

No. 1-11-3623

**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).

---

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. 2010 CR 6337
	)	
MICHAEL MILLS,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE EPSTEIN delivered the judgment of the court.  
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant’s conviction and sentence affirmed, where evidence was sufficient for conviction of aggravated robbery and did not warrant instruction on theft, trial counsel was not ineffective for decision not to call certain witnesses or further investigate defendant’s case, and trial court did not abuse its discretion in sentencing defendant.

¶ 2 Following a jury trial, defendant Michael Mills was found guilty of aggravated robbery, and the trial court sentenced defendant to twelve years’ imprisonment. Defendant presses four arguments on appeal: (1) the trial court erred when it refused to give an instruction for the lesser-included offense of theft; (2) the evidence was insufficient to support a conviction for aggravated

No. 1-11-3623

robbery; (3) defendant received ineffective assistance of counsel where trial counsel failed to call witnesses and further investigate defendant's case; and (4) the trial court abused its discretion in sentencing defendant where it considered an element of the offense as an aggravating factor and the sentence was otherwise manifestly disproportionate to nature of the offense. For the reasons that follow, we affirm.

### ¶ 3 BACKGROUND

¶ 4 Carlos Uribe, the complaining witness, testified that on March 21, 2010, he was employed at Bye Bye Chicago, a souvenir shop located at 11 East Ohio. Uribe was the only employee working that day. At 1:45 p.m., Uribe saw defendant enter the store. He was wearing a "huge" black puffy jacket and was carrying a box. Uribe identified defendant in court, and he also identified defendant in a surveillance video played for the jury.

¶ 5 Uribe testified that defendant "was kind of friendly" and came up to him "and tried to shake hands." Uribe explained that he "bump[ed] hands" with defendant instead. Defendant then went to the t-shirt display and took some shirts. He approached Uribe at the counter and said, "I want this," a few times, while pointing at the shirts. Uribe responded, "If you want that, you have to pay for that." Defendant again said, "I want this," and Uribe again told him he would have to pay for the shirts. Defendant then put the shirts on the counter, and Uribe scanned the merchandise and told defendant the total price.

¶ 6 According to Uribe, defendant then "got really mad." With his left hand, defendant turned his hat backwards; defendant kept his right hand in his jacket pocket. Defendant asked Uribe "Do I look like I'm joking?" Then, while showing Uribe the shirts, defendant asked Uribe

No. 1-11-3623

if he “want[ed] to die for this.” Uribe thought that defendant was carrying a gun, and he told defendant to take whatever he wanted and go.

¶ 7 Defendant put the shirts into the box he was carrying. He then walked to the front of the store and took another shirt that had a logo of the face of Al Capone. Defendant told Uribe that he was “the new Al Capone of Chicago” and he was “a gangster.” As he left the store, defendant said “I really mean it.” Uribe locked the door and called the police.

¶ 8 Later that day, after Uribe had spoken to the police and left the store, he received a telephone call from the store. Uribe went to a nearby 7-11 and saw defendant in the back of a police car. Uribe identified defendant as the person who committed the robbery, he identified the four t-shirts that defendant took from the store, and he identified the box in which defendant had put the shirts. Uribe testified that he had never met or seen defendant before the day defendant came into the store.

¶ 9 On cross-examination, Uribe admitted that he had known defendant for a year previous to the incident. Uribe denied knowing defendant because defendant worked at the Ben’s Liquor Store next to Bye Bye Chicago. Uribe testified that he did not know why the surveillance video had only captured the first fifty seconds of his interaction with the defendant; he did not give police the surveillance video from the store. Uribe stated that he did not see defendant with a weapon, and defendant never asked him to open the cash register. Uribe admitted that there were no Al Capone t-shirts among those he identified at trial. Uribe also agreed that he told police that defendant had screamed at him after defendant left the store, though on redirect Uribe testified he could not remember if defendant screamed at him.

No. 1-11-3623

¶ 10 Mayra Cisneros, a retail manager at Chicago Sports on Michigan Avenue, also testified for the State. On March, 2010, at 2:45 p.m., Cisneros saw defendant standing in front of a Walgreens on Michigan Avenue. Defendant took t-shirts from a cardboard box and showed them to someone on the street. Cisneros identified the tag on one of the t-shirts as a Bye Bye Chicago tag; she was familiar with the tag because Bye Bye Chicago was close to Chicago Sports.

