

NOTICE  
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2012 IL App (4th) 100922-U

Filed 4/5/12

NOS. 4-10-0922, 4-10-0923 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
BRIAN A. JAMES,	)	Nos. 08CF1054
Defendant-Appellant.	)	08CF822
	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.  
Justices McCullough and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in considering a factor inherent in the offense when it sentenced defendant to three-year prison terms for two counts of violation of an order of protection to run consecutively to a three-year prison term for another violation of an order of protection.

¶ 2 In July 2008, in McLean County case NO. 08-CF-822, the State charged defendant, Brian A. James, with two counts of violation of an order of protection—subsequent offense (720 ILCS 5/12-30(a)(1) (West 2008)), a Class 4 felony. In September 2008, in McLean County case No. 08-CF-1054, the State charged defendant with two counts of violation of an order of protection—subsequent offense (720 ILCS 5/12-30(a)(1) (West 2008)), a Class 4 felony. The cases were consolidated. Following a February 2010 bench trial, the trial court found defendant guilty on all four counts. In April 2010, the court sentenced defendant in No. 08-CF-

822 on count I only to a three-year prison term and in No. 08-CF-1054 to concurrent three-year prison terms on counts I and II, to run consecutively to the prison term in No. 08-CF-0822.

Defendant appeals, arguing the court abused its discretion in considering a factor inherent in the offense to aggravate defendant's sentence. We affirm.

¶ 3

## I. BACKGROUND

¶ 4

### A. Defendant's Prior Conviction

¶ 5

On February 7, 2008, defendant pleaded guilty to unlawful restraint and domestic battery in McLean County case No. 07-CF-1296. The trial court sentenced defendant to 24 months' probation.

¶ 6

### B. McLean County Case No. 08-CF-822

¶ 7

In June 2008, Rebecca Allen, defendant's girlfriend and caretaker for two of defendant's children, obtained an emergency order of protection against defendant. On July 10, 2008, in McLean County case No. 08-OP-127, the trial court entered a two-year plenary order of protection against defendant in favor of Rebecca Allen and her specified residence, which was served on defendant in open court. Allen testified she obtained the order because "things were out of control in the home" and she "was fed up with the verbal abuse and the emotional abuse."

¶ 8

On July 18, 2010, Allen called the police to her residence after she heard her dog barking and saw people standing in her yard. During their search, the police found defendant hiding under a bed in one of Allen's bedrooms. Defendant was arrested for violating the order of protection granted in case No. 08-OP-127.

¶ 9

Later that day, the State charged defendant, in McLean County case No. 08-CF-822, with two counts of violating an order of protection—subsequent offense (720 ILCS 5/12-

30(a)(1) (West 2008)), a Class 4 felony. Count I alleged that after having been previously convicted of domestic battery in McLean County case No. 07-CF-1296, defendant came within 500 feet of Allen's residence, as was prohibited by the order of protection. Count II charged defendant in similar terms with having contact with Allen. On July 28, 2008, defendant posted bond and was released.

¶ 10 C. McLean County Case No. 08-CF-1054

¶ 11 On September 15, 2008, defendant went to Allen's residence to help Allen repair her water heater. The order of protection was still in effect on this date. While defendant was at Allen's home, Nicole Tennison, defendant's probation officer, performed a home visit at defendant's father's house. Defendant's father indicated defendant could likely be found at Allen's residence. Tennison went to Allen's residence and spoke with defendant. Defendant told Tennison he knew an order of protection had been issued against him but felt his presence at Allen's was necessary as he had family to care for. Detective Johnson was called to the residence and defendant was arrested for violating the order of protection.

¶ 12 On September 16, 2008, in McLean County case No. 08-CF-1054, the State charged defendant with two counts of violation of an order of protection—subsequent offense (720 ILCS 5/12-30(a)(1) (West 2008)), a Class 4 felony, based on the September 15, 2008, incident. Count I alleged that after having been previously convicted of domestic battery in McLean County case No. 07-CF-1296, defendant came within 500 feet of Allen's residence, as was prohibited by the order of protection. Count II charged defendant in similar terms with having contact with Allen.

¶ 13 D. Dismissal of the Order of Protection

¶ 14 Allen testified she believed the order of protection was a mistake, and that in October 2008, she filed a motion to have the order of protection dismissed. The court granted Allen's motion and dismissed the order. Defendant testified at trial that he was never served with the order of protection.

¶ 15 E. Hearing on Consolidated Case and Sentencing

¶ 16 In February 2010, the trial court conducted a bench trial on the consolidated cases. The trial court found defendant guilty on count I and count II in No. 08-CF-822 and guilty on count I and count II in No. 08-CF-1054. At sentencing in April 2010, the trial court heard factors in mitigation and aggravation, including statutory and nonstatutory. The State sought unsuccessful discharge from probation in No. 07-CF-1296, and a five-year prison term in Nos. 08-CF-822 and 08-CF-1054, to run consecutively. Defendant concurred in the State's recommendation in No. 07-CF-1296 and argued for a two-year term in No. 08-CF-822, followed by a consecutive term of one year in No. 08-CF-1054.

¶ 17 The court sentenced defendant in No. 08-CF-822 on count I only to a three-year prison term and in No. 08-CF-1054 to concurrent three-year prison terms on counts I and II, to run consecutively to the prison term in No. 08-CF-822. At the sentencing hearing, the court explained in great detail why defendant was sentenced as he was and what factors it considered in sentencing. Defendant filed a motion to reconsider his sentence. The court denied the motion and again explained why the sentence was appropriate.

