

Nos. 1-11-1257 and 1-11-2402 (Cons.)

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 1607
	)	
TODD SOUTHWORTH,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Harris, P.J., and Connors, J., concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Circuit court's judgment was affirmed where defendant's sentence was not excessive, nor was there an unreasonable disparity between his sentence and that of his codefendant.
- ¶ 2 Defendant Todd Southworth entered into an open plea of guilty to aggravated kidnaping and was sentenced to 18 years' imprisonment. On appeal, defendant asserts that his 18-year sentence was excessive and was unreasonably disparate to the 4-year sentence imposed on his codefendant Ashley Henyard. We affirm.
- ¶ 3 The record shows that defendant and codefendant were charged with two counts of aggravated kidnaping, one count of robbery of a person 60 years of age or over, two counts of aggravated robbery, two counts of attempted residential burglary, and two counts of unlawful

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restraint. On December 13, 2010, defendant entered into an open plea of guilty to the offense of aggravated kidnaping based on the following stipulated facts.

¶ 4 On January 2 into January 3, 2009, Alfred Hayes, who was 65 years old, had a conversation with codefendant, who asked him to pick her up at North and Leamington Avenues in Chicago. Hayes drove to that location, did not see her, and turned to drive home. As he was driving, he observed codefendant and defendant following him in a car. After pulling up to his house, Hayes was approached by defendant who pulled out a gun, which was later determined to be a fake, and placed it to Hayes' head and searched his pockets. Defendant removed Hayes' wallet, pushed him into the doorway of his building, and forced him up to the third floor where Hayes' apartment was located. Defendant told Hayes that he was going to take all the money from his apartment, but Hayes told defendant he was not going to open the door. Defendant fled the building and, shortly thereafter, defendant and codefendant were arrested.

¶ 5 At sentencing on January 27, 2011, Reverend Johnny Miller testified on behalf of defendant that he was the pastor of the Mount Vernon Baptist Church and he knew defendant for over 35 years. Miller indicated that he could assist defendant if the court gave him a lesser sentence. Defendant's father, Willie Southworth, testified on behalf of defendant and asked the court to be merciful. The defense also presented evidence, through letters from Kimberly Flennoy and Claudia Barrera, that defendant worked at Safer Foundation as a crew supervisor.

¶ 6 Defense counsel also indicated in mitigation that when defendant's job ended in December 2008, defendant became depressed and began drinking. When his girlfriend, the codefendant in this case, initially proposed the idea of setting up the victim, defendant resisted, indicating that he would not harm Hayes. Furthermore, when he ultimately did rob Hayes, defendant did not use a real weapon or force entry into Hayes' apartment. Following his arrest, defendant cooperated with police and admitted to his involvement in the incident. In contrast, codefendant swore at police following her arrest and denied any responsibility. Defense counsel also noted that, although codefendant "is certainly not similarly situated in regards to [defendant]

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with background, [codefendant] did not have background, her matter was reduced by the State and she received four years Illinois Department of Corrections." Defense counsel then requested that the trial court take into consideration codefendant's sentence when sentencing defendant. In allocution, defendant admitted fault, apologized to the victim, and asked for mercy.

¶ 7 In aggravation, the State argued that the facts of the case were particularly aggravating where defendant robbed the victim and brought him upstairs at gunpoint. Furthermore, defendant had 10 prior convictions, almost all of which were robberies. The State also presented the victim impact statement of Hayes, which indicated that this offense left him in fear, depressed, and scared to trust people. The State noted that codefendant "pretty much set the trap and brought the victim to the defendant."

¶ 8 Following aggravation and mitigation, the trial court sentenced defendant to 18 years' imprisonment. In doing so, the court stated that it considered the arguments in aggravation and mitigation, including defendant's extensive criminal history, his education, social, and family history. The court further noted that his sentencing range was 6 to 60 years' imprisonment, due to the age of the victim, and, although he may have been persuaded to commit this offense by codefendant, he was 38 years old and had been to prison several times. The court thus concluded that the minimum sentence was not warranted. At the conclusion of the sentencing hearing, defense counsel filed a motion to reconsider sentence, arguing that his sentence was excessive in light of the evidence in mitigation and in comparison to the sentence received by his codefendant. The trial court denied defendant's motion.

¶ 9 No notice of appeal was filed within 30 days. On April 14, 2011, the trial court brought defendant back to court and told him that, because he entered an open plea, he could preserve his appeal rights by filing either a motion to vacate plea or a motion to reduce sentence. Defense counsel again filed the same motion to reduce sentence, and the court denied the motion for a second time. Notice of appeal was filed, and the appeal was assigned number 1-11-1257. The Office of the State Appellate Defender subsequently filed a motion for leave to file a late notice

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of appeal from the judgment entered on January 27, 2011, indicating that the one filed on April 14 was untimely. The court allowed the motion, the notice of appeal was filed on September 9, 2011, and was assigned number 1-11-2042. On January 27, 2012, this court entered an order consolidating appeal numbers 1-11-1257 and 1-11-2402, and denied defendant's motion requesting the transcripts of codefendant's plea proceedings.