¶ 11 Cisneros walked to Bye Bye Chicago, just a few buildings away from the Walgreens, and asked the employee there if the store had been robbed. Cisneros then walked back to Walgreens about five minutes later and saw defendant pick up the box and walk away. Cisneros walked behind defendant and then called 911 and gave a description of defendant. Eventually, defendant took the t-shirts into a 7-11 store. Cisneros, who was watching defendant through the windows, saw defendant place the box on the counter, remove t-shirts from the box, and show them to employees of the 7-11. The police arrived and detained defendant.

¶ 12 On cross-examination, Cisneros testified that she did not see defendant with a weapon, and she did not see him exchange any money with anyone. She could not hear defendant's conversations with individuals outside the Walgreens or inside the 7-11.

¶ 13 Chicago Police Officer Keith Rigan testified that he was on duty on March 21, 2010, and responded to a robbery call at 2:55 p.m. Rigan testified that he recovered a box from defendant with t-shirts inside of it. Rigan spoke to Uribe, who identified defendant as the person who had taken the shirts from the store. Rigan testified that he did not find a weapon in defendant's possession.

No. 1-11-3623

¶ 14 Defendant called Chicago Police Officer Augusta Cotton to the stand. Cotton was on duty on March 21, 2010, at 1:50 p.m., when she received a radio call of retail theft at Bye Bye Chicago. Cotton spoke to a male clerk in the store and filled out a retail theft report. The clerk told Cotton that an offender had taken items from the store, and that when the offender left the store, the offender had screamed at the clerk from outside the store.

¶ 15 Cotton further testified that the clerk told her that someone had come into the store and taken five or six t-shirts. The clerk told her that the offender asked, “Do you want to die for this?” and said something about being Al Capone. The clerk told Cotton that the offender had his hand in his pocket, but the clerk did not know if the offender had a gun. Cotton did not remember the clerk “saying anything about a robbery.”

¶ 16 Before closing arguments, defendant argued that the jury should be instructed on the lesser included offense of theft. Defendant’s theory was that Uribe and defendant “knew each other and that thy was just basically, a theft, and, in essence, they were working together.” The court disagreed, noting that there had to be “some scintilla of evidence to support the lesser included” instruction, and that in this case, “there’s no evidence of [theft].” The jury found defendant guilty of aggravated robbery.

¶ 17 On April 6, 2011, defendant’s attorneys filed to withdraw from representation of defendant. Defendant claimed that his attorneys were ineffective. He argued that his attorneys failed to provide defendant with a witness list, “which somehow caused the judge to bar defendant from having any witnesses on his behalf causing him his deprivation of his constitutional right to present a defense.” Defendant retained new counsel. Following a hearing

No. 1-11-3623

on defendant's motion for new trial, discussed in detail below, the trial court ruled that defendant was proven guilty beyond a reasonable doubt and that defendant's trial attorneys "engaged in effective examination and representation" of defendant. The court denied defendant's motion for a new trial.

¶ 18 Following a sentencing hearing, the trial court sentenced defendant to twelve years in the Illinois Department of Corrections. The court denied defendant's motion to reduce his sentence. Defendant now appeals.

#### ¶ 19 ANALYSIS

##### ¶ 20 Instruction on Lesser-Included Offense of Theft

¶ 21 Defendant first argues that the trial court erred in denying his request for the jury to be instructed on theft, as a lesser-included offense of aggravated robbery. Although generally a defendant cannot be convicted of an uncharged offense, a defendant may request "to have the jury instructed on less serious offenses that are included in the charged offense." *People v. Ceja*, 204 Ill. 2d 332, 359 (2003). To determine whether defendant is entitled to an instruction on a lesser offense, the court must first "must examine whether the charging instrument describes the lesser offense," and the court must then "examine the evidence presented and determine whether the evidence would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense." *People v. Ceja*, 204 Ill. 2d 332, 360 (2003).

