

No. 1-12-0941

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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. 11 CR 15065
)	
WESS ARNOLD,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not abuse its sentencing discretion, nor was the 42-month prison sentence excessive for this recidivist offender who, while enraged during a fight, punched a woman in the face who was not involved in the fight but who tried to provide a car as a safe place to sit for one of defendant's opponents in the fight.

¶ 2 Following a bench trial, defendant Wess Arnold was found guilty of two counts of aggravated battery (causing great bodily harm to Paula Gonzalez and committing battery while on a public way), and sentenced to a 42-month prison term. Defendant filed a motion to reconsider the sentence, which the trial court denied. On appeal, defendant contends that the trial court abused its sentencing discretion because it failed to consider probation as a possible punishment, it incorrectly recalled facts of the case, and it considered a factor inherent in the crime of aggravated battery, namely, harm to the victim.

¶ 3 This case stems from a fight that occurred at approximately 4:30 a.m. on September 3, 2011, in the area of 1260 South Union Avenue in Chicago between two groups of people: defendant and his two cousins, and a group of Hispanic men. During the fight, a police officer who worked for the University of Illinois at Chicago, Officer Szulka, saw defendant punch Paula Gonzalez, the victim, in the face with a closed fist. The blow knocked the victim off of her feet and onto her back, and required 17 stitches. The victim was not a participant in the fight; she had offered the passenger seat of her friend's SUV as a safe haven to a man who was bleeding from the fight, which angered defendant.

¶ 4 Alexandra Ruiz testified that, during the fight, defendant "slammed" a "guy" on top of her car, and the man's head cracked the car windshield.

¶ 5 Paula Gonzalez, the victim, testified that she noticed that a man was lunging toward the car and that his face was bleeding, and she opened the car door and asked if he needed help. She did not know him and had never seen him before and was just trying to help him out. He was very nervous and asked, "Can we leave?" She vacated the passenger seat and allowed him to sit

inside the car. She noticed that defendant was behind her. "[H]e was trying to apologize to him and he wanted to take him out of the car from the passenger seat, and I told him to leave him alone, we called the police." Defendant hit Gonzalez on the chin, splitting it open, and she fell to the ground. Gonzalez had not struck or grabbed defendant before he hit her. Defendant then started to punch the "guy" who was bleeding and sitting inside the car. Gonzalez received 17 stitches to her face.

¶ 6 Officer Szulka testified that he saw defendant strike Gonzalez on the face with a closed fist. The punch knocked Gonzalez off of her feet and she fell onto her back on the street. While Officer Szulka and his partner, Officer Guichon, ran to assist Gonzalez, Officer Szulka saw defendant halfway into the SUV and striking a male who was inside the SUV. Officer Guichon then tried to use a Taser on defendant, but the Taser deployment failed and defendant backed out of the SUV and fled. The officers pursued defendant for approximately one-half of a block on foot. As defendant ran, one Taser probe missed, and another Taser probe was in his shirt. Defendant made side to side motions while he ran, he removed a Taser probe from his shirt, and he jumped over a fence. When Officer Szulka caught defendant and tried to handcuff him on the ground, defendant twisted, flexed his arms, and kicked.

¶ 7 Randall Coleman and Xavier Carter, defendant's cousins who participated in the fight, testified on behalf of the defense. Coleman had prior felony convictions for possession of a controlled substance, robbery, and aggravated battery of a peace officer. Coleman saw three Hispanics surround and attack defendant. Coleman saw "the young lady try to grab him, I guess off of the defendant, he was protecting himself and he swung, he turned around and just swung.

It wasn't intentionally, I mean it's like a fight." She was short and Hispanic. Coleman did not see what happened to her. He did not see any blood.

¶ 8 Carter testified that he had a prior felony conviction for a Class 3 theft. Carter did not see defendant go to a car and punch a woman. Carter saw a woman grab defendant. She came from behind and Carter guessed she was trying to break it up, but he did not know what she was trying to do. Defendant reflexively turned around and hit her.

¶ 9 Defendant testified that he had two prior felony convictions, one for unlawful use of a weapon by a felon and one for possession of a controlled substance. Defendant was at Maxwell Street Polish with his two cousins and a female friend¹ when "some Latino men" approached him and made gang signs with their hands. Defendant told them that he was not from Chicago and that he had nothing to do with it. They said, "F ___ you," and punched him. They also said the "n" word. After one of them punched defendant in the mouth, a brawl broke out in the street and defendant fought with the one who had punched him in the mouth. After that man started to back up toward the car, defendant felt someone grab him from the back and his "natural instinct" was to hit that person. Defendant believed that he had hit her with his elbow. Defendant fought in the doorway of a car with the man who was in the car.

