisions of the aggravated unlawful use of a weapon failed; and the trial court did not abuse its discretion when it determined his sentence.

¶ 2 Following a bench trial, the defendant, Osvaldo Salazar, was convicted of six counts of aggravated unlawful use of a weapon (AAUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A); 24-1.6(a)(1), (a)(3)(C); 24-1.6(a)(1), (a)(3)(D); 24-1.6(a)(2), (a)(3)(A); 24-1.6(a)(2), (a)(3)(C); 24-1.6(a)(2), (a)(3)(D) (West 2010)), and one count of involuntary manslaughter (720 ILCS 5/9-3(a) (West 2010)). After merging the AAUW offenses into one count, the circuit court sentenced the defendant to three years' imprisonment for that offense and four years' imprisonment for the

involuntary manslaughter offense, to be served concurrently. On appeal, the defendant argues that the State's evidence is insufficient to sustain his AAUW conviction, or alternatively, that the provisions of the AAUW statute under which he was convicted are facially unconstitutional. He further argues that he is entitled to a reduction in his sentence because the circuit court did not adequately consider the proper aggravating and mitigating factors. For the reasons that follow, we affirm the judgment of the circuit court, but we modify the defendant's mittimus to reflect the count that corresponds to the constitutional section of the AAUW statute.

¶ 3 On July 10, 2011, the defendant fired a gun, resulting in the death of Holly Hieber. Count I of the grand jury indictment alleged that the defendant committed the offense of involuntary manslaughter in that he unintentionally, without lawful justification, recklessly performed acts in such a manner as were likely to cause death or great bodily harm and that such acts caused the death of Hieber.<sup>1</sup>

¶ 4 Counts III, IV, and V charged the defendant with AAUW under section 24-1.6(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1) (West 2010)), alleging that he knowingly carried a firearm on his person at a time when he was not on his own land or in his own abode and: the firearm was loaded and immediately accessible at the time of the offense (count III) (720 ILCS 5/24-1.6(a)(1),(a)(3)(A) (West 2010)); he did not possess a valid Firearm Owner's Identification (FOID) card (count IV) (720 ILCS 5/24-1.6(a)(1),(a)(3)(C) (West 2010)); and, he was under the age of 21 and not engaged in a lawful activity under the Wildlife Code (count V) (720 ILCS 5/24-1.6(a)(1),(a)(3)(I) (West 2010)).

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<sup>1</sup> Count II related to the concealment of a murder, but the circuit court vacated the defendant's conviction as to that count during posttrial proceedings; therefore, count II is not at issue in this appeal.

¶ 5 Counts VI, VII, and VIII charged the defendant with carrying a firearm on or about his person upon any public alley, namely the west alley of South Ewing Avenue in Chicago, at a time when he was not on his own land or in his own abode and: the weapon was loaded and immediately accessible (count VI) (720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (West 2010)); he did not possess a valid FOID card (count VII) (720 ILCS 5/24-1.6(a)(2),(a)(3)(C) (West 2010)); and he was under the age of 21 and not involved in a lawful activity under the Wildlife Code (count VIII) (720 ILCS 5/24-1.6(a)(2), (3)(I) (West 2010)).

¶ 6 On July 5, 2012, the matter proceeded to a bench trial at which Brittany Garcia testified that, on July 10, 2011, Hieber drove her, Heather Davis, Michael Davis, Michael Ortiz, Oscar Barragan, and the defendant to the beach where they remained for approximately two hours drinking alcohol and taking Xanax pills. After stopping to pick up more beer at a store, Hieber drove the group to the defendant's home and parked her car in the alleyway, outside of the defendant's garage. Garcia stated that the defendant's white Jeep was parked inside the garage and that the main garage door stayed opened while they drank inside the garage. She stated that there was also an access door on the side of the garage that led to the defendant's backyard.

