

No. 2—09—0669
Order filed February 24, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06—CF—5051
)	
WILLIE WHITE,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in sentencing defendant to the maximum 20 years' imprisonment for second-degree murder; despite defendant's minimal criminal history, this offense was very serious and defendant had demonstrated his extremely violent nature; the court's comments that the offense could have been classified as first-degree murder and that defendant was the aggressor and was "itching" to use his gun were properly based in the evidence; other-crimes evidence on which the court relied was sufficiently connected to defendant.

Following a jury trial, defendant, Willie White, was convicted of second-degree murder (720 ILCS 5/9—2(a)(1) (West 2006)), and he was sentenced to 20 years' imprisonment. On appeal, defendant argues that his sentence is excessive. We affirm.

In considering whether defendant's sentence is excessive, we note that we may not disturb a sentence within the applicable range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* at 210. "It is the province of the trial court to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case" (*People v. Latona*, 184 Ill. 2d 260, 272 (1998)), and we may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *Stacey*, 193 Ill. 2d at 209.

In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). A sentencing judge is presumed to have considered all relevant factors, unless the record affirmatively shows otherwise. *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Kolzow*, 301 Ill. App. 3d at 8. As a result, the existence of mitigating factors does not require the minimum sentence (*People v. Adamcyk*, 259 Ill. App. 3d 670, 680 (1994)) or preclude the maximum (*People v. Flores*, 404 Ill. App. 3d 155, 158 (2010)).

Here, defendant was convicted of second-degree murder. A defendant convicted of second-degree murder faces a prison term between 4 and 20 years. 730 ILCS 5/5—8—1(a)(1.5) (West 2008). Defendant's 20-year sentence thus is the maximum.

Defendant claims that his sentence is excessive, because he has a minimal criminal history, the trial court relied on facts neither proved by the State nor found by the jury, and the other-crimes evidence presented was unreliable. We address each of these contentions in turn.

First, we consider whether defendant's sentence is excessive because he has a minimal criminal history. Although defendant, who was a teenager when the murder occurred, has only one prior conviction on his record, "the seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). Here, the second-degree murder was quite serious.

The evidence presented at trial revealed that defendant willingly went driving around with some other men, who were all unarmed, on December 24, 2006. While they were driving around in a van drinking alcohol, Ricky Bell, the victim, and another man stopped to buy some cocaine. When they returned to the van, Bell sat in front of defendant, breaking up some cocaine on his lap. During that time, defendant allegedly called the men "crack heads," a comment to which the men took great offense. After that, some of the men talked in an aggressive manner about going back to someone else's home, and defendant took this to mean that the men were going to kill him. Bell turned around at one point, looked at defendant in a way that made defendant feel that Bell was going to come after him, and said, " 'fuck.' " At that point, after Bell turned to face forward, defendant shot Bell, an unarmed man, in the back of the head and then fled the scene.

Added to the violent nature of the offense is the fact that defendant acted violently shortly before the offense and was disruptive while in jail. More specifically, shortly before Bell was shot, the men stopped at the home of someone they knew. Defendant, who did not know this man, asked to use the man's phone. In response, the man said that defendant could use the phone if defendant

gave the man \$1. Instead of giving the man \$1, leaving the man's home, using someone else's phone, or acting in any other nonviolent way, defendant threatened the man by lifting his shirt to show the man the loaded gun that defendant kept tucked in the waistband of his pants.

Moreover, evidence presented at the sentencing hearing revealed that defendant repeatedly failed to follow the rules while in jail and incurred numerous infractions for his actions. For example, defendant physically fought with other inmates, ran from correctional officers while they were attempting to put him in lockdown or his cell, and swore at nurses who were attempting to treat him. Based on these and other incidents, one report from jail officials indicated that “[defendant] is ever increasingly becoming more insubordinate and disruptive to the pod.”

Based on precisely these acts, the court, after reciting the factors in mitigation and aggravation, found that the nature of the crime was quite serious, that defendant was likely to commit another crime, that defendant lacked any rehabilitative potential, and that a harsh sentence was necessary to deter others. In light of these aggravating factors, we cannot conclude that the fact that defendant had a minimal criminal history made the maximum sentence an abuse of discretion.

Second, we address whether defendant's sentence is excessive because the trial court relied on facts that were neither proved at trial by the State nor found by the jury. In the comments that defendant takes issue with, the trial court said:

“You [defendant] ask for mercy; and I believe that you have received it. I believe the jury extended mercy to you when they found you guilty of second degree murder, because the facts of this case are such that they could have found you guilty of first degree very easily. So to the extent that you're seeking mercy, you have received it, I believe. The sentence the Court is imposing is for the second degree murder conviction that [the jury] did return.

You've used the statement that 'actions speak louder than words.' And I concur; I agree with that conclusion. And your actions continue to demonstrate that you lack fundamental insight. You still see yourself as a victim. You see yourself as a victim. And by characterizing yourself as a victim, you are justifying what you've done.

You cannot justify what you've done. You are not a victim. You are a perpetrator. You were the aggressor. You killed a man who was the victim here.

The facts of this case indicate that all day long you were looking for an excuse to pull your pistol. Earlier in the dispute over the phone and then later on in the van you just were itching to pull that thing out and shoot somebody. I don't know why you felt the need to do that."

Relying on *People v. Hill*, 14 Ill. App. 3d 20 (1973), defendant contends that the court here, in these comments, substituted its own beliefs about the evidence for that of the jury. We disagree.

