SIXTH DIVISION
June 30, 2011

No. 1-09-2619

NOTICE: This order was filed under Supreme Court Rules 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 08 CR 20668
	)	
SAMUEL PRICE,	)	Honorable
	)	Catherine M. Haberkorn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice McBride concurred in the judgment.

O R D E R

Held: Defendant's conviction for aggravated robbery affirmed where defendant failed to show it was plain error for the trial court to sustain one of the State's objections. Defendant's 18-year sentence was excessive and the case was remanded for resentencing. The court services-sheriff fee was affirmed. The DNA ID system fee and the court system fee were vacated.

Following a bench trial, defendant Samuel Price was convicted of aggravated robbery (720 ILCS 5/18-5) (West 2008)) and sentenced to 18 years imprisonment. On appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial

court improperly sustained the State's objection to a question; (3) his 18-year prison sentence is excessive; (4) the trial court improperly assessed the $200 DNA ID system fee (730 ILCS 5/5-4-3 (West 2008)), $25 court services-sheriff fee (55 ILCS 5/5-1103 (West 2008)), and $5 court system fee (55 ILCS 5/5-1101(a) (West 2008)); and (5) the court failed to credit defendant $5 per day against the fines for pre-sentence time served. We affirm in part, vacate in part and remand for resentencing.

At trial, the State first called the victim, Christopher Williams. On the night of October 16, 2008, the victim was walking home from a Chicago Red Line train station when defendant approached him from an alleyway. Defendant walked up to the victim so that they were standing face to face. Defendant asked if the victim had a cigarette and the victim said he did smoke. Defendant then asked if the victim had a lighter, and the victim said no.

When the victim began to walk away, defendant stopped him and asked if he was in a gang. The victim replied that he was not and continued walking. Defendant followed two to three feet behind him. Defendant asked the victim if he had a "fin," meaning a five-dollar bill. While making this request, defendant reached his hand behind his back at the height of his waistband. Over defendant's objection, the victim testified that he had "a lot of friends that died in gang violence ***. So [the victim] figured [defendant] had a gun behind his back."

After the victim told defendant he did not have a five-dollar bill, defendant "asked [him] to drop [his] pockets," meaning turn his pockets inside-out to show their contents. The victim complied and pulled two one-dollar bills from his pockets with his left hand. He was holding a soda can in his right hand. The victim testified that defendant slapped the soda can out of his

right hand and took the two dollars out of his left hand.

On cross-examination, the victim said that defendant slapped the money out of his hand and it fell to the ground, and he never saw defendant pick up the money. The victim also said he felt like "how you feel when [you are] in a dangerous situation."

An unidentified third person walked up to defendant and the victim. The person and defendant spoke to each other briefly while the victim remained silent. The victim testified that defendant told the person that "[the victim] didn't have a fin on him" and the person looked at defendant "all puzzled." Defendant told the person it was "none of your business" and the person walked away. On direct examination the victim said the person was not present when defendant slapped the money out of the victim's hand. On cross-examination the victim said the person was "long gone" when defendant did this.

After the encounter, the victim "laughed" and started walking away, keeping defendant in his peripheral view. Over defense's objection, the victim testified that he did not run away because "I know not to run away from somebody if I suspect them from having a gun because that's a easy target to get hit in the back."

After the encounter, defendant followed the victim for two or three minutes, then turned around and walked in the other direction. As the victim approached the intersection of Broadway Avenue and Montrose Street, he saw a police car and flagged it down.

While speaking with the two police officers in the car, the victim saw defendant walking toward them. One of the officers detained defendant while the other officer drove the victim to defendant, who the victim identified as the man that robbed him.

On cross-examination of the victim, the following colloquy occurred:

"[Defense Attorney]: [Defendant] never said anything to you regarding why his hand was behind his back?

[Victim]: No.

[Defense Attorney]: He never threatened you?

[Victim]: No.

[Prosecutor]: Objection, Judge.

The Court: Sustained."

Officer Fitzgerald, the responding officer, testified that the victim identified defendant from about a half-block away. Fitzgerald left the victim at the street corner for his safety because the victim indicated defendant might be armed. A search of defendant recovered two one-dollar bills and no weapon.

No other evidence was presented. The court found defendant guilty of aggravated robbery and sentenced him to 18 years in prison.

On appeal, defendant first challenges the sufficiency of the evidence. He argues that the evidence did not establish the victim objectively believed defendant had a weapon and that the evidence did not show that he had used force or threatened the use of force against the victim.

