

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
March 29, 2013

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. 09 CR 6175
)	
ALBERT HOLIDAY,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant waived review of his sufficiency of the evidence contention where he invited the error by requesting a reckless homicide jury instruction. Despite waiver, the evidence supported the jury's verdict finding defendant guilty of reckless homicide. The trial court did not abuse its discretion in sentencing defendant. One of defendant's convictions for reckless homicide violated the one-act, one-crime rule and, therefore, defendant's mittimus must be corrected.

1-11-1492

¶ 2 Following a jury trial, defendant, Albert Holiday, was convicted of reckless homicide. Defendant was later sentenced to the maximum extended term within the class x range, *i.e.*, 10 years. On appeal, defendant contends: (1) the State failed to prove he acted recklessly beyond a reasonable doubt; (2) his sentence was excessive; and (3) the trial court must vacate one of his reckless homicide convictions because it violates the one-act, one-crime doctrine. Based on the following, we affirm one of defendant's convictions for reckless homicide and the accompanying sentencing, and we reverse the second conviction as a violation of the one-act, one-crime doctrine.

¶ 3 **FACTS**

¶ 4 The trial evidence demonstrated that a fight broke out between two large groups of neighboring parties during which defendant attempted to flee in his vehicle. After having been sprayed with mace in his eyes, defendant entered his vehicle and began driving away while the vehicle was surrounded by people. Defendant hit a number of people in the process. The victim, Charles Rowry, eventually died as a result of his injuries.

¶ 5 Towanner King testified that, on June 15, 2008, she hosted a Father's Day barbeque party at her home located on North Monticello in Chicago, Illinois. Towanner said her next door neighbors, the Spence family, were also hosting a party that day. The neighbors shared a common backyard with a walkway separating the addresses.

¶ 6 According to Towanner, at approximately 9 p.m. or 10 p.m., an argument erupted between Taura Roby, a member of her family, and another woman. At the time, Towanner was walking in the alley with her son. She was not aware of the cause of the fight. While walking

1-11-1492

southbound down the alley, Towanner heard someone say, "watch out." Towanner and her son were then struck from behind by a car. Towanner fell to the ground and was assisted to her feet by her sister, Patricia Jones. Towanner then heard Patricia say, "here he come again" and Towanner was struck again in her left leg. Towanner also witnessed the car strike her niece, Yolanda Smith, and the victim, who was sitting on a crate near a garage at the time.

¶ 7 Patricia testified that the fight was instigated between two women, each a member of one of the families, over an alley parking space. Patricia stated that "everybody was drinking." According to Patricia, the fight was verbal until someone from the "other side" sprayed mace, at which point the fight escalated to a physical event. Patricia said she was able to suppress the fight after approximately five or ten minutes. After the fighting had ceased, Patricia observed defendant enter his car, which was parked in a vacant lot located across from the backyard where the parties were being held and north of the garages on the westside of the alley. Patricia denied that defendant was being attacked as he entered his car. According to Patricia, defendant drove his car and struck Towanner and her son. Patricia ran to assist Towanner and pushed her against a garage. After moving across the alley, Towanner observed defendant's car return without its lights illuminated and strike Towanner again. Defendant also struck Yolanda, who was standing by the garage. Patricia additionally observed defendant strike the victim with his car. The victim had been sitting on a crate. Patricia said defendant fled the alley. Patricia subsequently identified defendant in a police lineup.

¶ 8 Yolanda testified that she was walking southbound in the alley toward the party when she saw a "huge fight" taking place in the alley. Yolanda recognized some of her family members

1-11-1492

involved in the fight, which engrossed somewhere between 10 and 20 people. Yolanda observed a vehicle strike Towanner and, after she assisted Towanner up from the ground, the vehicle struck both Towanner and Yolanda. Yolanda did not observe the car hit anyone else.

¶ 9 Antwone Rowry testified that when he arrived at the party there was a large crowd of people in the alley, but no one was fighting. Antwone denied telling the police that a brawl was ongoing when he arrived. According to Antwone, he observed defendant exit the common door of the building and he "looked pissed." Antwone knew defendant as a friend, but defendant refused to speak to Antwone. Antwone denied observing anyone attack defendant. Antwone did observe defendant enter his car, which was parked in the alley facing west. Antwone disagreed with Patricia's testimony regarding the location of defendant's car. Antwone testified that defendant "bagged up" his car and "shot down the alley." Antwone observed defendant strike Towanner and her son.¹ According to Antwone, the victim was sitting on a crate nearby. The victim stood for a brief moment and then sat back down. Antwone and a number of others rushed to Towanner's aid after defendant's car exited the alley. Patricia then alerted the group that defendant had turned his car around and was driving back down the alley toward them. Antwone observed defendant's car hit speed bumps and emit sparks. Defendant then struck Towanner and Yolanda and hit Antwone in the right leg. Antwone fell to the ground as a result and observed the victim on the ground. Antwone said defendant was "aiming" at his family members both times that he hit the individuals. Antwone subsequently identified defendant in a

¹Antwone initially testified that Towanner and her son were in the middle of the alley but later testified that they were near the garages.

