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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-3186
)	
TIMERA BRANCH,)	Honorable
)	Allen M. Anderson,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant showed no reversible error, and thus no plain error, in the trial court's imposition of a 34-year prison sentence (on a 20-to-60 range) for first-degree murder: the court's isolated reference to defendant's having caused serious harm did not demonstrate reliance on an implicit factor, the court expressly or presumably considered all the mitigating factors, and the sentence was justified by the nature of the offense; (2) we remanded the cause for the imposition of mandatory fines and the application of proper credit.

¶ 2 Following a bench trial, defendant, Timera Branch, was found guilty of two counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)). The trial court merged the counts and sentenced defendant to 34 years in prison. Defendant timely appealed. The following issues are

before us: (1) whether the trial court abused its discretion in imposing a 34-year prison sentence; (2) whether a \$100 Trauma Center Fund fee imposed by the trial court must be vacated; and (3) whether the case must be remanded for the imposition of certain mandatory fines. For the reasons that follow, we affirm in part, vacate in part, and remand.

¶ 3

I. BACKGROUND

¶ 4 Defendant was indicted on two counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)), arising out of the death of the victim, John Keyes. The indictment alleged that defendant “drove a car into [the victim] as he ran away from the defendant’s car, crushing [the victim’s] body against a building, thereby causing the acts which caused death to [the victim].” Count I alleged that defendant acted “with the intent to do great bodily harm to [the victim].” Count II alleged that defendant acted with knowledge that “such acts created a strong probability of death or great bodily harm.”

¶ 5 The evidence at defendant’s bench trial established that, on the evening prior to the offense, the victim, who was 17 years old, was at a party along with defendant’s son, Lacorbek Benion, who was a high school sophomore. When the victim started to dance with Benion’s girlfriend, “Kiwi,” Benion grabbed the victim’s shirt. The victim moved Benion’s hand away and struck Benion in the face. The victim then left the party with a friend. A parent, who lived at the residence and who was present during the party, saw that Benion’s eye was bleeding and attempted to treat the injury. Some time later, Kiwi’s step-father, Deonte Robinson, took Benion to a hospital emergency room. At about 2 a.m., defendant picked up Benion from the hospital and took him to her home. Later in the morning on November 8, 2009, defendant drove Benion to Kiwi’s house. While there, defendant spoke with Kiwi’s mother, Roxanne Robinson, about what had happened the night before between

Benion and the victim. Deonte Robinson overheard defendant tell Roxanne that “[Benion] is gonna have to stand up for himself, and [defendant’s] gonna have to show him how to go in.”

¶ 6 Defendant testified that she returned to Kiwi’s house at about 3 or 4 p.m., on November 8, 2009, to pick up Benion. She told him that she wanted to go talk to the victim’s mother to try and resolve the problems between the boys. Defendant left Kiwi’s house in her vehicle, along with her sister and two other children. Benion, Deonte Robinson, and three other men followed behind defendant in another vehicle. After defendant dropped one of the children off at home, the group traveled, with defendant’s car in the lead, to an apartment complex, where defendant thought that she would find the victim’s mother. As defendant approached the apartment complex, she saw the victim and hit him with her car. An occurrence witness, 18-year-old Aidaliz Figuero, who knew Benion, was looking out of her second-floor window at the time of the incident. Figuero saw defendant’s vehicle, which was traveling at a high rate of speed, strike the victim. Figuero saw the victim’s body bend over backward on top of the car’s hood, with his legs under the car. The victim’s body was pinned against a building. Figuero saw defendant exit her vehicle, along with another woman and one of defendant’s younger sons. Deonte Robinson, who had arrived in the second car immediately after the victim was hit, exited the car and heard defendant yell, “ ‘Fuck him up; y’all fuck him up.’ ” Figuero saw three men, including Benion, exit the second car. Benion, who was carrying a bat, walked up to the victim and hit him with the bat, saying, “ ‘Talk shit now bitch.’ ” Defendant testified that she did not know why she hit the victim with her car. She stated that she got out of the car to check on the victim, but people started yelling at her to get in her car and leave, so she did. Defendant was apprehended shortly after the incident and ultimately confessed.

