

NOTICE
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2012 IL App (4th) 110383-U

NO. 4-11-0383

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 31, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
KIM FRANKLIN,)	No. 10CF341
Defendant-Appellant.)	
)	Honorable
)	Richard P. Klaus,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court held (1) the State proved defendant's driving with a blood alcohol concentration above 0.08 was the proximate cause of the victim's injuries, (2) the trial court did not consider an improper factor in aggravation, (3) the court did not abuse its discretion in sentencing defendant to 12 years in prison, and (4) the court lacked the authority to impose a \$10 "Crime Stoppers" fee.

¶ 2 Following an October 2010 trial, a jury found defendant, Kim Franklin, guilty of aggravated driving with a blood alcohol concentration (BAC) of 0.08 or more. In January 2011, the trial court sentenced defendant to 12 years in prison, ordering her to pay restitution and various fines and fees, including a \$10 "Crime Stoppers" fee. In February 2011, defendant filed a motion to reconsider sentence, which the court later denied.

¶ 3 Defendant appeals, arguing (1) the State failed to prove her driving was the proximate cause of the injuries the victim sustained, (2) the trial court considered an improper aggravating

factor during sentencing, (3) the court imposed an excessive sentence, and (4) the court did not have the authority to impose the "Crime Stoppers" fee. We affirm in part, vacate in part, and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 On December 9, 2009, defendant was driving her Ford Explorer northbound on a five-lane road in Champaign County when she struck Mercedes Washington's Oldsmobile. Washington had been traveling southbound and was attempting to make a left turn into a nearby apartment complex. Officers later transported defendant to a hospital, where a blood sample revealed she had a BAC of 0.208. As a result of the accident, Washington suffered a brain injury, fractured pelvis, two fractured vertebrae, and nerve damage to her bladder.

¶ 6 In March 2010, a grand jury indicted defendant with aggravated driving with a BAC of 0.08 or more, a Class 4 felony, based on defendant becoming involved in a motor vehicle accident that resulted in great bodily harm or permanent disability to Washington. 625 ILCS 5/11-501(a)(1), (d)(1)(C) (West 2010)). Following an October 2010 jury trial, a jury found defendant guilty of the charge.

¶ 7 In November 2010, defendant filed a motion for acquittal notwithstanding the verdict, alleging the State failed to show defendant's BAC was the proximate cause of the great bodily harm to Washington. In January 2011, the trial court denied defendant's motion and proceeded to sentence defendant to 12 years in prison with 81 days' credit for time previously served.

¶ 8 The court also ordered defendant to submit specimens of blood, saliva, or tissue to the state police and to pay (1) a \$200 genetic marker grouping analysis fee, (2) over \$57,000 in restitution to the victim, (3) the statutory minimum fine of \$1,750, (4) a \$10 local anti-crime

assessment fee, and (5) a \$150 laboratory crime analysis fee of \$150.

¶ 9 In February 2011, defendant filed a motion to reconsider, arguing the trial court imposed an excessive sentence. The court denied defendant's motion after an April 2011 hearing.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues (1) the State failed to prove her driving was the proximate cause of the injuries the victim sustained, (2) the trial court considered an improper aggravating factor when sentencing her, (3) the court imposed an excessive sentence, and (4) the court did not have the authority to impose the \$10 local anti-crime fee. We address each argument in turn.

¶ 13 A. Whether The State Proved Defendant's Driving Was
The Proximate Cause Of The Victim's Injuries

¶ 14 Defendant first contends the State failed to prove her driving was the proximate cause of the injuries Washington sustained. We disagree.

¶ 15 Under section 11-501(a)(1) of the Illinois Vehicle Code (Vehicle Code), a person commits a Class A misdemeanor when she drives a vehicle with a BAC of 0.08 or more. 625 ILCS 5/11-501(a)(1), (c)(1) (West 2010). A person commits aggravated driving under the influence (DUI), a Class 4 felony, when she (1) drives with a BAC of 0.08 or more, (2) becomes involved in an accident that results in great bodily harm to another, and (3), while driving with a BAC of 0.08 or more, is a proximate cause of the victim's injuries. 625 ILCS 5/11-501(d)(1)(C), (2)(A) (West 2010).