¶ 10 During cross-examination, defendant testified that he was angry because he had been punched in the mouth for no reason, and he "got enraged" and threw a man on top of someone else's car. Defendant was fighting three or four people, so he went "hard," he went "a little

¹ Both Coleman and Carter testified that they did not know the name of defendant's girl friend.

extra." When asked if he punched Gonzalez in the face, defendant testified, "Not like intentionally punched her." Defendant testified further, "[S]he grabbed me, I spun around, she got cold-cocked by the elbow." Defendant turned around and she fell to the ground, but defendant "paid no attention." Defendant testified that he "kind of blacked out" because he was fighting three or four people and "you go off instinct." Defendant had been drinking, and he panicked, ran from the police, and tried to jump over a fence. Defendant was using crutches on the day of the trial because he hurt himself during the melee.

¶ 11 The trial court observed as follows. Defendant admitted he had been drinking. During the fight, defendant, who was a large man, became the aggressor and "smacked somebody against the car and cracked a windshield." A small woman tried to help, but defendant turned around and "smacked her in the face in front of [the] police officer causing 17 stitches ***." Defendant was the aggressor as to Paula Gonzalez and defendant admitted that he was in a state of rage.

¶ 12 The presentence investigative report (PSI) disclosed the following. Defendant was 6 feet, 4 inches tall, weighed 240 pounds, and was born in 1983, so he was 28 years old at the time of the crime. Defendant had obtained a GED in 2009 and he also attended one semester of college at the college of Lake County in 2010. He was single and unemployed with no children. He reported that, prior to his incarceration, he was employed by a cleaning service in Gurnee, Illinois, and earned \$350 per week, but the investigator could not find a telephone listing for that business. Defendant was involved with a street gang from age 14 to age 20. He pleaded guilty as a juvenile in California to attempted "vehicle theft." He had seven prior adult convictions: a 2010 conviction for driving while under the influence of alcohol (DUI), a 2007 conviction for

possession of a controlled substance, a 2006 conviction for unlawful possession of a weapon by a felon, two 2005 convictions for possession of cannabis, a 2005 conviction for DUI, and a 2004 conviction for aggravated unlawful use of a weapon.

¶ 13 Defendant admitted he used alcohol as well as marijuana "joints" and "blunts."

¶ 14 The assistant State's Attorney argued in aggravation that defendant had an extensive criminal history which dated to 2004 and which included convictions for aggravated unlawful use of a weapon in 2004, unlawful possession of a weapon by a felon in 2005, and possession of a controlled substance in 2007. He argued that defendant's criminal history and "the egregious facts of this case, which prove that the victim was extremely injured by the Defendant's actions, ***, " warranted a substantial prison term.

¶ 15 Defense counsel argued in mitigation that defendant obtained his GED and was working at the time and trying to be a positive member of society. He observed that "deeply offensive language" was used before the fight and that "unfortunately, as the Court has found, somebody else got hurt ***." He argued that defendant did not intend to "precipitate the fight," but he did participate and "[t]he person was injured." Defense counsel recommended the minimum sentence.

¶ 16 During allocution, defendant said that it was "a pure accident" that "an innocent person got hit" because he did not know who was behind him at the time. Defendant stressed that he did not start the fight and he stated, "By no means do I hit women ***." Defendant observed that it had been five years since his last conviction and that he had "matured and grown out of that lifestyle," had obtained his GED, had attended college, and had a job. He asked for probation.

¶ 17 The court observed that it had heard a very different version of what happened, that it was more than a street fight because someone got hurt and it was all defendant's fault. The court sentenced defendant to a term of 42 months imprisonment.

¶ 18 Defendant's motion to reconsider the sentence alleged that the sentence was excessive given his background and the nature of his participation in the offense, that the trial court improperly considered in aggravation matters implicit in the offense of aggravated battery, that the State failed to prove defendant was eligible for an enhanced penalty or an extended term, that the sentence was disparate compared to the sentences of codefendants, and that the sentence penalized him for exercising his right to a trial.

¶ 19 During the hearing on the motion to reconsider the sentence, which immediately followed the motion for a new trial, the court stressed that defendant was a recidivist. The court also observed, "You're smacking women and throwing them up against car windows." Defendant protested that he did not throw her against the car. The court responded, "I heard what I heard." The court also observed that defendant's judgment was "flawed."

¶ 20 On appeal, defendant contends that the sentence was an abuse of discretion because the trial court did not consider probation during the sentencing hearing and thereby violated the applicable statute (730 ILCS 5/5-6-1(a) (West 2012)), relied on the improper factor of harm to the victim, and mistakenly believed that defendant had slammed the victim, a woman, against a car, when according to Alexandra Ruiz he actually had thrown a "guy" against the windshield. Defendant maintains that the State erroneously informed the court that defendant was not eligible for probation, and that the court believed that to be true. He alleges that the court relied only on

aggravating factors and did not mention the mitigating evidence, namely, that it had been five years since his last conviction, that the last previous conviction was not for a crime of violence, that during the five years he had obtained a GED, had attended a semester of college, and had been employed at the time of the current crime. Defendant asks that the sentence be reversed and either reduced or remanded for a new sentencing hearing.