¶ 7 Following presentation of the evidence, the court found defendant guilty of both counts of murder. The court refused to find that defendant was acting under a sudden and intense passion resulting from a serious provocation, because of the passage of time and defendant's activities prior to going to the apartment complex. The court also refused to find that the offenses were accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 8 At the sentencing hearing, the State presented victim impact testimony from the victim's father. In aggravation, the State argued a lack of remorse on the part of defendant and asked the court to consider the "facts of the crime itself." The State emphasized that defendant knew what she was doing and that the victim was a teenager and was attempting to run away from the car at the time of the incident. The State emphasized that the victim was "crushed to death, crushed to death so much that everything, everything in the center of his body, organs and bones were either crushed or severed except for his skin." The State further argued that "[defendant] did this knowing he was a teenager, knowing he was running away, she did it with her own 13-year-old son in the car with her." The State asked the court to consider the facts of the crime not to impose an extended term but rather as related to "the degree to which they have been shown to [the court] in making a determination as to where [it would] sentence the Defendant in that range of 20 to 60 years." The State asked for a sentence of 48 years in prison.

¶ 9 In mitigation, defense counsel argued that defendant was remorseful and asked the court to consider that she accepted responsibility and confessed to the offense. Defense counsel also asked the court to consider that defendant was provoked by the victim's actions, which took place the night before the offense, and that defendant wanted to protect her child. Defense counsel also asked the court to consider defendant's lack of criminal history and the hardship on her children. Finally,

counsel asked the court to consider that defendant's conduct was the result of circumstances unlikely to recur. Defense counsel asked the court for a sentence of 20 years in prison.

¶ 10 Defendant made a statement in allocution. Defendant acknowledged that what she did was wrong. She explained that she acted out of love for her child and out of a desire to protect him. She stated that, when she saw the victim, she "snapped." She apologized for what happened to the victim, and she apologized to her children.

¶ 11 In sentencing defendant, the court began by noting that it would consider the evidence at trial, the presentence investigation reports, the financial impact of incarceration, and the evidence in aggravation and mitigation. With respect to the factors in mitigation, the court stated: "I can find in mitigation that the Defendant has no history of prior criminal activity and I can find that the Defendant's criminal conduct was a result of circumstances unlikely to reoccur." The court stated that it "cannot agree with [defense counsel] on the other factors as having been found or demonstrated by the circumstances." With respect to the factors in aggravation, the court stated: "In aggravation, I can find that the Defendant's conduct caused or threatened serious physical harm and also must make a finding that the sentence is necessary to deter others from committing the same crime, part of which is built into the sentencing range from the legislature." The court then commented that nothing it did would compensate the victim's family for its loss. Thereafter, the court stated:

"So often as I sit here after hearing facts at a trial or a sentencing hearing, I silently wonder, what were you thinking when you did what you did? How could the events in your life be so overwhelming as you would do something so hurtful to another person without any apparent self-control? How can you not see beyond the sudden impulse that what you're

doing also will affect yourself and your family and the community in which you live? Too often the answer is there was no thought involved, there was no restraint, there was no recognition then that the actions that take place in a matter of seconds will alter the life of others forever and alter your life, as well. Our community, our society is founded on an assumption and an expectation that people will think before they act and then act to try and avoid harm to their own interest and to others and that we expect that people will act consistent with these principles and values that they have in life. And, of course, we assume that people have values and principles that are consistent with our own. Not necessarily the case. When people don't act in accordance with this community understanding, then the community expects consequences, expects to be protected from those that demonstrate the frightening lack of self-control and that's again why we are here today.

The sentencing ranges in any case whether you look at and think that the lower end is appropriate or the higher end is appropriate is vested in a judge. And the reasons for lower-end sentences frequently are in a case of this magnitude, a self-defense claim that wasn't upheld. There might be factual differences between the charge of first and second degree murder or another homicide charge, might be guilty by accountability for the acts of another. All of these could suggest that a minimum end is adequate to send the necessary message. And I did make a finding that the evidence in this case didn't meet the legal test of heinous and brutal, which would have allowed argument for an extended term sentence, but it doesn't mean that it wasn't a finding that it was outrageous, unnecessary and just almost beyond description."

¶ 12 Thereafter the court sentenced defendant to 34 years in prison. The court also imposed “costs of \$350, DNA indexing of \$200, trauma fee of \$100” and found that the two counts merged. The court granted defendant credit for time served since November 8, 2009.

¶ 13 Without first filing a postsentencing motion, defendant timely appealed.