¶ 10 On appeal, defendant contends that the trial court imposed a sentence that was excessive in light of his belief that his codefendant was primarily responsible for the offense, he minimized the risk of harm to the victim by using a toy gun rather than a real firearm, and he took responsibility for his actions in pleading guilty. He specifically requests this court to exercise its authority under Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999), and reduce his sentence to a more appropriate term.

¶ 11 Aggravated kidnaping is a Class X felony, with a possible sentencing range of 6 to 30 years. 720 ILCS 5/10-2(a)(4),(b) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008)). Here, however, defendant was subject to an extended term of 30 to 60 years because the victim was 60 years of age or older at the time of the offense. 730 ILCS 5/5-5-3.2(a)(8) (West 2008); 730 ILCS 5/5-8-2(a)(2) (West 2008).

¶ 12 A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Henderson*, 354 Ill. App. 3d 8, 19 (2004). Where mitigating evidence is presented to the trial court, it is presumed, absent some indication to the contrary, other than the sentence itself, that the court considered it. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004).

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¶ 13 The trial court clearly stated that it had considered appropriate factors in mitigation and aggravation. At defendant's sentencing hearing, the court stated, "[a]fter considering all the factors in aggravation and mitigation, the Court finds an appropriate sentence to be 18 years in the Illinois Department of Corrections." Furthermore, defendant's 18-year sentence was warranted, in large part, by his extensive criminal history. The record shows that, prior to the instant offense, defendant had been convicted of 10 felonies and was on parole when he committed the offense at bar. We also note that defendant's sentence was 42 years below the possible maximum extended-term sentence of 60 years.

¶ 14 In finding that defendant's sentence was not excessive, we reject defendant's argument that it was codefendant who instigated and orchestrated the crime. Although the record shows that codefendant asked the victim to pick her up shortly before the offense, it was defendant who pulled out a replica gun, placed it to the victim's head, searched his pockets, and removed his wallet. Defendant also pushed the victim into the doorway of the building and up to the third floor toward the victim's apartment. Defendant's use of a replica gun and flight before entering the victim's apartment did not warrant a reduction in sentence.

¶ 15 We also find defendant's argument that his sentence should be reduced because he has the potential to be rehabilitated unpersuasive. In support of his argument, defendant points to several letters that were written on his behalf regarding his employment as a crew supervisor. The trial court, however, was aware of these letters and considered them prior to imposing defendant's sentence. See *People v. Morgan*, 306 Ill. App. 3d 616, 633 (1999) (trial court is presumed to have considered mitigation evidence absent some indication to the contrary). Moreover, the trial court is not required to detail the process by which it determined a sentence, nor is it required to make an express finding that defendant lacked rehabilitative potential. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). Here, in determining defendant's potential for rehabilitation, the trial court also had to consider his lengthy criminal background. Furthermore, defendant was on parole when he committed the instant crimes.

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¶ 16 Defendant also contends that his 18-year sentence is unconstitutionally disparate to the 4-year sentence imposed on his codefendant.

¶ 17 In general, an arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). However, by itself, a disparity in sentences does not establish a violation of fundamental fairness. *Caballero*, 179 Ill. 2d at 216. A difference in sentences may be justified by the relative character and history of the codefendants, the degree of culpability, rehabilitative potential, or a more serious criminal record. *People v. Martinez*, 372 Ill. App. 3d 750, 759-60 (2007).

¶ 18 As the State correctly notes, defendant failed to provide this court with a record of codefendant's plea proceedings. It is the defendant's burden to produce a record from which a rational comparison of sentences can be made. *People v. Kline*, 92 Ill. 2d 490, 509 (1982). The defendant must demonstrate that he and his codefendant were similarly situated with respect to background, prior criminal history, potential for rehabilitation, or involvement in the particular offense which would justify a consideration of the disparity. *People v. Cooper*, 239 Ill. App. 3d 336, 363 (1992). Where a reviewing court is unaware of the factors which the trial court relied on in sentencing a codefendant, it cannot be determined whether or not the disparity in sentences is justified. *Cooper*, 239 Ill. App. 3d at 363.

¶ 19 Even without a record of codefendant's plea proceedings, the record here sufficiently demonstrates that defendant and codefendant were not similarly situated. Defendant and codefendant had vastly different criminal backgrounds. At the sentencing hearing, defense counsel acknowledged that codefendant "is certainly not similarly situated in regards to my client [defendant] with the background, [codefendant] did not have background." As indicated above, in contrast to codefendant, defendant was on parole when he committed the instant offense, and had an extensive criminal background. Furthermore, despite defendant's contentions to the contrary, defendant's participation in the instant offense was more severe than codefendant's participation. Although codefendant set up the instant offense, the factual basis for the plea

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indicated that defendant pulled out a replica gun, placed it to the victim's head, searched his pockets, and removed his wallet. Defendant then pushed the victim into the doorway of the building and up to the third floor towards the victim's apartment. Defendant told the victim that he was going to go into the apartment to take all of the victim's money, and then fled the scene with the victim's wallet. Based on the record, because there is ample evidence establishing that defendant and codefendant were not similarly situated with respect to their criminal background and participation, defendant cannot demonstrate that the sentencing disparity was unjustified.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.