¶ 16 Proximate cause includes both cause in fact and legal cause. *People v. Johnson*, 392 Ill. App. 3d 127, 131 (2009). Cause in fact is established where a reasonable certainty is shown that

a defendant's acts caused the injury, and legal cause is established where an injury was foreseeable as to the type of harm that a reasonable person would expect to see as a likely result of her conduct.

Id.

¶ 17 We review a challenge to the sufficiency of the evidence by assessing whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Martin*, 2011 IL 109102, ¶ 15, 955 N.E.2d 1058, 1062. "We view the evidence in the light most favorable to the prosecution," drawing all reasonable inferences from the evidence in the prosecution's favor. *Id.* We will not set aside a conviction unless the evidence is "so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 18 Based on the evidence presented at trial, a reasonable jury could find defendant's driving with a BAC above 0.08 was the proximate cause of Washington's injuries. First, Officer Brian Greear testified he responded to the accident and spoke to defendant, who told him she had been "driving pretty fuckin' fast." Defendant later told Greear she had been driving 40 miles per hour, but it was not until after Greear asked her, "does that mean you were going a hundred, you were going 80, you were going 40?" The speed limit was either 35 or 40 miles per hour. Greear opined that excessive speed could contribute to damage in an accident. He also described the area of the accident as "a heavily traveled roadway in Champaign," with numerous turnoffs and turnons. Based on the foregoing, the jury could reasonably find defendant's driving was the proximate cause of Washington's injuries.

¶ 19 Nonetheless, defendant contends that Washington's act of "pulling in front of oncoming traffic" was the proximate cause of her injuries. We disagree. Greear testified if defendant

were driving at an excessive speed, it could affect another driver's ability to make a left-hand turn. Moreover, Greear opined lack of braking contributed to the damage Washington sustained. Both Greear and Officer Thomas Petrilli testified they observed the scene of the accident and did not see skidmarks or evidence that defendant tried to brake. In addition, following the impact, Washington's car came to rest 20 to 30 feet past the point where she was trying to make a turn. The foregoing testimony and circumstantial evidence support the jury's finding that defendant's driving was the proximate cause of Washington's injuries.

¶ 20 Likewise, we disagree with defendant's contention that the State "failed to rebut" the testimony of Rodney Franklin, defendant's husband, who was a passenger in defendant's car on the night of the collision. Franklin testified the impact happened in "a split second" and he did not "see a way to avoid" it. However, the "trier of fact is best equipped to judge the credibility of witnesses," and accordingly, a jury's findings concerning credibility are entitled to great weight. *Wheeler*, 226 Ill. 2d at 114-15. Based on the other evidence presented at trial, a rational jury could reject Franklin's testimony on this point and find defendant's driving with a BAC over 0.08 was the proximate cause of Washington's injuries.

¶ 21 B. Whether The Trial Court Considered An Improper Aggravating
Factor When Sentencing Defendant

¶ 22 Defendant also argues the trial court erred by considering, during sentencing, the "general harm" defendant caused Washington because this "general harm" was a factor inherent in the offense. Defendant concedes she has forfeited her claim by failing to raise it in her motion to reconsider sentence, but she urges us to review it under the plain-error doctrine. See *People v. Rathbone*, 345 Ill. App. 3d 305, 310 (2003).

¶ 23 The plain-error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurs and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step of plain-error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 24 A trial court may not consider a factor inherent in the offense as a factor in aggravation at sentencing. See *People v. Conover*, 84 Ill. 2d 400, 404 (1981). However, our supreme court has stated that the "the *degree of harm* caused to the victim *** may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphases in original.) *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986).

¶ 25 Here, the court stated it considered "the impact on Mercedes Washington, frankly the impact of the fact that society has been deprived of Ms. Washington's talents and abilities which have been deprived or have—the Defendant has deprived both her and society of." Later, the court stated that defendant used drugs and alcohol and "got into a car, drove at a high rate of speed up North Mattis and encountered Mercedes Washington and altered both the course of her life and Mercedes Washington's life irrevocably."