¶ 14 II. ANALYSIS

¶ 15 A. Prison Term

¶ 16 Defendant argues that the trial court abused its discretion in imposing a 34-year prison sentence, because it improperly considered in aggravation “that the Defendant’s conduct caused or threatened serious physical harm,” which is a factor inherent in the offense of murder, and because it failed to consider numerous mitigating factors. The State argues that the trial court’s sentence was proper.

¶ 17 As an initial matter, we note that defendant did not object to the trial court’s alleged consideration of the improper aggravating factor or file a postsentencing motion, and thus she has forfeited her arguments on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (to preserve a claim of sentencing error, the defendant must object at the sentencing hearing and raise the objection in a postsentencing motion). Defendant acknowledges that she forfeited the issue but urges us to consider it under the plain-error rule. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Hillier*, 237 Ill. 2d at 545. Plain error is a limited and narrow exception to the general forfeiture rule. *Hillier*, 237 Ill. 2d at 545. To obtain relief under the plain-error rule, a defendant must first show that reversible error occurred. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008). If the error complained of is not reversible, a reviewing court need not go any further, because, without a reversible error, the defendant cannot invoke the plain-error rule. *Id.* On the other hand, if reversible error is identified,

the defendant may obtain relief if the error complained of meets either prong of the two-pronged plain-error rule. *Id.* That is, in the sentencing context, the defendant must show either that: “(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing.” *Hiller*, 237 Ill. 2d at 545. Defendant bears the burden of persuasion under either prong of the plain error rule. *Id.* We note that defendant did not specifically address the plain error factors. Instead, she argues (quite tersely) that the sentence imposed was manifestly excessive and the product of an abuse of discretion. In any event, we find that application of the plain-error doctrine is not warranted in this case, because defendant has failed to establish that the trial court committed reversible error in sentencing her to 34 years’ imprisonment.

¶ 18 Our constitution requires that “[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” Ill. Const. 1970, art. I, § 11. A reviewing court will not disturb a sentence that is within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). The sentencing range for first-degree murder is 20 to 60 years. See 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant’s rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* So long as the trial 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. Bosley*, 233 Ill. App. 3d 132, 139 (1992) (quoting *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990)). A

sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 210. “It is the province of the trial court to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case” (*People v. Latona*, 184 Ill. 2d 260, 272 (1998)), and the reviewing court may not substitute its judgment for that of the trial court merely because it might weigh the pertinent factors differently. *Stacey*, 193 Ill. 2d at 209. “The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors.” *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). A sentencing judge is presumed to have considered all relevant factors unless the record affirmatively shows otherwise. *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001).

¶ 19 Defendant’s argument that the court abused its discretion in sentencing her is premised primarily on her claim that the court considered an improper aggravating factor, specifically, that “defendant’s conduct caused or threatened serious harm.” 730 ILCS 5/5-5-3.2 (a)(1) (West 2008). It is well established that the trial court may not consider a factor implicit in an offense as an aggravating factor in sentencing. See *People v. Martin*, 119 Ill. 2d 453, 459-60 (1988); *People v. Saldivar*, 113 Ill. 2d 256, 271 (1986); *People v. Conover*, 84 Ill. 2d 400, 404 (1981). This is because it is reasonable to presume that the legislature already considered the factor in establishing the penalty for the offense. *Conover*, 84 Ill. 2d at 405. Thus, in *Saldivar*, the supreme court held that the trial court erred when it considered the harm done to the victim as an aggravating factor in imposing sentence for voluntary manslaughter. *Saldivar*, 113 Ill. 2d at 271. Nevertheless, this rule is not to be applied rigidly. *Id.* at 268. “[E]very reference by the sentencing court to a factor implicit in the offense does not constitute reversible error. [Citations.] When the weight placed on an

improperly considered aggravating factor is so insignificant that it did not lead to a greater sentence, a remand for resentencing is not required. [Citations.]” *People v. Burge*, 254 Ill. App. 3d 85, 91 (1993). In considering whether error occurred, a reviewing court should not focus on a few words or statements of the trial court, but should make its decision based on the record as a whole. *People v. Curtis*, 354 Ill. App. 3d 312, 326 (2004).