1-11-1492

police lineup.

¶ 10 Jacalyn King testified that she was in the alley when the fight escalated. Jacalyn said the fighting calmed as a result of Patricia, her mother, but resumed when someone sprayed Jacalyn's cousin with mace. Jacalyn brought her children to a neighbor's house for their safety. Jacalyn, however, testified that she observed defendant obtain keys from a woman and retrieve something from the trunk of his car, which was parked near the garages in the alley. Jacalyn admitted that the notes from an interview she gave to the police do not include her testimony regarding a woman transferring keys to defendant. Jacalyn testified that she observed defendant drive his car and strike Towanner and her son. Jacalyn said the victim was sitting on a crate near the garage when Towanner was first hit. Jacalyn additionally testified that defendant drove down the alley and made a u-turn. Jacalyn, Patricia, Antwone, and Shannon Alexander assisted Towanner. Jacalyn then observed defendant's car return and swerve to strike Towanner again, along with Antwone, Yolanda, Shannon, and the victim. Jacalyn later identified defendant in a police lineup.

¶ 11 Clarence White testified that he was in his house on the date in question when a neighbor told him that "someone crashed into [his] garage." White said his garage shared the alley with the Monticello apartment building. As he exited his house, White testified that he saw a dark-colored car "going at least 50 miles an hour" down the alley and hit his fence and garage. White said he was five feet from the garage when the car hit. When White walked into the alley, he saw an older man, *i.e.*, the victim, and a woman on the ground "directly in front of the garage." White said the car drove northbound away from the area. White denied hearing anyone say "get him" as

1-11-1492

the car hit the fence and garage. White described the scene as "basically chaos in the alley."

¶ 12 Doctor Kimberly Nagy testified that she and another doctor treated the victim at Cook County Hospital from June 15, 2008, until July 21, 2008, when he was discharged to a long term care facility. When the victim first arrived to the hospital, he was in a coma, had low blood pressure, and had a dislocated knee. Dr. Nagy categorized his condition as extremely unstable. The victim underwent an emergency operation to release bleeding and pressure in his abdomen. According to Dr. Nagy, the victim suffered injuries to his brain and multiple fractures in his spinal cord, spine, and neck, causing his spinal cord to compress. The victim was placed in the intensive care unit where he was unable to breath on his own, remained in a coma, and was quadriplegic. The victim required the assistance of a ventilator for his entire hospital stay.

¶ 13 Doctor Hilary McElligot, an assistant medical examiner, testified regarding the victim's autopsy results. The autopsy was performed on February 5, 2009. Dr. McElligot testified that the victim died of sepsis due to quadriplegia caused by the multiple injuries that resulted from the car striking him. Dr. McElligot opined that the victim's death was a homicide. According to Dr. McElligot, the victim had ulcers, or "bed sores," on his lower back, buttocks, heels, and right elbow. In addition, the victim's brain was swollen and had softened and there was evidence that he suffered remote strokes. The autopsy report demonstrated a clinical history of sepsis and quadriplegia, as well as multiple injuries, such as cervical spine fractures, and an enlarged heart, softened areas of the brain, and pulmonary congestion.

¶ 14 Defendant testified that he arrived at the party at approximately 5 p.m. on the date in question. Defendant brought his six year old son. According to defendant, a party was not being

1-11-1492

held next door at the neighbor's house. Defendant said he parked his green Mazda in the alley.

Defendant acknowledged seeing Antwone, but testified that he greeted him and spoke to him.

