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SECOND DIVISION
MAY 17, 2011

1-09-0066

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 17923
)	
KENNETH SCOTT,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held: Mittimus corrected to accurately reflect the trial court's oral pronouncement of a single conviction for residential burglary and defendant's entitlement to an additional 50 days of credit for time served before sentencing; eight-year sentence affirmed over claim that it was excessive.

Following a bench trial in the circuit court of Cook County, defendant Kenneth Scott was found guilty of residential burglary with intent to commit an attempted aggravated criminal sexual assault and was sentenced to eight years' imprisonment. On appeal, defendant contends that the trial court erred in entering a separate conviction and sentence for attempted aggravated criminal sexual assault after finding that it was a lesser-included offense of residential burglary. He also contends

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that his eight-year sentence for residential burglary is excessive and that he is entitled to an additional 50 days of credit for time served before sentencing.

This prosecution arose from an incident that occurred at 5 a.m. on August 19, 2007, when S.T. encountered defendant in the hallway outside her studio apartment. S.T. did not recognize defendant and was startled by his presence. As she opened her apartment door, defendant pushed her inside. She fell on her hands and knees, and when she turned around, defendant approached her with his penis in his hand and said, "you know what time it is bitch." When she pulled out a knife, he ran away.

The State charged defendant with home invasion, residential burglary based on attempted aggravated criminal sexual assault, and three counts of attempted aggravated criminal sexual assault. Following a bench trial, defendant was found not guilty of home invasion and one count of attempted aggravated criminal sexual assault "based on a finding of no bodily harm," and not guilty of another count of attempted aggravated criminal sexual assault "during the course of a home invasion." On the remaining two counts, the court found as follows:

"As far as residential burglary and attempt aggravated criminal sexual assault based on residential burglary, there is a finding of guilty on those two counts. The second count, attempt aggravated criminal sexual assault, that may be a lesser included offense of residential burglary under these circumstances. I am not sure. If I am shown that it was, I can vacate it if it is appropriate to do it at a later time."

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Subsequently, the trial court denied defendant's motion for a new trial and pronounced defendant's sentence as follows:

"Defendant was found guilt[y] on two counts, residential burglary and attempt aggravated criminal sexual assault. I believe under the circumstances that the attempt is a lesser-included offense of the residential burglary because to commit the residential burglary you have to have the intent to commit a felony inside the place, that felony being attempted aggravated criminal sexual assault, so the sentence will be only on the residential burglary which additionally works to your client's benefit as well because on that charge he goes to prison with a residential burglary conviction as opposed to attempted aggravated criminal sexual assault, plus he gets day-for-day credit as well.

On the charge in Count Number 2 only at this point, residential burglary based on attempt sexual assault in the apartment of [S.T.], I sentence you to 8 years Department of Corrections."

At the hearing held on defendant's motion to reconsider that sentence as excessive, the trial court noted that defendant was "sentenced on a charge of residential burglary with the intent to commit sexual assault," and denied defendant's motion. This appeal followed.

In this court, defendant does not challenge the sufficiency of the evidence to sustain his residential burglary conviction. Rather, he contends that his attempted aggravated criminal sexual

assault conviction should be vacated as a lesser-included offense of residential burglary under the charging instrument approach, for purposes of the one-act, one-crime doctrine. He acknowledges his failure to raise this issue below, but asserts that we should address it under the plain error doctrine.

We are mindful that a forfeited one-act, one-crime argument may be reviewed by this court under the second prong of the plain error rule because it implicates the integrity of the judicial process. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). We observe that defendant concedes in his reply brief that the Illinois Supreme Court's recent decision using the abstract elements approach to evaluate whether a charged offense is a lesser-included offense of another under the one-act, one-crime doctrine has "eviscerated" his argument for vacatur under the charging instrument approach. *People v. Miller*, 238 Ill. 2d 161, 172-75 (2010).

Nonetheless, defendant maintains that the relief he seeks remains viable and urges that we correct the mittimus to reflect a single conviction for residential burglary by striking the reference to the separate attempted aggravated criminal sexual assault conviction. Having abandoned his lesser-included offense argument, defendant essentially asks that the mittimus be corrected to accurately reflect the trial court's oral pronouncement of sentence, a request that we may properly grant pursuant to Supreme Court Rule 615 (Ill. S. Ct. R. 615 (eff. Aug. 27, 1999)) without remanding the cause to the trial court (*People v. Johnson*, 385 Ill. App. 3d 585, 609 (2008)).