¶ 7 According to Garcia, at one point, the defendant flashed a gun to the other males, showing it off and "cocking it." She stated that Heather told the defendant to put the gun away before someone got hurt and that the defendant complied, placing the gun in the ceiling of the garage. Garcia and the other females then proceeded out the access door leading to the defendant's backyard in order to use the bathroom in the house. Upon her return to the garage, Garcia saw the defendant flashing the gun to two males whom she never saw before. Garcia stated that she was standing in the access doorway and Hieber was standing to her right, about two steps from the garage entrance. One of the unidentified males asked Hieber to drive him to

get a keg of beer, and Hieber agreed and began walking into the garage when Garcia heard a gunshot. She stated that she did not see who fired the gun, but when she turned around, she saw the defendant with the gun in his hands and Hieber lying on the floor of the garage. The defendant then ran out of the garage into the alley with some of the other males in the group. Shortly thereafter, Barragan and Ortiz returned to the garage and told her to call 911. Garcia stated that Heather called 911, and the defendant returned to the garage. Garcia testified that she heard someone then yell "say it was a drive-by." Garcia stated that she left the scene with Michael Davis because she was afraid and "they were all lying to the police on the phone." However, the next day, she went to the police station, told the officers what happened, and identified the defendant from a lineup. Garcia also identified the defendant in-court.

¶ 8 Barragan testified that, after leaving the beach, Hieber drove the group to the liquor store and then to the defendant's house. He stated that the defendant pulled out a silver handgun to show it to him and Ortiz, but he denied that the defendant pointed the gun at anyone or cocked the weapon. Barragan testified that he took the gun from the defendant, removed its loaded magazine, and placed both items in his pocket. When the defendant said that he was leaving with Hieber to get marijuana, Barragan placed the magazine back into the gun and returned it to the defendant. However, he did not recall whether he engaged the gun's safety mechanism before he handed the gun to the defendant. Barragan testified that, after he returned the gun, he walked to the other side of the garage to get a beer and it was then that he heard a gunshot. He walked back to where he had been standing and saw Hieber lying on the ground in a pool of blood, but he did not recall seeing the defendant inside the garage.

¶ 9 Barragan denied that any other men joined the group while the girls went to the bathroom. He also denied that the defendant consumed any Xanax, stating that he saw him

consume only one or two beers. Barragan admitted that the group first told the police that Hieber was shot during a drive-by shooting.

¶ 10 Ortiz testified that, while at the defendant's house, he sat in the passenger seat of Hieber's car, talking to her while charging his cellular phone. Hieber then walked away to use the bathroom with the other girls, and Ortiz heard a gunshot. Ortiz walked inside the garage, saw Hieber on the floor, and heard people screaming that "it was an accident." Ortiz did not recall seeing the defendant with a gun before Hieber was shot and did not recall whether the defendant left the garage after the gunshot. However, after he called 911, Ortiz remembered seeing the defendant in the garage and that he did not have a gun. Ortiz stated that Garcia contrived the drive-by shooting story, but he denied that the group agreed to lie to the police.

¶ 11 On July 11, 2011, Ortiz signed a statement for an assistant state's attorney (ASA) at the police station. Ortiz testified that, at the time he signed the statement, he was handcuffed and did not believe that he could leave the police station. According to Ortiz, he told the ASA that some of the facts in the statement were not true, but he signed it so that the police would allow him to leave. Cook County ASA Lorraine Lynott rebutted Ortiz's testimony, stating that he had voluntarily signed the statement and was given the opportunity to make changes to it. In the statement, Ortiz admitted that the defendant had a handgun in the garage and that the defendant fled the scene after Hieber was shot. When the defendant returned to the garage, he did not have the gun, and Ortiz admitted that the group agreed to lie to the police about the drive-by shooting.

¶ 12 Chicago Police Officer Tim Morgan testified that he responded to the scene of the shooting and spoke to the defendant, who told him that a dark-colored Chevy vehicle drove through the alley and the occupant fired three shots in their direction, one of which struck Hieber in the head. However, according to Officer Morgan, when the fire department moved the

defendant's white Jeep out of the garage, a shell casing was recovered from underneath the vehicle. From the location of the shell casing, Officer Morgan did not believe the defendant's story that Hieber was shot from a car in the alley, but rather he believed the shot was fired inside the garage.

¶ 13 Chicago Police Officer Louis Garcia testified that the defendant's mother, Graciella Salazar, owned the property where Hieber was shot, and she consented to a search of the premises. Chicago Police Officer Daniel Pruszewski testified that the search produced one empty .25 caliber ammunition box and one box of live .25 caliber ammunition box which were recovered from a bedroom closet.