Evidence is sufficient to sustain a conviction when, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find the elements of the crime beyond a reasonable doubt. *People v. Williams*, 239 Ill. 2d 119, 126, 940 N.E.2d 50 (2010). We will reverse a conviction if "the evidence is so unreasonable, improbable, or unsatisfactory as to

justify a reasonable doubt of defendant's guilt." *People v. Smith*, 185 Ill. 2d 532, 542, 708 N.E.2d 365 (1999).

A defendant is guilty of aggravated robbery when he: (1) takes property from the person or presence of another (2) by the use of force or by threatening the imminent use of force and (3) while indicating verbally or by his actions to the victim that he is presently armed with a firearm or other dangerous weapon. 720 ILCS 5/18-5 (West 2008). The offense applies even where it is later determined that the defendant had no firearm or other dangerous weapon. 720 ILCS 5/18-5 (West 2008).

Defendant argues that the State did not prove an objective observer would believe he was armed. To convict a defendant of aggravated robbery, the State must prove the victim had an objective reason to believe the defendant was armed. *People v. Hall*, 352 Ill. App. 3d 537, 543, 816 N.E.2d 703 (2004). Defendant's reliance on *People v. Williams*, 329 Ill. App. 3d 846, 769 N.E.2d 518 (2002), and *Hall*, 352 Ill. App. 3d 537, is misplaced. While the defendants in *Hall* and *Williams* acted in a manner indicating they were armed, neither case purported to set out the minimum conduct necessary to create that impression. See *Hall* 352 Ill. App. 3d at 539 (the defendant asked a store clerk if he was wearing a bullet proof vest, asked if the clerk wanted to get shot and pointed to his waistband while asking the clerk if he was going to cooperate); *Williams*, 329 Ill. App. 3d at 849 (the defendant kept his hand under his shirt and pushed a woman's head to a desk when she tried to call the police); but see *People v. Woods*, 373 Ill. App. 3d 171, 177, 866 N.E.2d 1205 (2007) (it was objectively reasonable to believe the defendant was armed where he gestured to his waist while grabbing at a cash register and cashier saw

"something wooden" in his waistband).

Here, while placing his hand near his waistband, defendant asked that the victim "drop his pockets." Defendant's hand positioning, combined with his request that the victim empty his pockets and his earlier question asking the victim whether he was in a gang, could lead a reasonable person to believe defendant had a gun. See *People v. Timberson*, 188 Ill. App. 3d 172, 176, 544 N.E.2d 64 (1989) (a defendant pleading self-defense could reasonably believe the decedent had a weapon where the decedent approached him in a threatening manner with his hand near his waistband). The fact that here the victim laughed and walked away from defendant does not compel a different conclusion. Viewing the evidence in the light most favorable to the prosecution, the victim may have laughed out of disbelief or nervousness or to avoid further upsetting defendant. It is unlikely that the victim was laughing because he felt at ease where he testified that he kept defendant in his peripheral view as he walked away and felt like he was in "a dangerous situation." The victim also testified that he decided to walk, rather than run, to avoid giving defendant a reason to shoot him in the back. The victim provided ample testimony to prove he objectively believed defendant was armed.

Defendant also contends the evidence was insufficient to prove he either used force or threatened the imminent use of force. In support of his contention, defendant cites *People v. Grengler*, 247 Ill. App. 3d 1006, 617 N.E.2d 486 (1993), and *People v. Hollingsworth*, 120 Ill. App. 3d 177, 457 N.E.2d 1062 (1983). Neither case supports defendant's position.

The holding in *Grengler* supports the State's position. The defendant there entered a gas station and asked the station attendant for directions. After talking with the attendant for a short

period of time, the defendant asked him if he had ever seen a ".25 special." He proceeded to press something against his coat pocket that looked like the barrel of a gun and said "give it to me," presumably referring to the money in the register. *Grengler*, 247 Ill. App. 3d at 1008. The court held that these actions created a reasonable fear that the attendant would have to part with his property for the sake of his person. *Grengler*, 247 Ill. App. 3d at 1012-13. Here, defendant's actions also created a reasonable belief that the victim would have to part with his property to protect his person. As discussed above, and as was true in *Grengler*, the victim reasonably believed defendant was armed. Telling the victim to "drop his pockets" was no less a command than saying "give it to me" in *Grengler*.

Defendant's position is also not supported by *Hollingsworth*. The court there noted that where a "defendant does not take any action which would reasonably allow the victim to conclude that he was armed, and only gives instructions such as 'put the money in the bag,' which do not, of themselves, threaten force, then no robbery is committed." *Hollingsworth*, 120 Ill. App. 3d at 179. Here, defendant not only told the victim to drop his pockets but also indicated that he had a weapon in his waistband by keeping one of his hands behind his back. Viewing the evidence in the light most favorable to the State, defendant threatened the imminent use of force when he indicated that he was armed while telling the victim to "drop his pockets." The trial court correctly found defendant guilty of aggravated robbery.