¶ 22 In this case, the indictment for aggravated robbery alleged that Mills "knowingly took property, to wit: clothing, from the person or presence of Carlos Uribe, by the use of force or by

No. 1-11-3623

threatening the imminent use of force while indicating verbally or by his actions \*\*\* that he was presently armed with a firearm.” Defendant requested an instruction on theft. See 720 ILCS 5/16-1 (West 2010) (“A person commits theft when he or she knowingly \*\*\* obtains or exerts unauthorized control over property of the owner.”). Our supreme court has held that theft can be a lesser included offense of armed robbery where the conduct and the mental states required for theft are alleged in the armed robbery indictment. *People v. Jones*, 149 Ill. 2d 288, 295 (1992); *People v. Washington*, 375 Ill. App. 3d 243, 248 (2007); see also *People v. Pierce*, 226 Ill. 2d 470, 478 (2007) (noting that “at common law, theft or larceny was a lesser-included offense of robbery”). Here, the parties agree that defendant’s charge contained the elements of theft, namely, knowingly obtaining or exerting unauthorized control over the property of Uribe, acting as an employee of Bye Bye Chicago.

¶ 23 Defendant must identify evidence at trial that would allow a jury to rationally find him guilty of theft, but acquit him of aggravated robbery. *People v. Medina*, 221 Ill. 2d 394, 405 (2006). “The amount of evidence necessary to meet this factual requirement, *i.e.*, that tends to prove the lesser offense rather than the greater, has been described as ‘any,’ ‘some,’ ‘slight,’ or ‘very slight.’ ” *People v. Novak*, 163 Ill. 2d 93, 108-09 (1994) (quoting *People v. Upton*, 230 Ill. App. 3d 365, 374 (1992) and *People v. Willis*, 50 Ill. App. 3d 487, 490-91 (1977)), *abrogated on other grounds by People v. Kolton*, 219 Ill. 2d 353 (2006). We review the circuit court’s decision not to give the instruction for an abuse of discretion. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998); *People v. Jones*, 219 Ill. 2d 1, 31 (2006).

No. 1-11-3623

¶ 24 At trial, the theory of defense was that Uribe knew defendant for about a year, and because of their “friendly relationship,” the jury could infer that defendant simply “went into the store, took some t-shirts, and walked out of the store without threatening Uribe.” When the trial court asked why the alleged relationship was evidence of theft as opposed to aggravated robbery, defense counsel answered that Uribe “basically said, go ahead, take those shirts, and that’s why nothing shows up on the video after the first minute, because six or seven minutes later, [Uribe] realizes, oh, wait, there’s a mistake, there’s a video and then calls 911.” Put another way, defendant argues that Uribe tampered with the surveillance video, and he then falsely told the police that defendant robbed and threatened him to hide his involvement in the theft of the shirts from Bye Bye Chicago.

¶ 25 The problem with this theory is that the only evidence that arguably supports it is that (1) Uribe admitted that he knew defendant for a year; and (2) the “fist bump” seen at the beginning of the video shows that defendant and Uribe were friends. The inference that defendant draws from mere fact of acquaintance—that Uribe was complicit in the theft of his employer—is too tenuous to support an instruction on theft. We acknowledge that defendant otherwise suggests that Uribe tampered with the video footage to hide his involvement in the crime, but there was no evidence that Uribe had the ability to alter the surveillance footage. Uribe testified that he was not responsible for giving the surveillance video to police. To establish that Uribe helped defendant take the shirts from the store, defendant needed to present more evidence than Uribe’s “friendly relationship” with defendant and missing video footage. Without more, defendant’s view of events cannot “fairly be inferred from the evidence

No. 1-11-3623

presented,” and he is not entitled to an instruction on theft. *People v. Garcia*, 188 Ill. 2d 265, 284 (1999).

¶ 26 Defendant offers what seems to be a more general claim: that the jury could find Uribe’s conflicting testimony unbelievable, and thus “all the State had left was the police arresting Mills with a box of t-shirts \*\*\* that still had the Bye Bye Chicago tags on them.” This argument proves too much: if the jury did not believe Uribe’s testimony, the result would be a finding of not guilty on both aggravated robbery and theft. See *People v. Parsons*, 284 Ill. App. 3d 1049, 1060 (1996) (lesser included offense instruction not required where “there was no rational basis for acquitting the defendant of the greater offense and for convicting him only of the lesser offense”). What defendant assumes is that the jury would find that Uribe was lying about defendant’s threats *in order to hide the fact that he helped defendant take the shirts from the store*. As noted above, however, defendant has not identified any evidence from which the jury could fairly infer that Uribe was complicit in defendant’s taking of the shirts from Bye Bye Chicago. Accordingly, we find no abuse of discretion in the trial court’s decision to deny defendant’s request for an instruction on the lesser-included offense of theft.