¶ 14 Chicago Police Detective Richard Sullivan testified that he spoke to the defendant after the shooting, and the defendant maintained that Hieber was shot during a drive-by incident. When Detective Sullivan confronted the defendant with information that other individuals told him a different story, the defendant admitted that he accidentally shot Hieber and that he hid the gun in some bushes in the alley. According to Detective Sullivan, the defendant admitted that he showed the loaded gun to his friends in the garage and had placed it in his belt at one point. The defendant also told him that he put the gun up in the rafters of the ceiling at one point and that the gun accidentally went off when he was speaking to Hieber about leaving to get marijuana. After the gun went off and Hieber fell, the defendant exited the garage, ran down the alley, and hid the gun under a bush. Detective Sullivan testified that the defendant stated that, after he hid the gun, he returned to the garage, and the group collectively decided to tell the police the drive-by story. The defendant accompanied officers to the alley of South Ewing Avenue where the loaded gun was retrieved from some bushes located a short distance from the defendant's home.

¶ 15 Chicago Police Forensic Investigator Carl Brasic testified regarding the evidence recovered in the case, including the spent shell casing found on the garage floor, the empty and live boxes of .25 caliber ammunition retrieved from the defendant's residence, and the .25 caliber gun, containing a live round of ammunition, retrieved from the bushes where the defendant hid it.

¶ 16 The parties stipulated that: forensic testing established that the spent shell casing was fired from the .25 caliber weapon recovered from the bushes; no relevant fingerprint or gunshot residue evidence was recovered; and the cause of Hieber's death was a gunshot wound to her head. Additionally, the State admitted the defendant's birth certificate into evidence, showing his date of birth as June 1, 1993, and a certification from the Illinois State Police indicating that the defendant did not possess a valid FOID card at the time of the shooting. The defendant presented no evidence.

¶ 17 The circuit court found the defendant guilty as to each count in the indictment. The circuit court found that the State proved that the defendant recklessly waved a loaded gun among a group of intoxicated individuals. Additionally, the court found it relevant that the defendant quickly planned to cover up the truth by lying to police about the drive-by shooting.

¶ 18 The defendant filed a posttrial motion, which the court denied as to all counts relevant to this appeal.

¶ 19 At the defendant's sentencing hearing, Hieber's mother and aunt read victim impact statements. In mitigation, the defendant's aunt and brother testified to his good character, and the defendant presented several letters from other family and friends. The defendant apologized for his actions and stated that he wished he had never seen that gun. Further, defense counsel argued other relevant mitigating factors, including that the defendant had no criminal or juvenile history,

was only 18 years old at the time of the incident, and that he was a young man socializing with a group of people in their 20's who were drinking and using Xanax.

¶ 20 The court stated that it considered the statutory factors and all evidence presented in aggravation and mitigation. The court specifically noted that the defendant did not have a criminal history and appeared to come from a good family. However, the court stated that it could not minimize the seriousness of the defendant's conduct by sentencing him to probation or boot camp. Accordingly, as to the involuntary manslaughter offense, the court sentenced the defendant to four years' imprisonment. As to the AAUW offenses, the court merged the six counts into one and sentenced the defendant to a concurrent three-year term of imprisonment. The sentencing order indicates that the defendant was sentenced on count III of the indictment.

¶ 21 The defendant moved for reconsideration of his sentence, and the court denied that motion. During the hearing, the defendant argued that the court penalized him twice by considering an element of the crime, namely the victim's death, as an aggravating factor. The court denied doing so, stating that it only considered the "crime and the impact of the crime." In fact, the court stated that it was inclined to sentence the defendant to the maximum until he heard the mitigating factors and observed the defendant's apparent remorse over what had occurred. But, the court explained, it could not reduce the sentence any more, given the recklessness of the defendant's conduct in waving a loaded gun around a group of people who were drinking and taking Xanax. This appeal followed.

¶ 22 The defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of the AAUW offense where it did not prove that he was not on his property at the time Hieber was shot. We disagree.

¶ 23 A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant, but rather, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

¶ 24 The defendant is correct that the State did not prove that the defendant was outside of the garage at the time Hieber was shot. However, the defendant ignores the remaining evidence which is sufficient to sustain his AAUW conviction for carrying the loaded weapon when he left his property to hide the gun in the alley. Specifically, Garcia testified that she saw the defendant with the gun in his hands seconds after Hieber was shot and that she saw him run out of the garage into the alley. Detective Sullivan corroborated Garcia's testimony when he testified that the defendant admitted he ran down the alley to hide the gun and that he led the police to the gun's location. The evidence established that the loaded gun was retrieved from the alley of South Ewing Avenue, not on the defendant's property. Thus, the State proved that the defendant carried a loaded firearm on his person into the alley, an area which was not his property or abode, at a time when he did not possess a valid FOID card. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012).