Defendant next contends that the trial court improperly sustained a general objection to the question, "He never threatened you?"

Although defendant forfeited this issue by failing to include it in his posttrial brief, we

will review the contention under plain error. *People v. Herron*, 215 Ill. 2d 167, 178, 830 N.E.2d 467 (2005). To show plain error, a defendant must demonstrate that: (1) the evidence in the case is so closely balanced that the guilty verdict may have resulted from the error; or (2) the error was so serious that the defendant was denied a fair trial. *People v. Allen*, 222 Ill. 2d 340, 351, 856 N.E.2d 349 (2006) (citing *Herron*, 215 Ill. 2d at 178-79). The defendant bears the burden of persuasion under either prong. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184 (2010).

Here, the evidence was not so closely balanced as to constitute plain error under the first prong. To have plain error, the error alone must have threatened to tip the scales of justice against the defendant. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045 (2010). Here, the objection alone would not have tipped the scales against defendant. The evidence showed that defendant threatened the imminent use of force and the victim reasonably believed defendant was armed. The victim testified defendant asked him if he was in a gang, put his hand behind his back in a way that indicated he had a gun and told the victim to drop his pockets. The victim also testified that he kept defendant in his peripheral vision, felt like he was in a dangerous situation during the encounter and chose not to run away to avoid being shot in the back. The State's evidence was unrebutted. Defendant has not met his burden to show that sustaining the objection alone tipped the scales against him.

Defendant has also failed to show the error was serious enough to deny him a fair trial. To satisfy the second prong, a defendant bears the burden to show that the trial court's error went beyond a typical trial mistake and represented "a breakdown in the adversary process." *People v. Lewis*, 234 Ill. 2d 32, 47, 912 N.E.2d 1220 (2009). The threat to the fairness of the defendant's

trial must be severe. *People v. Hopp*, 209 Ill. 2d 1, 12, 805 N.E.2d 1190 (2004). Defendant contends that by sustaining the State's objection, the court improperly limited his right to cross-examination and denied him the ability to present his theory of the case. But defendant has not carried his burden by demonstrating that these errors led to a breakdown of the adversarial process or caused a severe threat to the fairness of his trial. Defendant was allowed to continue cross-examining the witness and could have used further questioning to develop his theory of the case. Defendant has failed to show that a structural error rather than a typical trial mistake occurred.

Defendant next argues that his 18-year prison sentence is excessive because the sentence was disproportionate to the nature and circumstances of the offense.

We may reduce a defendant's sentence when the trial court has abused its discretion, but we will not substitute our judgment for the trial court's merely because we would have weighed the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13, 940 N.E.2d 1062 (2010); *People v. Stacey*, 193 Ill. 2d 203, 209, 737 N.E.2d 626 (2000). A sentence within the statutory guidelines is presumed to be proper, but we will find a sentence excessive when it varies greatly from the spirit and purpose of the law or when it is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90, 871 N.E.2d 1 (2007); *People v. Hamilton*, 361 Ill. App. 3d 836, 846, 838 N.E.2d 160 (2005).

At sentencing, the prosecution asked for the maximum Class X sentence of 30 years imprisonment (730 ILCS 5/5-8-1(a)(3) (West 2008)). The trial court said defendant had "been given numerous opportunities" and noted defendant's history of Class 2 felony convictions and

convictions subject to Class X sentencing. The court said defendant kept "going back to the life of crime, back to drugs and now [was] involved in very serious violent offenses." The court admonished defendant for failing to get his General Equivalency Diploma while in prison and for not caring for his mother, who was ill. The court sentenced defendant to 18 years in prison.

We agree with defendant that his 18-year sentence is excessive in light of the nature of the offense. In *Stacey*, our supreme court reduced a defendant's two Class X sentences from 25 years each to 6 years each under similar circumstances. 193 Ill. 2d at 205-06. The defendant in *Stacey* was convicted for aggravated criminal sexual abuse and criminal sexual abuse following incidents where he approached teenage girls on their way to school and forcibly grabbed their breasts. 193 Ill. 2d at 205-07. Despite the defendant's eight previous convictions and poor record of rehabilitation, the court found the sentence manifestly disproportionate to the nature of the offense, where "defendant momentarily grabbed the breasts of two young girls, who were fully clothed at the time" and "made lewd comments and gestures." *Stacey*, 193 Ill. 2d at 208, 210. The court noted that the new sentence comported with our constitution's mandate "that penalties be determined according to the seriousness of the offense." Ill. Const. 1970, art. I, §11; *Stacey*, 193 Ill. 2d at 211.

