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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 Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 05-CF-2480
)	
RAYMOND D. ABERNATHY,)	Honorable
)	James K. Booras,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 15 years' imprisonment for aggravated battery with a firearm: in imposing its sentence the court did not misconceive of the victim's injuries as life-threatening.

¶ 2 Defendant, Raymond D. Abernathy, whose case we previously remanded for new posttrial and sentencing proceedings (*People v. Abernathy*, 399 Ill. App. 3d 420, 432 (2010)), now appeals from his 15-year sentence for aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)). He alleges that, because the court based the sentence in part on a misconception that the victim's injuries were life-threatening, the sentence was an abuse of discretion. We conclude that

the record shows that the court was not mistaken about the seriousness of the victim's injuries, and we therefore affirm the sentence.

¶ 3

I. BACKGROUND

¶ 4 Defendant had a jury trial. The relevant evidence here is that which relates to how seriously the shooting injured the victim and to defendant's motivation for the shooting.

¶ 5 At trial, patrol officer Michael Gildea of the Zion police department testified that, on July 1, 2007, at about 8:37 p.m., he was dispatched to the scene of a reported shooting. On arrival, he saw a person—James Walls— lying in the roadway. Walls was bleeding from his leg; Gildea spoke to him, and Walls said that “Chopper” had shot him. Walls did not appear to be armed in any way. In the area in which the shooting occurred, Gildea found a baseball cap,¹ a pair of dice, and a small bag of what appeared to be marijuana.

¶ 6 Walls testified that he knew defendant's brother, Ronnie Abernathy, “from the neighborhood.” On the night of July 1, Walls was with Ronnie in a group that included about 15 other people. He and Ronnie “had some words,” then Ronnie swung at him with a closed fist, hitting him in the face. While they were fighting, defendant came onto the scene. When defendant was about 12 feet from Walls, he pulled a .32-caliber revolver from his waistband. Walls told defendant that it was a one-on-one fight, and defendant backed up. Ronnie hit Walls again, and Walls began walking backwards with his hands raised. Defendant pulled the revolver's trigger three times. The first two times, nothing happened, but the third time, it fired, hitting Walls in the leg. Walls ran

¹The transcript actually has Gildea finding a “baseball bat.” However, given the other testimony, the cross-examination, and the physical evidence, we take it that this is a transcription error.

west. His leg hurt; it “felt like it was going to break.” His right pants leg was soaked with blood. He lay down and tried to flag down a car, and the police arrived after a few minutes. He was taken to a hospital where he remained for three days. The medical staff did not remove the bullet or any fragments of it from his leg, but a year later, a bullet fragment worked its way out on its own. Walls displayed a scar on his right inner thigh to the jury.

¶ 7 The parties stipulated that X-rays of Walls’ thigh showed an object, presumed to be a bullet fragment, “in the soft tissues medial to the midshaft of the right femur.” They also stipulated to the testimony of Sergeant Alan Lothar, who had interviewed Walls in the emergency room while he was being treated. Medical staff told Lothar that the bullet had passed through most of Walls’ thigh, but had stayed under the skin at the back. Walls told Lothar that he had been in a fight with Ronnie. “When the fight between Ronnie and Walls was resolved without a clear victor, Chopper attempted to instigate further conflict.” The argument between Walls and defendant went on for about 10 minutes.

“Chopper said, ‘I do this,’ three times as he pulled a black revolver from his right front pants pocket. Chopper pointed the gun at Walls’ leg and pulled the trigger two times (misfired) before it discharged on the third round[,] striking Walls in the right leg.”

¶ 8 The jury convicted defendant. Sentencing was delayed, in part because defendant was to be tried for another shooting.