¶ 25 Next, we reject the defendant's contention that his AAUW conviction should be reversed because the entire statute is facially unconstitutional. Whether a statute is constitutional is a question of law to be reviewed *de novo*. *People v. Taylor*, 2013 IL App (1st) 110166, ¶ 25.

¶ 26 While our supreme court has held that section 24-1.6(a)(1), (a)(3)(A) is facially unconstitutional because it is a flat ban on carrying guns outside the home in violation of the

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Second Amendment of the U.S. Constitution (*People v. Aguilar*, 2013 IL 112116, ¶ 22), this court has determined that other sections of the AAUW statute survive constitutional attack (see *People v. Taylor*, 2013 IL App (1st) 110166, ¶ 32). Specifically, this court upheld a defendant's AAUW conviction under section 24-1.6(a)(1), (a)(3)(C) of the Code after determining that *Aguilar* did not extend to this section of the AAUW statute (*Taylor*, 2013 IL App (1st) 110166, ¶ 28) and that requiring individuals to obtain a FOID card survived strict scrutiny analysis (*Taylor*, 2013 IL App (1st) 110166, ¶ 30) and the "text, history, and tradition" analysis-approach (*Taylor*, 2013 IL App (1st) 110166, ¶ 31). *Taylor*, 2013 IL App (1st) 110166, ¶ 32.

¶ 27 In this case, the circuit court found the defendant guilty of the six charged AAUW offenses, including count IV which was based on his failure to possess a valid FOID card at the time he carried the gun in the alley (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012)). The court merged the AAUW offenses for sentencing purposes and, we acknowledge that the defendant's mittimus reflects that he was sentenced on count III, which was based on the section of the Code deemed unconstitutional in *Aguilar* (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2012)). However, using our powers under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we modify the defendant's sentencing order to reflect that he was sentenced on count IV, rather than count III. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 46; *People v. Magee*, 374 Ill. App. 3d 1024, 1036 (2007). Because the defendant's conviction and sentence under count IV survives his constitutional attack, we need not address his remaining constitutional arguments regarding other sections of the AAUW statute.

¶ 28 Finally, the defendant argues that the circuit court improperly considered Hieber's death, an element of the involuntary manslaughter offense, as an aggravating factor and failed to adequately consider mitigating factors when determining his sentence. He contends that his

sentence for involuntary manslaughter should be reduced to two years' imprisonment and his AAUW sentence should be reduced to one year imprisonment. We disagree.

¶ 29 The trial courts are afforded great discretion in fashioning an appropriate sentence within the statutory limits. *People v. Fern*, 189 Ill. 2d 48, 53-54 (1999). "The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id.* at 53. When considering the propriety of a sentence, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *Id.* "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Id.* at 54.

¶ 30 Here, the defendant's sentences are within the statutory ranges for each offense. The range for the AAUW offense was one to three years' imprisonment (720 ILCS 5/24-1.6(d)(2) (West 2012)), and the range for the involuntary manslaughter offense was two to five years' imprisonment (730 ILCS 5/5-4.5-40 (West 2012)). Further, while it is well-established that the circuit court may not consider a factor inherent in the offense as an aggravating factor when determining a sentence (*People v. Martin*, 119 Ill. 2d 453, 459-60 (1988); *People v. Saldivar*, 113 Ill. 2d 256, 271-72 (1986)), we see no evidence in the record to support the defendant's contention that the circuit court did so here. Nowhere in the court's comments do we find evidence that it considered Hieber's death as an aggravating factor. In fact, during the hearing on the defendant's motion for a reduction in his sentence, the court explicitly stated that it did not "hit him twice for the same thing," but only considered the "crime and the impact of the crime." The court explained that it rendered the sentence based on its consideration of the extremely

reckless and careless nature of the defendant's behavior when he waved a loaded gun around a room full of people under the influence of drugs and alcohol.

¶ 31 Regarding the mitigating factors, we likewise find no evidence in the record to support the defendant's contention that the court failed to adequately consider them. The court specifically acknowledged the defendant's youth, lack of a criminal record, and his apparent remorse when it determined his sentence. It is not this court's function to reweigh the factors, and we see no reason to disturb the sentences imposed by the circuit court in this case.

¶ 32 Based on the foregoing reasons, we affirm, as modified herein, the judgment of the circuit court of Cook County.

¶ 33 Affirmed as modified.