#### ¶ 27 Sufficiency of the Evidence

¶ 28 Defendant next argues that the evidence was insufficient to support a conviction for aggravated robbery. A person commits aggravated robbery when he knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force while indicating verbally or by his actions to the victim that he is presently armed with a firearm or other dangerous weapon. 720 ILCS 5/18-5(a) (West 2010) (now 720 ILCS 5/18-1(a),

No. 1-11-3623

(b)(1)). This offense shall be applicable even though it is later determined that he had no firearm or other dangerous weapon in his possession when he committed the robbery. *Id.*

¶ 29 Considering the evidence in the light most favorable to the State, we must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). We will not substitute our judgment for that of the jury with regard to the credibility of witnesses, the weight to be given to each witness' testimony, or the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272. A defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 30 Here, there was direct testimony from Uribe that defendant took t-shirts from the store, that defendant threatened the use of force, and that defendant suggested by his words and actions that he was armed with a firearm. Uribe testified that defendant approached him with t-shirts and said, "I want this." After Uribe scanned the t-shirts and gave defendant a total price, defendant said, "Do I look like I'm joking" and "Do you really want to die for this?" Defendant's right hand remained in his jacket pointing outward, such that Uribe thought defendant had a gun in his pocket. Uribe told defendant to take whatever he wanted and go. This evidence is sufficient to convict defendant of aggravated robbery beyond a reasonable doubt. See, e.g., *People v. Hall*, 352 Ill. App. 3d 537, 544 (2004) (finding evidence sufficient for conviction of aggravated robbery where defendant asked a store clerk if he was wearing a bullet proof vest and asked if the clerk wanted to get shot while he pointed to his waistband); *People v. Woods*, 373 Ill. App. 3d

No. 1-11-3623

171, 177 (2007) (finding evidence sufficient for conviction of aggravated robbery where defendant gestured to his waist while grabbing at cash register and cashier saw “something wooden” in his waistband).

¶ 31 Defendant’s sole complaint as to the sufficiency of the evidence is that Uribe was the only witness to testify about defendant threatening him, and Uribe’s “credibility is questionable.” Whether we agree with defendant’s assessment of Uribe’s credibility irrelevant; it is the jury’s role to evaluate witness credibility, and this court will not retry the defendant. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). The single discrepancy in Uribe’s testimony (about whether he knew the defendant) did not render his testimony so unreasonable or improbable as to justify reversal of the jury’s determination that defendant was guilty beyond a reasonable doubt. See, e.g., *People v. Williams*, 329 Ill. App. 3d 846, 853 (2002) (concluding that where there was a conflict in testimony as to whether the defendant actually threatened the victim, the evidence was sufficient to prove defendant guilty of attempted aggravated robbery); *People v. Dawson*, 403 Ill. App. 3d 499, 512 (2010) (concluding that evidence was sufficient to support conviction despite “obvious imperfections” in witness testimony). Viewing the testimony in a light most favorable to the State, we conclude that the evidence was sufficient to support a conviction for aggravated robbery.

#### ¶ 32 Ineffective Assistance for Failure to Call Witnesses

¶ 33 Defendant next argues that he received ineffective assistance of counsel because his trial counsel failed to investigate defendant’s case and call witnesses on his behalf. After trial, defendant alleged that his trial counsel was ineffective. Defendant, represented by new counsel,

No. 1-11-3623

filed a motion for a new trial. In a supporting affidavit, defendant stated that his “attempts to get [his] counsel to investigate witnesses and photographs relevant to [his] case were rebuffed.”

Defendant stated that he wished to have witnesses testify, including the owner of Ben’s Wine & Spirits, his sister Lisa Mills, and an acquaintance, Karl Phillips. Defendant also stated that at the time of trial he had photographs of himself with Uribe. Defendant stated that he told his trial counsel about this evidence, but his counsel ignored his requests. Defendant also presented an affidavit from Karl Phillips, which stated that Phillips “knew Michael Mills and Carlos Uribe to be known acquaintances of one another.”