¶ 9 At sentencing, Detective Kyle Helgesen of the Zion police described the other shooting with which defendant was charged, that of Sherlonder King. King was shot on September 29, 2005—three months after the shooting of Walls. On November 4, 2005, King remained hospitalized. She named defendant as the person who shot her and picked him from a photo lineup. When she spoke

to Helgesen, she could not remember the shooting very well, but suggested that she had gotten into an argument with defendant over a minor domestic issue. She walked away, went into the bedroom, and lay down on the floor. He entered the room, stood over her, and shot her. He then left. The apartment lacked a working phone, so King had to struggle into the hallway to seek help. King and defendant had been in a relationship for several months, but they had started arguing partly because she was unhappy when she realized that he was carrying a gun. The State placed in evidence a report of King's medical treatment. She had damage to her heart, stomach, liver, spleen, and diaphragm.

¶ 10 Defendant presented mitigation testimony of family members and a pastor. The State urged a sentence of 14 to 15 years' imprisonment.

¶ 11 The court said that it had considered all factors in mitigation. Further, it deemed persuasive the evidence that defendant had also shot King. Further, it considered the risk to life in both shootings:

“It's lucky for him and lucky for the two victims that they were not hit in—especially the victim in this case, in a place where he would have gotten killed. But if an artery were to be pierced that person could have gotten killed. And in the situation of Miss King, she came close to being killed.”

It deemed defendant to be a danger to the public:

“I will sentence the defendant to a sentence that's necessary and appropriate under the circumstances and keep the defendant as long as possible under the circumstances as it is justifiable by his actions in the Department of Corrections because I cannot tell the public that this defendant will be rehabilitated, and I cannot assure the public that this defendant would not shoot somebody else again.”

It imposed a sentence of 16 years' imprisonment. After some further complications, defendant filed what became the effective notice of appeal. We then "reverse[d] and remand[ed] for new posttrial and sentencing proceedings and, [potentially], the appointment of counsel for those proceedings." *Abernathy*, 399 Ill. App. 3d at 432.

¶ 12 On remand, defendant filed a new posttrial motion, which the court denied. At the sentencing on remand, the State said that it was relying on the evidence in aggravation already presented, except that it added evidence of defendant being disciplined in prison for a gang-related infraction. The court asked about the health of the victims, saying that it remembered Walls showing his wound to the jury. The State said that it had no new information. The court then ordered a brief recess so that it could examine the new presentencing investigation report (PSI) and documents submitted by defendant.

¶ 13 The court said that it had considered the evidence in aggravation and mitigation, the PSI, and defendant's criminal record.

"The fact remains in my view that the defendant shot two people. They were extremely lucky to survive, especially the one shot through the chest. There probably needs to be protected folks. [*Sic.*] I think that the defendant has not demonstrated a propensity towards rehabilitating himself so to speak. He still continues with these gang activities, still continues to be a member of a gang and engage in fights.

That said, I also considered some of the positive aspects, that the defendant engaged in education. *** Also talk [*sic*] about the lawlessness that occurs out there and also take into consideration the lawlessness and the violence and the fact that there were two people that were shot and they were hurt and they were near probably death. With that in

mind—and I hope they recover because I don't have any updated information and I do criticize probation for not providing updated information with respect to that.”

At that point, the State interrupted, saying, “Before the court makes its sentencing, there is [*sic*] two separate cases with two separate victims just to make that clear for the record. We are sentencing him only on the one shooting in 05 CF 2480.” The court responded, “I do consider the fact that he shot someone else,” and the State replied, “I just wanted to make sure that the record was clear.”

The court then continued:

“It is not an isolated situation. It is not a situation where perhaps this defendant was acting in self-defense, even though they still respond otherwise. I will proceed and sentence this defendant to 15 years in the Illinois Department of Corrections. Credit for time served and good time credit as allowed by the Illinois Department of Corrections.”

The court and parties noted that, in the case stemming from defendant's shooting of King, he had received a 12-year sentence for aggravated battery with a firearm. The court ruled that the sentences were to be consecutive.

¶ 14 Defendant moved for reconsideration of the sentence. Among other things, defendant took issue with the court's characterization of defendant's acts as having left both victims “probably near death,” which he said reflected a misapprehension of the facts. The State responded that a gunshot wound to the leg is a life-threatening injury. The court denied defendant's motion. It commented on defendant's gang involvement, noting that membership can be a survival tactic, and on his attainment of a graduate equivalency degree. It focused on “the fact *** that [defendant] shot somebody and shot somebody when he had also shot somebody before,” and it did not comment on the extent of the injury to Walls. Defendant filed a timely notice of appeal.