¶ 26 We do not interpret these statements to mean the trial court considered in aggravation that defendant caused "great bodily harm or permanent disability." Rather, we find the court was emphasizing that Washington's injuries surpassed the minimum "great bodily harm or permanent disability" that is statutorily required. Indeed, in her victim impact statement, Washington, a 23-year-

old graduate student who graduated from college at the top of her class, explained that she is no longer able to drive, attend school, or control her bladder. She is also unable to obtain a job because she is unable to stay alert and focused and also unable to sleep at night. Washington's mother's impact statement said the changes in Washington's life are permanent, and the financial stress of caring for Washington is taxing. The trial court is entitled to consider "the degree of harm caused to the victim." (Emphasis omitted.) *Saldivar*, 113 Ill. 2d at 269. Based on the foregoing, we conclude the court did not rely on an improper factor in aggravation.

¶ 27 C. Whether The Trial Court Abused Its Discretion In Sentencing Defendant

¶ 28 Defendant argues the trial court abused its discretion in sentencing her to 12 years in prison because she presented mitigation evidence sufficient to warrant a lesser sentence. Specifically, defendant cites her age, children, employment record, and lack of meaningful criminal history.

¶ 29 A trial court has broad discretionary powers in imposing a sentence, and absent an abuse of discretion, the sentence may not be altered on review. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence within statutory limits will be deemed excessive and an abuse of discretion only where 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. Fern*, 189 Ill. 2d 48, 54 (1999). When mitigating factors are presented to a court, we presume the court considered them. *People v. Phippen*, 324 Ill. App. 3d 649, 652 (2001).

¶ 30 Here, the jury convicted defendant of aggravated DUI, a Class 4 felony punishable by 1 to 12 years in prison. 625 ILCS 5/11-501(d)(1)(C), (2)(A), (2)(F) (West 2010)). In announcing defendant's 12 year-sentence, the trial court stated it had considered the factors in mitigation as well as defendant's presentence report, noting that defendant demonstrated "a long pattern of substance

abuse" and, despite prior court involvement and efforts at substance-abuse treatment, defendant continued to choose "a lifestyle of abusing alcohol and cannabis." Defendant's presentence report showed that defendant had previously been convicted of (1) disregarding a stop sign (on two separate occasions), (2) disregarding a traffic-control device, (3) driving 21 to 25 miles per hour above the speed limit, (4) resisting a peace officer, and (5) DUI. Defendant had also previously been placed on court supervision for (1) operating an uninsured motor vehicle and (2) endangering the life or health of a child. As part of her sentence in the resisting a peace officer, DUI, and endangering the life or health of a child charges, the court had ordered defendant to complete substance abuse treatment.

¶ 31 The trial court did not abuse its discretion in sentencing defendant. While defendant presented mitigating factors to the court, "[t]he existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed." *Pippen*, 324 Ill. App. 3d at 652. The court stated it had considered the factors in mitigation, defendant's presentence report, defendant's statement in allocution, and the arguments of counsel. The court further stated it had considered "the impact on Mercedes Washington, frankly the societal impact of the fact that society has been deprived of Ms. Washington's talents and abilities which have been deprived or have—the Defendant has deprived both her and society of." Finally, the court noted defendant's history demonstrated a "long pattern of substance abuse" but defendant had "elected to continue a lifestyle of abusing alcohol and cannabis." Thus, the record indicates the trial court properly weighed both the factors in mitigation and aggravation and sentenced defendant to a term of imprisonment within the statutory limit. The court did not abuse its discretion.

¶ 32 D. Whether The Trial Court Possessed The Authority
To Impose The "Crime Stoppers" Fee

¶ 33 Finally, defendant argues the trial court lacked the authority to impose the \$10 "Crime Stoppers" fee. The State concedes this issue, and we accept the State's concession. See *People v. Beler*, 327 Ill. App. 3d 829, 837 (2002) (concluding the trial court could not order the defendant to pay a Crime Stoppers fee under section 5-6-3 or 5-6-3.1 of the Unified Code of Corrections (730 ILCS 5/5-6-3(b)(12), 5-6-3.1(c)(12) (West 1998)) because the court imposed a sentence of incarceration).

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we vacate the \$10 Crime Stoppers fee and otherwise affirm the trial court's judgment. We remand for issuance of an amended sentencing judgment reflecting vacatur of the Crime Stoppers fee. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 36 Affirmed in part, vacated in part, and cause remanded.