As in *Stacey*, the sentence here was manifestly disproportionate to the nature of the offense. The trial court characterized defendant's actions as a "very serious violent offense," but we disagree. Defendant had no weapon and the only violent act was slapping a pop can and two dollars out of the victim's hands. Like the defendant in *Stacey*, defendant here had multiple prior convictions. Although aggravated robbery is distinguishable from the Class 2 felonies in *Stacey*,

the present case features similarly unusual facts. *Stacey*, 193 Ill. 2d at 210; see *People v. Romero*, 387 Ill. App. 3d 954, 982-83, 901 N.E.2d 399 (2008) (declining to reduce 50-year sentence for first-degree murder absent unique facts like those in *Stacey*). Also, the record shows the trial court may have unduly focused on defendant's failure to attend to his ill mother as an aggravating factor. Defendant's relationship with his mother does not constitute a statutory aggravating factor. 730 ILCS 5/5-5-3.2 (West 2008). We remand the case to the trial court to determine a reduced sentence in light of the nature of the offense and without considering defendant's relationship with his mother as a factor in aggravation.

Defendant next contends that the $200 DNA ID system fee (730 ILCS 5/5-4-3 (West 2008)) should not apply to him because he was ordered to pay the fee and has submitted DNA to the Illinois State Police in to a previous conviction. The State argues that: (1) defendant did not provide record evidence to show that he was assessed and paid the fee following his earlier conviction, and (2) defendant forfeited the claim by failing to include it in a written posttrial motion.

Despite the State's objections, we will consider the merits of defendant's contention. See *People v. Rigsby*, 405 Ill. App. 3d 916, 940 N.E.2d 113 (2010) (a challenge to an alleged void order is not subject to forfeiture). Defendant also did not forfeit his ability to contest the fees by failing to raise them in a posttrial motion. See *People v. Cleveland*, 393 Ill. App. 3d 700, 713, 913 N.E.2d 646 (2009) (citing *People v. Roberson*, 212 Ill.2d 430, 440, 819 N.E.2d 761 (2004)).

Section 5-4-3(a) of the Unified Code of Corrections (Code) requires "[a]ny person convicted of *** any offense classified as a felony under Illinois law *** shall, regardless of the

sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police in accordance with the provisions of this Section." 730 ILCS 5/5-4-3(a) (West 2008). Section 5-4-3(j) of the Code states that "[a]ny person required by subsection (a) to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for analysis and categorization into genetic marker grouping, in addition to any other disposition, penalty, or fine imposed, shall pay an analysis fee of $200." 730 ILCS 5/5-4-3(j) (West 2008).

In *People v. Marshall*, No. 110765, slip op. at 15 (Ill. May 19, 2011), our supreme court recently held "that section 5-4-3 authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA and the payment of the [$200] analysis fee *only* where that defendant is not currently registered in the DNA database." (Emphasis added.) Because only one DNA analysis per offender is necessary, only one analysis fee is necessary as well. *Marshall*, No. 110765, slip op. at 9 (citing *Rigsby*, 405 Ill. App. 3d at 918-19).

Here, defendant supplemented the common law record to show that he had previously been assessed the $200 DNA ID system fee and that his DNA profile is on record with the Illinois State Police. Because the record shows defendant is currently registered in the DNA database and was already assessed the fee, we order the $200 DNA ID system fee vacated under *Marshall*. Next, defendant contends the trial court improperly assessed the $25 court services fee. 55 ILCS 5/5-1103 (West 2008). Defendant argues the fee does not apply because the offense he committed, aggravated robbery, is not listed in the statute. We find this issue

controlled by our holding in *Adair*, 406 Ill. App. 3d at 144-45. In *Adair* "the encompassing language of the statute and its clear purpose of defraying court security expenses" led us to conclude that "the failure to list the offenses the defendant committed [does not] mean[] he cannot be required to defray the expenses incurred by the sheriff for his court proceedings." *Adair*, 406 Ill. App. 3d at 144. We find nothing distinguishable about this case and affirm the trial court's assessment of the $25 court services fee.

The parties agree that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2008)) should be vacated because it does not apply to aggravated robbery convictions. We order this fee vacated.

Finally, we need not address defendant's contention that he is entitled to apply his $5-per-day credit for each day spent in custody before sentencing (725 ILCS 5/110-14 (West 2008)) to the DNA analysis fee because we have vacated that fee.

Having found no plain error in the court's sustaining the State's objection, we affirm defendant's conviction for aggravated robbery. We affirm the $25 court-services fee and vacate the $200 DNA ID system fee and the $5 court systems fee. We remand the case for resentencing.

Affirmed in part and vacated in part; remanded with directions.