¶ 21 The trial court is vested with considerable discretion in imposing a sentence, and a sentence consequently will not be modified on appeal in the absence of an abuse of that discretion. See *People v. Garcia*, 296 Ill. App. 3d 769, 781 (1998); see also *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977). A sentence within the statutory range is entitled to great deference on appeal. *Garcia*, 296 Ill. App. 3d at 781. The trial court is in a better position than a court of review to determine an appropriate sentence (*People v. Brooks*, 297 Ill. App. 3d 581, 585 (1998)) and to consider such factors as credibility, demeanor, moral character, mentality, social environment, habits, age, and inclination or aversion to commit crime (see *People v. McCain*, 248 Ill. App. 3d 844, 850 (1993); *People v. Marsan*, 238 Ill. App. 3d 470, 473 (1992); *People v. Riddle*, 175 Ill. App. 3d 85, 92 (1988)).

¶ 22 Here, defendant's 42-month (or 3½-year) prison sentence fell within the statutory range of not less than 2 years and not more than 5 years available for aggravated battery, a Class 3 felony. See 720 ILCS 5/12-3.05(a)(1), 5/12-3.05(c), 5/12-3.05(h) (West 2012); 730 ILCS 5/5-4.5-40(a) (West 2012).

¶ 23 Defendant was eligible for probation (730 ILCS 5/5-5-3(c)(2) (West 2012)), and the trial court informed him during pretrial proceedings that probation was a possible sentence but that it

would not be imposed due to his criminal record, which included convictions for aggravated unlawful use of a weapon, unlawful possession of a weapon by a felon, and possession of a controlled substance. The trial court's decision not to impose probation was not an abuse of discretion.

¶ 24 Next, defendant contends that the trial court improperly considered the harm he caused the victim, which is inherent in the offense of aggravated battery, as an aggravating factor for sentencing. The State responds that the trial court did not consider a factor inherent in the offense as an aggravating factor for sentencing, but that if it did, the factor did not significantly increase the sentence because the trial court merely misstated the gender of the person whom defendant threw against the car with such force and rage that it caused the person's head to crack the car's windshield.

¶ 25 In *People v. Beals*, 162 Ill. 2d 497, 509 (1994), the trial court remarked that the defendant's conduct had "caused the ultimate harm. It caused the loss of a human life." The Illinois Supreme Court held that this "was simply a general passing comment based upon the consequences of the defendant's actions," because the trial court never indicated that it had "considered" the victim's death as a factor in aggravation. *Id.* at 509. The supreme court observed that even if the remark was improper, the record revealed that the trial court had placed little, if any, weight upon the victim's death, and the supreme court stated:

"Where it can be determined from the record that the weight placed upon the improperly considered aggravating factor was insignificant and that it did not lead to a greater sentence, remandment is not required." *Id.* at 510-11.

¶ 26 In the present case, the trial court considered defendant's rage and his flawed judgment more than the gender of the person whom he threw against the car. For example, defendant testified that he "got enraged," went "hard," and went "a little extra" during the fight and that he slammed someone onto the car windshield. The trial court explained that defendant's sentence was based on his criminal record, his recidivism, and his flawed judgment. The trial court merely mentioned that someone had been hurt, and the trial court observed that it could have sentenced defendant to "a lot more time." Read as a whole, the record shows that the trial court did not place significant weight during sentencing on the fact that someone had gotten hurt.

¶ 27 Furthermore, the court considered all of the requisite factors in imposing sentence. The trial court's explicit references to only aggravating factors does not mean that the court failed to consider mitigating factors; the court is presumed to have considered all of the relevant factors unless the record shows otherwise. *People v. Raymond*, 404 Ill. App. 3d 1028, 1072 (2010). The court was not required to articulate the mitigating factors. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002)). The record discloses that defendant has an extensive criminal history. Prior probationary and prison sentences have had no rehabilitative effect on him. Given the circumstances, the 42-month prison sentence was not excessive.

¶ 28 Finally, if the trial court mistakenly believed that defendant had thrown the victim, a woman, instead of a man onto the windshield, it did not significantly affect the sentence under the recidivist circumstances here.

¶ 29 We have considered, and rejected, all of defendant's contentions on appeal, and conclude that the trial court did not abuse its sentencing discretion and that remandment for resentencing is

No. 1-12-0941

not warranted. See *Beals*, 162 Ill. 2d at 510.

¶ 30 The judgment of the circuit court is affirmed.

¶ 31 Affirmed.