¶ 18 Defendant appealed the trial court's judgments in Nos. 08-CF-822 and 08-CF-1054, docketed Nos. 4-10-0923 and 4-10-0922 respectively. We granted defendant's motion and consolidated the appeals.

¶ 19

## II. ANALYSIS

¶ 20 Defendant argues the trial court abused its discretion in sentencing defendant because it improperly considered a factor inherent in the offense to aggravate his sentence. See *People v. Thomas*, 171 Ill. 2d 207, 226, 664 N.E.2d 76, 86 (1996) ("sentencing courts cannot consider an element inherent in the offense as an aggravating factor"). Specifically, defendant contends the court's consideration that defendant's conduct threatened serious harm was improper because the threat of harm is inherent in the crime of violating an order of protection. Defendant bases his claim on a comment made by the court during its discussion of mitigating factors, wherein the court stated, "the violation of an order of protection is inherently threatening." After the court made this statement, it continued on with the aggravating factors and stated, in "[t]erms of statutory factors in aggravation; the defendant's conduct threatened serious harm."

¶ 21 Defendant states it is difficult to ascertain how much weight the trial court placed on the fact that defendant's actions threatened serious harm. He states a three-year term for the July 2008 incident is appropriate given his numerous prior felonies and the fact that Allen did not want him in her home. However, he argues punishing him the same for the September 2008 incident, attempting to restore hot water to the home, is an abuse of discretion demonstrating the court relied too heavily on the threat of harm in pronouncing the sentence.

¶ 22 The State argues the trial court did not use an improper aggravating factor in determining defendant's sentence. The State contends that any mention by the court of the threat of harm being inherent in the violation of an order of protection was referenced for the purpose of summarizing defendant's history of domestic violence with Allen. The State further argues that defendant's sentence does not necessitate remand even if the court improperly considered a

factor in aggravation because the weight the court placed on the threatening nature of the offense was insignificant and did not lead to a greater sentence. See *People v. Walker*, 392 Ill. App. 3d 277, 301, 911 N.E.2d 439, 461 (2009). We have reviewed the record and agree with the State.

¶ 23 A. Standard of Review

¶ 24 "A sentence which falls within the statutory guidelines will not be disturbed on review unless it is manifestly disproportionate to the nature of the offense." *People v. Nussbaum*, 251 Ill. App. 3d 779, 783, 623 N.E.2d 755, 758 (1993). In sentencing a defendant, the trial court "enjoys wide latitude in determining and weighing factors in mitigation or aggravation, and this court gives great deference and weight to the sentence the trial court thought appropriate in any given case." *Nussbaum*, 251 Ill. App. 3d at 781, 623 N.E.2d at 757. Further, this court indulges a strong presumption that the trial court based its sentencing decision upon proper considerations only. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43, 904 N.E.2d 1022, 1028 (2009).

¶ 25 B. Defendant's Sentence

¶ 26 1. *Sentencing Range*

¶ 27 The trial court sentenced defendant in No. 08-CF-822 on count I only to a three-year prison term and in No. 08-CF-1054 to concurrent three-year prison terms on counts I and II, to run consecutively to the prison term in No. 08-CF-0822. The nonextended sentencing range for a Class 4 felony is one to three years, and the extended-term range is three to six years (730 ILCS 5/5-4.5-45; 730 ILCS 5/5-8-2 (West 2010)). Defendant's sentence falls within the statutory guidelines. Further, the sentences were required to be served consecutively (730 ILCS 5/5-8-4(d)(8) (West 2010)) because defendant committed the September 2008 offenses while on bond for the July 2008 offenses.

¶ 28

*2. Statutory Factor in Aggravation*

¶ 29

The record shows the trial court listed the threat of serious harm by defendant as a possible aggravating factor, as is allowed by section 5-5-3.2 of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(a)(1) (West 2010) (the trial court may consider that "the defendant's conduct caused or threatened serious harm" as a reason for imposing a more severe sentence). However, a review of the hearing on defendant's sentencing shows the court made a statement about the inherently threatening nature of the violation because the particular circumstances of these offenses reflected an ongoing cycle of violence between Allen and defendant. At the October 2010 hearing on defendant's motion to reconsider sentence, the court clarified that a "violation of an order of protection is inherently threatening when there is a history of violence which is established so abundantly as it was established in this case." The court further explained this violation had an inherent threat of harm because "a volatile interaction [is] contemplated any time" the parties are in the physical presence of each other.

¶ 30

The trial court considered many factors in aggravation in addition to the threat of harm when it sentenced defendant. Among these factors, the court considered (1) that defendant has not "taken responsibility for breaking the cycle" of violence; (2) it has become necessary for the government to step in to protect defendant and Allen, as well as the children, from their loss of control, as is demonstrated by the many "charges and counter charges regarding DCFS" (referring to a second order of protection Allen sought against defendant in September 2009 and the State's subsequent petition for adjudication of wardship for Allen's children); (3) defendant has a history of prior criminal activity and was convicted of committing a felony while released on bail; (4) defendant's prior record is "so long, \*\*\* so problematic, so often violent, so often

characterized by these denials and evasions and minimizations" that it "cries out for the extended-term maximum in this case"; and (5) a significant sentence is necessary to deter others.

¶ 31 Further, at the hearing on defendant's motion to reconsider sentence, the trial court again noted that "anything other than the maximum sentence within the regular range of imprisonment sentences authorized by statute would deprecate the seriousness of this offense." We conclude the court did not improperly consider a factor inherent in the offense. Rather, it properly considered a statutory factor in aggravation. However, even if it had, it was of little significance in comparison to the entirety of factors discussed and relied on by the court. We conclude the court did not abuse its discretion in sentencing defendant.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.