¶ 34 On October 11, 2011, defendant’s trial attorney Brendan Shiller testified at a hearing on defendant’s motion for a new trial. Shiller was formally retained as counsel in January, though he talked with defendant by phone in November and December. He testified that there were “several phone calls” in December and January leading up to the March trial, with “one extensive meeting at some point in February at the jail.” Shiller also met with defendant “a handful of times” in the court’s lockup. Defendant asked Shiller to get the case to trial as soon as possible, so Shiller made a trial demand in January. Shiller felt he had a sufficient amount of time to prepare for trial. Shiller’s strategy at trial was two-fold: to elicit that Uribe was an acquaintance of defendant, and to establish that defendant committed theft, not aggravated robbery.

¶ 35 Shiller testified that he asked defendant if he knew any witnesses or evidence that could be presented at trial. According to Shiller, defendant never told him the name of any potential witnesses for his trial, and defendant never asked him to investigate potential witnesses. Specifically, according to Shiller, defendant never told Shiller that he wished to have the owner

No. 1-11-3623

of Ben's Wine and Spirits testify at his trial. Defendant also did not tell Shiller that he wanted his sister Lisa to testify at his trial, nor did he tell Shiller that his sister could testify that he and the victim had spent time together. Defendant only mentioned Lisa as someone who could bring defendant clothes and pay for his defense. Shiller testified that defendant never told him that Karl Phillips was an acquaintance, and he did not mention that he wanted Phillips to testify at trial. Defendant also never told Shiller that he had photographs of himself and the victim taken together. Shiller further testified that defendant did mention the nickname of somebody that defendant wanted Shiller "to ask about" during cross-examination of Uribe. Defendant told Shiller that Uribe, defendant, and this person had smoked marijuana together.

¶ 36 The trial court found that Shiller "testified truthfully," and the court not give "a lot of credence or weight" to defendant's affidavit. The court explained that defendant's affidavit failed to mention that he was pushing his attorneys to demand trial. The court found that the lawyers complied with this request and that attorney Shiller "was conscientious in his attempts to investigate the case" and "raise some of the key issues in the defense of the case." The court denied defendant's posttrial motion.

¶ 37 To prevail on a claim of ineffective assistance of counsel, defendant must satisfy the two-part test set forth in *Strickland v. Washington*: first, "defendant must show that counsel's performance fell below an objective standard of reasonableness," and second, defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Under the first prong, defendant

No. 1-11-3623

must overcome the presumption that counsel's decision was a matter of trial strategy. *Id.* It is well settled that the decision whether to call certain witnesses is a matter of trial strategy entitled to great deference. *People v. Orange*, 168 Ill. 2d 138, 149 (1995). The parties agree that where, as here, the trial court's posttrial evidentiary hearing involves fact-finding and credibility determinations, we will only disturb the decision of the trial court where it is manifestly erroneous. *People v. English*, 403 Ill. App. 3d 121, 135 (2010); *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. Manifest error is error that is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 38 As in the trial court, defendant argues that his counsel was ineffective because counsel did not call three witnesses who could have testified that Uribe knew defendant. On appeal, defendant fails to acknowledge that the factual basis for this claim was rejected at the trial level: the trial court credited the testimony of trial counsel and determined that defendant never informed his attorney of any potential witnesses who would have helped his case. While defendant, in his affidavit, claimed that he did inform his trial counsel of witnesses, the trial court resolved the conflict in favor of trial counsel, finding that counsel's testimony at the posttrial hearing was credible. It was for the trial court to resolve the conflicts in evidence regarding counsel's performance, and we see no manifest error in the trial court's finding that defendant never told trial counsel about the three potential witnesses described in his affidavit. See *People v. English*, 403 Ill. App. 3d 121, 137-38 (2010) (affirming ruling of trial court that counsel was

No. 1-11-3623

not ineffective for failure to call witnesses, where trial court credited counsel's testimony that defendant never told counsel about potential alibi witnesses).

¶ 39 Accordingly, we agree with the trial court that counsel was not ineffective for failing to call witnesses, where these witnesses were not brought to his attention, even after counsel questioned defendant about potential defense witnesses. Attorneys are generally required to conduct a reasonable investigation in order for their representation to be considered to be a valid trial strategy, but defense counsel is not required "to read the defendant's mind about the existence of a potentially exculpatory witness and the potential nature of that witness' testimony." *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008). Moreover, where counsel determines that further investigation is unnecessary, we apply a "heavy measure of deference to counsel's judgment." *Orange*, 168 Ill. 2d at 149. Here, trial counsel explained that he felt he had a good faith basis to cross-examine Uribe about his relationship with defendant based on what defendant told him. Trial counsel elicited testimony from Uribe that he knew defendant for about a year, and he used Uribe's admission in support of the theory that defendant did not threaten or rob defendant. We agree with the trial court that defense counsel's performance did not fall below an objective standard of reasonableness.