¶ 15 Defendant testified that he initially observed an argument in the backyard of the apartment building, but he later learned that there was an argument in the alley. Defendant observed his cousin, Jacques Spence, and another man preparing to fight in the backyard. Jacques was punched and defendant was hit in the mouth. Defendant could not identify who hit him. According to defendant, he was continuously struck by several people and sprayed with mace, causing his eyes to burn and tear. Defendant reported having trouble breathing and coughing. Defendant said he stumbled toward the alley and fell to the ground. When he stood up, defendant ran to his car because he was "trying to get away from these people that was jumping on me." Defendant said he ran to his car because he did not believe he could escape from his attackers by running down the alley. Defendant entered the car, which was not locked, and started the ignition. Defendant said he attempted to close the door, but was prevented by people continuing to jump on him. The attackers attempted to reach his keys and grabbed the steering wheel. Defendant, however, eventually placed the car into drive and jerked the steering wheel to counteract his attackers. According to defendant, people were running and fighting in the alley and backyard. Defendant then pushed the accelerator in an attempt to "get away from these people that were jumping me." Defendant said, when the car began to move, his vision was blurred from the mace, but he could see. Defendant continued to attempt to fend off his attackers with his left arm while they tried to pull him from the car.

1-11-1492

¶ 16 Defendant testified that he did not know whether his car hit anything or anyone and he did not look forward when the car was moving. Instead, defendant's attention was focused on his attackers at the side of the car door. Defendant testified that as the car moved down the alley the car was jerking and the ride was "rough." Defendant said he eventually gained control over the car and did not hit anyone or anything thereafter. Defendant testified that he did not try to hit anyone. Defendant said he drove to the end of the alley, but became concerned that he had hit people with his car and concerned for the well-being of his family. As a result, defendant turned his car back in the direction of the party. Defendant did not attempt to drive around to the front of the building because he did not know the address of his uncle's home. As he approached, defendant heard his attackers threaten him, saying "get him, get him." Defendant observed people laying in the alley and knew that he might have struck them with his car, but he did not stop. Rather, to avoid the attackers that he said were running toward the car and throwing items such as bottles, defendant accelerated down the alley without his headlights illuminated. According to defendant, he did not strike anyone when he drove down the alley the second time.

¶ 17 Defendant drove his car to his brother's house. He did not alert the authorities. Defendant turned himself into the police two days later.

¶ 18 Bridgette Spence, defendant's aunt, and Jacques denied that the next door neighbors were also having a party on the date in question. However, Bridgette testified that there were non-family members in the alley adjacent to the common backyard.

¶ 19 Defendant's witnesses testified that members of their family attempted to break up the fight. Some of the witnesses observed defendant being attacked, but none of the defense

1-11-1492

witnesses observed defendant drive in the alley and hit individuals because none of them were present at the time.

¶ 20 Michelle Crockett, defendant's cousin, testified that she observed a Mexican or Puerto Rican in a car in the alley while the fight was ongoing. Michelle observed the individual reach under his seat and retrieve what she believed was a handgun or weapon. Michelle called the police as a result and reported seeing a handgun to cause the police to arrive quickly despite never actually seeing a handgun.

¶ 21 Robin Smith, defendant's cousin, testified that she was at the party and became scared for her life when the fight began. Robin did not observe defendant during the fight. Robin testified, however, that she observed a car arrive with two men and the driver said "air this b*** out." Robin interpreted the statement to mean the pair intended to shoot.

¶ 22 LaTarah Spence, also defendant's cousin, testified that while at the party she heard someone yell "shoot the party up" or "air the party out." LaTarah did not observe any handguns. LaTarah said she, Robin, and LaTarah's boyfriend fled to a house one block over. They hid under a porch for approximately 15-20 minutes. They emerged when they heard sirens.

¶ 23 After the close of evidence, a jury instructions conference was held off the record. When back on the record, the trial court noted that defendant requested the jury be instructed on both second degree murder and reckless homicide as lesser included offenses. The requests were granted.

¶ 24 During closing arguments, defense counsel read the instructions for reckless conduct and reckless homicide to the jury. Defense counsel argued that defendant "got in that car, and he

1-11-1492

tried to drive off without taking into account who could be possibly around him knowing that there was a crowd in the alley, and he put his foot on the gas, and he drove, and he hit Charles Rowry, and he hit some other people.” Defense counsel later added that defendant “was thinking of preventing injury to himself, further injury to himself, and that self-preservation resulted in a reckless act.” Lastly, defense counsel finished his closing argument by stating:

“[Defendant] didn’t mean to kill anybody that day. He simply wanted to save himself from harm out there in the alley on Father’s Day. I am asking that you find him not guilty of first degree murder, not guilty of attempt first degree murder. If anything that [defendant] did, it was reckless, his behavior. We are asking that you take that into consideration and find him not guilty.”