¶ 15

II. ANALYSIS

¶ 16 On appeal, defendant again argues that the court abused its discretion in basing the sentence on its misconception of Walls' injury. We do not agree that the court was mistaken on this point.

¶ 17 A general principle of sentencing is that "the trial court is the proper forum to determine a sentence and the trial judge's decision in sentencing is entitled to great deference and weight." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). "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." *Latona*, 184 Ill. 2d at 272. A reviewing court should neither reweigh factors that the trial court considered (*People v. Pippen*, 324 Ill. App. 3d 649, 653 (2001)) nor disturb a sentence that is within the statutory limits for the offense unless the trial court abused its discretion (*People v. Coleman*, 166 Ill. 2d 247, 258 (1995)). Here, defendant's sentence was in the lower half of the range for aggravated battery with a firearm, a Class X felony. See 720 ILCS 5/12-4.2(b) (West 2004) (aggravated battery with a firearm is a Class X felony); 730 ILCS 5/5-8-1(a)(3) (West 2004) (the Class X sentencing range is 6 to 30 years). A sentence is an abuse of discretion only if it "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).

¶ 18 That said, where a trial court's exercise of discretion is founded in a misconception, the exercise of discretion is not proper. An exercise of discretion based on a misunderstanding of *law* is not a proper exercise of discretion: "Where a trial court's exercise of discretion has been frustrated by [its application of] an erroneous rule of law, appellate review is required to permit the exercise of discretion consistent with the law." *People v. Williams*, 188 Ill. 2d 365, 369 (1999). Similarly, an exercise of discretion based on a manifest error of *fact* is also an abuse of discretion. See *People*

v. Johnson, 227 Ill. App. 3d 800, 817 (1992) (reviewing cases and holding that a sentence was an abuse of discretion when the trial court relied on the conclusion that a crime was drug-related and no evidence supported that conclusion).

¶ 19 We do not read a ruling made extemporaneously the same way we read a written disposition or piece of legislation: the choice of words is generally not as careful. For instance, where a judge has plainly used the wrong word—such as “defendant” for “victim”—we will often, as a routine matter, read in the intended word. As the record here shows, the court’s decision lacked the clarity we would expect in a writing. Its statements need to be considered, however, in the full context of the proceedings. This is the case with the court’s comments about the victim’s injuries.

¶ 20 Had the court not made clear that it remembered the injury of Walls, the victim here, defendant might have persuaded us that the court had conflated the injury suffered by this victim with those injuries that defendant inflicted on King. However, given the court’s comments about Walls displaying his scar, we can be assured that the court *did* remember and knew that Walls’ injury was to the thigh.

¶ 21 In theory at least, the court’s comments might be taken to mean that it had concluded, against the evidence, that Walls had been close to death from the shooting. That is not the case here. At the first sentencing, the court made clear that it thought, not that Walls was near death, but rather that the wound was nearly in a life-threatening area:

“It’s lucky for him and lucky for the two victims that they were not hit in—especially the victim in this case, in a place where he would have gotten killed. But if an artery were to be pierced that person could have gotten killed. And in the situation of Miss King, she came close to being killed.”

This statement is clearer than anything that it said at the second hearing, but the court was expressing the same overall idea at both hearings. That the idea was not expressed with complete clarity at the second does not change the reasoning. To be sure, the court could have made the record clearer by using the hearing on the postsentencing motion to restate its reasoning in better words; a court should not hesitate to clarify where it can. Nevertheless, we see no real doubt about what the court was trying to say.

¶ 22 Because the court was not acting under a misapprehension of fact when it imposed the sentence, it properly exercised its discretion in imposing the sentence here.

III. CONCLUSION

¶ 23 For the reasons stated, we affirm defendant's sentence.

¶ 24 Affirmed.