The oral pronouncement of the judge is the judgment of the court, and the written order of commitment merely evidences that judgment. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). Where a conflict arises between the two, the language of the court prevails over the language of the

mittimus. *People v. Willis*, 184 Ill. App. 3d 1033, 1047 (1989).

In this case, the mittimus reflects separate convictions and eight-year sentences for residential burglary and attempted aggravated criminal sexual assault with a notation that the attempted aggravated criminal sexual assault conviction merged into the residential burglary conviction. This clearly conflicts with the trial court's oral pronouncement at sentencing. As noted, the trial court initially found defendant guilty of residential burglary and attempted aggravated criminal sexual assault, but ultimately determined that "the attempt is a lesser-included offense of the residential burglary," and imposed a single sentence for the residential burglary conviction.

Although that reasoning may be incompatible with the abstract elements approach recently recognized in the *Miller* case, (*Miller*, 238 Ill. 2d at 176), it is the court's judgment and not what else may have been said by the trial court that is on appeal to this reviewing court. *People v. Wiley*, 169 Ill. App. 3d 140, 144-45 (1988). Accordingly, we may affirm the judgment of the trial court for any reason supported by the record. *Id.* at 145.

In this case there was nothing equivocal about the trial court's oral pronouncement that sentence was imposed solely on the residential burglary conviction and the State expressed no concerns about it at that time. *People v. Lewis*, 379 Ill. App. 3d 829, 837 (2008). We thus direct the clerk of the circuit court to amend the mittimus to reflect a single conviction for residential burglary and sentence of eight years' imprisonment. *Jones*, 376 Ill. App. 3d at 395-96.

Based on this disposition, the State's assertion that the trial court found defendant guilty of a separate count of attempted aggravated criminal sexual assault, as indicated on the mittimus, is factually incorrect and warrants no further consideration. *People v. Horrell*, 381 Ill. App. 3d 571,

575 (2008); see also *Willis*, 184 Ill. App. 3d at 1046 (a mittimus is not part of the common law record and, thus, it cannot serve as basis for claim of error).

Defendant next contends that his eight-year sentence for residential burglary was excessive and an abuse of the trial court's discretion. He acknowledges that the sentence is within the range allowed by law, but argues that the court abused its discretion by not giving adequate consideration to the factors he presented in mitigation as well as his rehabilitative potential. He thus asks this court to reduce his sentence or, alternatively, to vacate it and remand the cause for a new sentencing hearing.

The trial court's determination as to the appropriate punishment is accorded great deference and will not be disturbed absent an abuse of discretion. *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010). Where, as in this case, the sentence imposed falls within the 4-15-year statutory range for Class 1 felonies (730 ILCS 5/5-8-1(a)(4) (West 2008)), an abuse of discretion will be found only if the sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). We do not find that this occurred in this case.

Contrary to defendant's assertion, the trial court did not ignore the mitigating factors defendant presented. The record shows that during the hearing on defendant's motion to reconsider his sentence, the trial court reviewed defendant's presentence investigation report, which included factors such as defendant's personal history, education, and social environment. Defense counsel highlighted defendant's young age at the time of the offense, his family history of schizophrenia and his lack of a criminal record. The record further shows that in denying defendant's motion to

reconsider his sentence, the trial court specifically stated that it had considered these factors. The trial court also noted the seriousness of defendant's conduct and stated that the eight-year sentence was lenient under the circumstances. On this record, defendant cannot overcome the presumption that the trial court considered all relevant factors in determining his sentence. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010).

We note that defendant's rehabilitative potential is only one of the factors that needs to be weighed in determining a sentence; the trial court is not required to expressly state its reasoning for sentencing or expressly find that defendant lacks rehabilitative potential. *Id.* at 159. The seriousness of the offense is the most important sentencing factor and defendant's rehabilitative potential need not be given greater weight. *People v. Tye*, 323 Ill. App. 3d 872, 890 (2001). In this case the record shows that the trial court considered the appropriate mitigating and aggravating factors in determining defendant's sentence. We find that the trial court did not abuse its discretion and conclude that the eight-year sentence imposed on defendant's residential burglary conviction is not excessive. *People v. Alexander*, 239 Ill. 2d 205, 215 (2010).

Defendant lastly contends, and the State concedes, that he is entitled to an additional 50 days of credit for time served before sentencing and that the mittimus must be corrected to reflect the proper amount of 414 days. We agree. We therefore order that the mittimus be corrected to reflect that defendant is entitled to 414 days credit for time served. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

For the reasons stated, we affirm defendant's residential burglary conviction and sentence, as modified.

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Affirmed as modified.