¶ 25 Defendant was found guilty of reckless homicide for the death of the victim and not guilty of first degree murder and all counts of attempted first degree murder.

¶ 26 At defendant’s sentencing hearing, the State argued in aggravation that he was eligible for an extended term sentence based on his background. Defense counsel argued in mitigation that defendant’s convictions were nonviolent, that he obtained a GED, and that he was employed prior to the incident. Defendant gave a statement in allocution that he was sorry for the incident and did not intend to hurt anyone.

¶ 27 In announcing defendant’s sentence, the trial court stated:

“I have heard the evidence, along with the jury. Mr. Holiday came to court accused of first degree murder. I would have found it well within the facts heard had the jury returned that particular verdict. They did not. And, of course, that is

respected. That's why we have a jury system. In their minds, what the government proved beyond a reasonable doubt was reckless homicide.

It was an egregious reckless homicide where many people got hurt, one killed. He had a very difficult end of his life, living in a shell, a prisoner in his own body for a period of time before finally dying. He was in considerable pain. All this because of Albert Holiday's behavior. Multiple people hurt, which started out as an argument over a parking space escalated because of Albert Holiday. Now the Rowry family is impacted forever; Mr. Holiday's family impacted, too.

He's got several felony convictions in his background. I agree *** they are not crimes of violence. But I also am mindful of the facts that there was so much damage that was done in this case, all without any just cause.

I have looked carefully at all the matters contained in the presentence investigation. I find that he is extendable for an extended term, and I find it would be in the interest of justice to sentence him accordingly. The sentence will be ten years in the penitentiary on counts 1 and 2. They will be concurrent."

The trial court denied defendant's motion to reconsider that sentence, finding it "carefully considered all of the evidence [adduced] at trial, the things contained in the pre-sentence investigation that brought to the Court's attention at the sentencing hearing, both aggravation and mitigation." This timely appeal followed.

¶ 28

DECISION

¶ 29

I. Sufficiency of the Evidence

¶ 30 Defendant first contends the State failed to prove him guilty of reckless homicide beyond a reasonable doubt. Specifically, defendant argues that the jury's rejection of the State's theory of intentional murder in favor of a reckless homicide verdict necessarily meant the jurors did not find the State's witnesses to be credible. Defendant argues that the jury's verdict demonstrated that it relied upon his testimony that he hit the victim while being attacked, which did not amount to recklessness. In response, the State contends defendant is barred from raising his contention where he invited the alleged error by requesting a jury instruction for reckless homicide. In the alternative, the State contends that the evidence supported the jury's verdict.

¶ 31 A challenge to the sufficiency of the evidence requires a reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Williams*, 388 Ill. App. 3d 422, 429 (2009). In order to overturn a judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 32 A defendant is guilty of reckless homicide when the State proves beyond a reasonable doubt that: (1) the defendant was operating a motor vehicle; (2) the defendant unintentionally caused a death while operating the vehicle; and (3) the acts which caused the death were

1-11-1492

performed recklessly so as to create a likelihood of death or great bodily harm to some person.

720 ILCS 5/9-3(a) (West 2008). Section 4-6 of the Criminal Code of 1961 defines

"recklessness" as "[a] person is reckless or acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2008).

¶ 33 We first address the State's claim that defendant waived review of his contention by inviting the alleged error. "A defendant cannot successfully argue for a lesser-included-offense instruction, allowing deliberation on whether that lesser-included offense was committed, and later challenge the sufficiency of the evidence to support a verdict in favor of the defendant's lesser guilt." *People v. Feldmann*, 314 Ill. App. 3d 787, 797 (2000). In the case before us, defendant did just that. Defendant was charged with first degree murder, but defense counsel requested and was granted an instruction for reckless homicide. Following deliberations, the jury found defendant guilty of reckless homicide. Defendant now challenges the sufficiency of the evidence to support the jury's verdict. "The purpose of the invited error rule is to prohibit a defendant from unfairly obtaining a second trial on the basis of error which he injected into the proceedings." *People v. Schickel*, 347 Ill. App. 3d 889, 897 (2004). We find defendant has waived his contention based on the doctrine of invited error.

¶ 34 Waiver aside, we find that the evidence was sufficient to support the jury's verdict of reckless homicide. Contrary to defendant's argument that the jury's verdict necessarily

1-11-1492

demonstrated it accepted defendant's version of the events and rejected the State's version of the events, the jury was the trier of fact and was able to rely on *any* evidence that a rational trier of fact could have relied upon to support its finding. *Jackson*, 443 U.S. at 319. We will not invade the province of the jury by attempting to surmise what testimony it found credible, how it resolved inconsistencies, or the weight it gave to certain witness testimony. See *Williams*, 388 Ill. App. 3d at 429.