In *Hill*, the defendant was convicted of contributing to the sexual delinquency of a child. *Id.* at 21. At sentencing, an abundance of mitigating evidence was presented, including that the defendant's inculpatory statement was the only real evidence against the defendant, the defendant was steadily employed, the defendant was 66 years old, and the defendant had no criminal record. *Id.* at 23. Additionally, neither the probation department nor the State opposed sentencing the defendant to probation. *Id.* Nevertheless, the trial court, without mentioning whether the defendant was likely to reoffend or could be rehabilitated, refused to give the defendant probation, noting that the defendant could have been charged with a felony instead of a misdemeanor. *Id.* The appellate court found this improper, because the defendant was neither charged with nor proved guilty of committing a felony. *Id.*

Hill is clearly distinguishable. The problem in *Hill* was that the trial court, in imposing a sentence, did not rely on the facts presented and failed to consider all the statutory factors in aggravation and mitigation. See *People v. Glass*, 144 Ill. App. 3d 296, 303 (1986) (“[t]he decision in *Hill* stands only for the proposition that a trial court abuses its discretion when it considers an improper factor not supported by the evidence or fails to consider all of the statutory factors in aggravation and mitigation.”). That is, the trial court in *Hill* did not consider any of the evidence presented and refused to give the defendant probation based solely on the fact that the defendant could have been charged with a felony instead of a misdemeanor. Here, in contrast, after considering the evidence presented at trial and going through all the statutory factors that a court should weigh in aggravation and mitigation, the trial court found that a sentence at the top of the sentencing range was appropriate.

More specifically, when the trial court asserted that the evidence revealed that the jury could have “very easily” found defendant guilty of first-degree murder and that defendant was the “aggressor,” it made those statements in light of the proven fact that defendant shot Bell, an unarmed man, in the back of the head while Bell’s attention was focused on matters that had nothing to do with defendant. Likewise, the court’s comment that defendant was “itching” to use his gun was based on the fact that defendant threatened another man earlier in the day when that man simply asked defendant to give him \$1 before defendant could use the man’s phone. In any event, before making these statements, the court made clear that any remark it made on the facts surrounding the offense was not made in support of enhancing defendant’s sentence but, rather, was simply a statement concerning the nature and circumstances of the offense. Given these facts, commenting on the evidence in this manner was not improper. See *People v. Fitzgerald*, 55 Ill. App. 3d 626, 632-

33 (1977) (not improper for court, in sentencing the defendant for robbery, to consider fact that the defendant was carrying a gun when he robbed the victims, because there was credible testimony that a weapon was used in the robbery).

In *People v. Michels*, 72 Ill. App. 3d 281 (1979), the defendant was charged with four counts of murder, but was convicted of involuntary manslaughter after a jury trial. In imposing sentence, the trial court commented on the closeness of the evidence and stated that a verdict for murder could have properly been sustained. *Id.* at 183-84. The appellate court held that the record did not support the defendant's contention that the sentence was imposed because the trial court believed the defendant was guilty of murder rather than involuntary manslaughter. *Id.* at 185. The court distinguished *Hill* by concluding that the trial court, in sentencing Michels, "was not indulging in speculation but instead was reciting what had actually occurred." *Id.* Likewise, the trial court in the present case focused its comments of what had actually occurred during the commission of the offense.

Third, we consider whether the trial court erred when it considered other-crimes evidence presented at the sentencing hearing. The statement the trial court made with which defendant takes issue is as follows:

"I have considered the evidence presented regarding the shooting of [an attempted armed robbery victim]. I think there is a high probability that [defendant's] nine millimeter pistol was used, and I think there's a high probability that [defendant] was the armed robber who demanded money from [the victim] and in the ensuing struggle [the victim] was shot in the foot."¹

¹This statement was made when the trial court was deciding whether defendant should be

It is well established that “evidence showing the defendant’s commission of other crimes or acts of misconduct is admissible even though the defendant was not prosecuted or convicted for such conduct.” *People v. Edgeston*, 157 Ill. 2d 201, 246 (1993). Moreover, “[h]earsay evidence of crimes that did not result in prosecution or conviction is *** admissible at the aggravation and mitigation phase if it meets the requirements of relevancy and reliability.” *People v. Williams*, 181 Ill. 2d 297, 331 (1998).

There is no question that the account of the officials who investigated the attempted armed robbery and relayed the details to the court was relevant, as, if true, it established defendant’s propensity for acting violently. However, defendant attacks the reliability of the account of the attempted armed robbery, arguing that nothing connected him to that offense. Defendant’s suggestion is based on the fact that no one identified defendant as the assailant and the victim gave a vague description of his attacker. However, the evidence also revealed that the attempted armed robbery was committed only a few weeks before Bell was killed, that the gun used in the attempted armed robbery was the same one that defendant used to kill Bell, and that defendant, ever since 2005, never left home without this gun. Given those facts, we cannot conclude that the trial court erred in inferring that defendant committed the attempted armed robbery and considering that fact in fashioning an appropriate sentence.

sentenced as an adult (see 705 ILCS 405/5—810(b) (West 2008)), not when the trial court was weighing the mitigating and aggravating factors and deciding what sentence to impose. Although the trial court never specifically indicated that it considered the attempted armed robbery in aggravation in imposing a 20-year sentence, we address defendant’s claim to the extent that the trial court considered defendant’s general violent nature in imposing a sentence.

For all of these reasons, we conclude that the trial court did not abuse its discretion in imposing a 20-year sentence for second-degree murder.

Affirmed.