#### ¶ 40 Sentence

¶ 41 Defendant finally challenges his sentence of twelve years' imprisonment. Defendant does not dispute that his criminal backgrounds mandates his status as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2010)), and he was therefore subject to a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2010)). Defendant's arguments as to his sentence are two

No. 1-11-3623

sides of the same coin. First, defendant argues that the trial court improperly applied an element inherent in the crime of aggravated robbery—the cause or threat of serious harm—as a factor in aggravation. Second, defendant argues that his sentence was “manifestly disproportionate to the nature of the offense” because “Mills did not actually cause physical harm” to Uribe or take anything other than four t-shirts.

¶ 42 The trial court has “broad discretionary powers” in sentencing a defendant. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). “Where the sentence chosen by the trial court is within the statutory range permissible for the pertinent criminal offense for which the defendant has been tried and charged, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion in the sentence it imposed.” *Id.* at 373-74. “In sentencing a defendant, a trial court must balance the retributive and rehabilitative purposes of the punishment taking into account both the seriousness of the offense and the objective of restoring the offender to useful citizenship.” *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996) (citing *People v. Hernandez*, 278 Ill. App. 3d 545, 555 (1996)); Ill. Const. 1970, art. I, § 11. The court may consider the nature of the crime, protection of the public, deterrence, and punishment. *People v. Jackson*, 357 Ill. App. 3d 313, 329 (2005). We review the sentence for an abuse of discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005).

¶ 43 After hearing arguments of the parties, the trial court first reviewed the statutory mitigating factors. See 730 ILCS 5/5-5-3.1 (West 2010) (listing mitigating factors). The court found that the first two mitigating factors—that the defendant did not cause or threaten serious physical harm and that the defendant did not contemplate that his conduct would cause or

No. 1-11-3623

threaten serious physical harm—were not applicable. The court explained, “Once you cross the line into the area of robbery, you’re now committing an offense where the risk is high that someone, including yourself, could be hurt.” The court further noted that aggravated robbery “is one of the types of offenses that there is the strong possibility that someone could get hurt out there, the victim could get hurt. You don’t know how someone is going to react when you threaten someone with a gun.” In considering the remaining factors, the court noted that while letters of support for defendant showed that he might have rehabilitative potential, defendant had a lengthy criminal history that did not support a finding that his character and attitude made it unlikely that he would commit another crime.

¶ 44 The court then turned to the statutory aggravating factors, starting with the first on the list: “the defendant’s conduct caused or threatened serious harm.” 730 ILCS 5/5-5-3.2(a)(1) (West 2010). As to that factor, the court stated, without further elaboration, “the defendant’s conduct did cause or threaten serious harm.” The court went on to consider each of the statutory aggravating factors, noting that defendant had an extensive criminal history and had committed the aggravated robbery during his mandatory supervised release (MSR) term. The court then summarized his view of the mitigating and aggravating factors in arriving at a sentence:

“I originally felt the appropriate sentence would be somewhere in the range between fifteen and twenty years. That was what I originally thought would be the appropriate sentence. I didn’t think there was much in mitigation. But I do see that there are people cheering for Mr. Mills, and they have confidence in him and, in addition, I see that the [d]efendant has not wasted his time while

No. 1-11-3623

incarcerated in the [c]ounty jail. But he has availed himself of those programs, has attended Bible study classes, has worked in the barber shop and has done some things to make better use of his time than he has in the past.

I cannot, however, neglect the extensive criminal history that the defendant has. So accordingly, the sentence will be twelve years in the Illinois Department of Corrections.”

¶ 45 Defendant later filed a motion to reduce sentence, arguing that the trial court was “not entirely clear at sentencing, whether the implicit harm was used as both \*\*\* an element of aggravated robbery and as an aggravating factor in the sentence.” In denying defendant’s motion, the court clarified that it had not applied the “cause or threatened serious harm” factor to increase defendant’s sentence:

“I thought I even made comment that I had considered a higher [sentence] for Mr. Mills, but felt compassionate at that moment of sentencing, and I thought I was thinking in terms of 15 or so.