¶ 35 The jury heard evidence that defendant attempted to flee the scene of a large fight between two families. In so doing, defendant entered his car and proceeded to drive down an alley crowded with people, despite his limited vision after having been sprayed in the eyes with mace. Defendant testified that he had to fight off attackers before gaining control of his car, but admitted that he hit people while fleeing. Then, despite having retreated to safety, defendant made a u-turn and drove back down the alley. Defendant testified that on his return trip he did not hit anyone; however, several State witnesses testified that defendant hit Towanner and her son on the first trip and Towanner, Yolanda, Antwone, and the victim on his return trip. The victim later died from his injuries related to being hit by defendant's car. Any rational trier of fact, such as this jury, could have found that defendant's actions were reckless and not reasonable under the circumstances. See 720 ILCS 5/4-6 (West 2008).

¶ 36 II. Excessive Sentence

¶ 37 Defendant next contends his sentence was excessive in light of mitigating factors and where the trial court failed to properly consider his potential for rehabilitation. The State contends defendant's maximum extended term sentence was proper due to his prior felony

1-11-1492

convictions and where the trial court considered the factors surrounding defendant's conviction and his rehabilitative potential.

¶ 38 A circuit court's sentence is entitled to great deference. *People v. Illgen*, 145 Ill. 2d 353, 379 (1991). A sentence must be balanced between the seriousness of the offense at issue and the potential for the defendant's rehabilitation. See Ill. Const. 1970, art. I, § 11. A trial court, however, need not assign greater weight to the defendant's rehabilitative potential than to the seriousness of the offense. *People v. Gutierrez*, 402 Ill. App. 3d 866, 902 (2010). "In fact, the seriousness of the crime committed is considered the most important factor in fashioning an appropriate sentence." *Id.* A sentence that is within the statutory limits should not be disturbed unless the circuit court has abused its discretion. *People v. Perrequet*, 68 Ill. 2d 149, 153 (1977). So long as the circuit court "does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense." *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990). The trial court weighs the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court may not substitute its judgment for that of the trial court simply because it would have weighed those factors differently. *Id.*

¶ 39 At the outset, we note that defendant does not dispute that his sentence was within the statutory limits where the trial court found he was eligible for an extended term. See 730 ILCS 5/5-5-3.2(b)(1), 5-8-2(a) (West 2008). Moreover, our review of the record demonstrates that the trial court considered evidence in mitigation and aggravation. It is well established that a trial

court need not expressly announce its consideration of mitigating factors. *People v. Jones*, 376 Ill. App. 3d 372, 393 (2007). Rather, absent evidence to the contrary, a trial court is presumed to have considered all mitigating factors presented. *Gutierrez*, 402 Ill. App. 3d at 900.

Furthermore, in instances, such as in this case, where a presentence investigation report is presented to the court, it is presumed the trial court considered the defendant's potential for rehabilitation. *Id.* The existence of mitigating factors does not obligate the court to reduce the sentence from the maximum. *Id.* There is nothing in the record before us to overcome the presumption that the trial court considered all of the mitigating evidence and defendant's potential for rehabilitation. We, therefore, find there was no abuse of discretion.

¶ 40 III. One-Act, One-Crime Violation

¶ 41 Defendant contends, and the State concedes, that one of his convictions for reckless homicide should be vacated as a violation of the one-act, one-crime rule.

¶ 42 In *People v. King*, 66 Ill. 2d 551 (1977), the Illinois Supreme Court announced the one-act, one-crime rule, which prohibits multiple convictions for offenses that were based on the same physical act. *Id.* at 566. In this case, defendant was convicted of two counts of reckless homicide based on the reckless driving which caused the death of the victim. As a result, one of defendant's convictions must be vacated. *People v. Crespo*, 203 Ill. 2d 335, 344-46 (2001) (when the State treats the defendant's conduct as one single act instead of distinct and separate acts, then multiple convictions cannot stand). Pursuant to Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we instruct the circuit clerk to amend defendant's mittimus to reflect only one conviction for reckless homicide.

1-11-1492

¶ 43

CONCLUSION

¶ 44 We affirm one of defendant's convictions for reckless homicide and the accompanying sentence. We instruct the circuit clerk to modify defendant's mittimus to reflect only one reckless homicide conviction.

¶ 45 Affirmed; mittimus corrected.