\* \* \*

And then, based on the right of allocution, and the fact that I found some mitigation in the mitigation factors, I actually came lower than what I originally thought I might be at, which evidences the fact that I did not apply a factor that was inherent in the offense also as an extra factor in aggravation.”

¶ 46 Defendant first argues that the trial court considered a factor implicit in the offense of aggravated robbery—the cause or threat of harm—as an aggravating factor in applying a

No. 1-11-3623

heightened sentence. Generally, a factor implicit in an offense cannot be used as an aggravating factor in sentencing. *People v. Walker*, 392 Ill. App. 3d 277, 300 (2009). Even if a sentencing court considered an improper factor, however, resentencing is not necessary if the record shows that the weight given to the factor was “so insignificant that it did not lead to a greater sentence.” *Id.* at 301-02. For example, in *People v. Beals*, 162, Ill. 2d 497 (1994), the trial court stated, “ ‘In aggravation the first guideline indicated in the statute is “whether the conduct of the defendant caused or threatened serious harm.” Well, we all know that your conduct caused the ultimate harm. It caused the loss of a human life.’ ” *Beals*, 162 at 509. Our supreme court held that this comment was “simply a general passing comment based upon the consequence of defendant’s action,” where nothing in the record showed that the trial court considered the victim’s death as an aggravating factor supporting a longer sentence. *Id.* The court reasoned that even if the trial court did improperly consider loss of life as an aggravating factor, “the record clearly reveal[ed] that the court relied upon other aggravating factors in sentencing the defendant,” such that any weight given to the improper factor was insignificant and did not result in a greater sentence. *Id.* at 510.

¶ 47 Here, as in *Beals*, the record shows that the trial court did not consider defendant’s threat of harm as a factor that increased his sentence. While the trial judge noted that defendant “did cause or threaten serious harm,” he was going through the list of statutory aggravating factors one by one. The judge did not further elaborate on this statement or again refer to the aggravating factor as he summarized his consideration of factors in mitigation and aggravation and sentenced the defendant. Other aggravating (and mitigating) factors—defendant’s extensive criminal

No. 1-11-3623

history and his activity following his arrest—were the focus as the trial court announced its sentence. Defendant points to the “trial court’s speech about an offender not knowing how someone will react when they are threatened” as evidence that the trial court used robbery “in and of itself” as an aggravating factor. But the trial court’s statement was made in reference to certain mitigating factors (*e.g.*, that defendant did not cause or threaten serious harm). The trial court found that these mitigating factors did not apply where the defendant had threatened the victim’s life, even if it turned out that the defendant did not have a weapon.

¶ 48 Most importantly, in considering defendant’s motion for a reduced sentence, the trial judge made clear that he did not apply the “serious harm” factor as an aggravating factor. The trial judge further explained that he arrived at a sentence of 12 years (on the low end of the range of 6 to 30 years) because he found some mitigating factors and he felt “compassionate” in light of defendant’s allocution. Accordingly, we conclude that the trial court did not consider an element of aggravated robbery as an aggravating factor that resulted in a longer sentence.

¶ 49 Defendant also argues that he sentence is manifestly disproportionate to the nature of the offense. A sentence that falls “within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense.” *People v. Walker*, 392 Ill. App. 3d 277, 300 (2009). In a single paragraph, without citation to authority, defendant argues that “twelve years is a long time to spend incarcerated for a meager 4 t-shirts.” He contends that “[p]resumably, Uribe had a wallet, a cell phone, \*\*\* there was cash in the register of the store and \*\*\* there were other valuables,” but defendant only took four t-shirts. Defendant also points out that no weapon was recovered and Uribe did not see a weapon. These are arguments for the

No. 1-11-3623

sentencing judge, not a court reviewing for an abuse of discretion. And while the trial court rejected these arguments, our review of the record, much of which is recounted above, shows that the trial court thoroughly considered the mitigating and aggravating factors. Despite substantial aggravating factors—defendant’s extensive criminal background and commission of the crime during his MSR term—the trial court credited evidence in mitigation to arrive at a twelve-year sentence at the low end of the Class X sentencing range of 6 to 30 years. We may not substitute our judgment for that of the trial court merely because we may have weighed the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995). The trial court did not abuse its discretion in sentencing defendant.

¶ 50 CONCLUSION

¶ 51 For all the foregoing reasons, we affirm defendant’s conviction and sentence.

¶ 52 Affirmed.