¶ 20 Here, the judge stated: “In aggravation, I can find that the Defendant’s conduct caused or threatened serious physical harm.” Notwithstanding this isolated comment concerning “harm,” the judge otherwise made no improper reference to the death of the victim. Defendant points to no comment, other than the comment complained of, to support her argument. This fact distinguishes the present case from those relied on by defendant. In *Saldivar*, the record demonstrated that the judge “focused primarily on the end result of the defendant’s conduct, *i.e.*, the death of the victim.” *Saldivar*, 113 Ill. 2d at 272. In *Martin*, the record demonstrated that “the trial court focused solely on the victim’s death in sentencing the defendant.” *Martin*, 119 Ill. 2d at 460-461. Looking at the record of the sentencing hearing as a whole, it is clear that the court did not place any weight on the victim’s death as an aggravating factor in sentencing defendant. The court properly commented on the protection of the public, deterrence, and punishment. The court also commented that, although it did not make a finding that the offense was brutal and heinous, such that an extended sentence would apply, “it doesn’t mean that it wasn’t a finding that it was outrageous, unnecessary and just almost beyond description.” As the supreme court noted in *Saldivar*, it is not improper for a court to consider the degree of harm caused to a victim. The *Saldivar* court stated:

“While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be

considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*” (Emphases in original.) *Saldivar*, 113 Ill. 2d at 269.

¶ 21 Further, also relevant is the fact that, here, the State made no argument that the court should consider in aggravation that defendant’s conduct caused the victim’s death. In *People v. Abdelhadi*, 2012 IL App (2d) 111053, and *People v. Dowding*, 388 Ill. App. 3d 936 (2009), the State argued the improper aggravating factor during the sentencing hearing. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 12 (during the sentencing hearing for the defendant’s conviction of aggravated arson, the State argued in aggravation that the defendant’s conduct endangered the lives of others); *Dowding*, 388 Ill. App. 3d at 943 (during the sentencing hearing for the defendant’s conviction of aggravated driving under the influence, the State argued in aggravation that the defendant’s conduct caused or threatened serious harm, specifically that he “ ‘killed someone’ ” or “ ‘caused the death of someone’ ”). In each case, we found that, because the trial court, in announcing its sentencing decision, “mirrored” the improper factors that the State argued, the court actually relied on the improper factors rather than merely mentioned them. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 12; *Dowding*, 388 Ill. App. 3d at 944. Here, in aggravation, the State focused on the degree of harm and the nature and circumstances of the offense. Thus, though the trial court mentioned that “[d]efendant’s conduct caused or threatened serious physical harm,” it did not rely on the victim’s death in sentencing defendant.

¶ 22 Defendant also argues that the sentence was an abuse of discretion where the court “fail[ed] to recognize the many mitigating factors,” such as defendant’s age, her lack of criminal history, the fact that she had three children, the fact that she acted under a strong provocation, the fact that the

criminal conduct was the result of circumstances unlikely to recur, the unlikeliness that she would commit another crime, her cooperation with authorities, and her expression of remorse. However, the record refutes defendant's contention. The court expressly considered and rejected defendant's argument that she acted under a strong provocation, because of the passage of time and defendant's activities prior to going to the apartment complex, when it found defendant guilty of first-degree murder. In addition, contrary to defendant's claim, the court also expressly considered in mitigation that defendant had no history of criminal activity and that defendant's criminal conduct was a result of circumstances unlikely to recur. All of the other factors cited by defendant were before the court and presumably considered. See *Hernandez*, 319 Ill. App. 3d at 529. Defendant essentially asks this court to reweigh the evidence and strike a new balance warranting a lesser sentence. This we may not do. The trial court was in the best position to observe and evaluate the myriad factors that comprised the sentencing determination, and we will not substitute our judgment for that of the trial court merely because we might have weighed the factors differently. *People v. Perruquet*, 68 Ill. 2d 149, 156 (1977). In any event, as noted, the most important factor to be considered in sentencing a defendant is the seriousness of the offense. See *Quintana*, 332 Ill. App. 3d at 109. Given the nature of the offense, we cannot say that the trial court abused its discretion in sentencing defendant to a prison term six years below the midpoint of the range of available sentences. Accordingly, we find no error.

¶ 23

B. Trauma Center Fund Fee

¶ 24 Defendant next argues that the trial court erred in imposing the \$100 Trauma Center Fund fee, because a Trauma Center Fund fee may be assessed only against a person (1) convicted of, or receiving an order of supervision for, driving under the influence of drugs or alcohol (730 ILCS 5/5-

9-1(c-5) (West 2008)) or (2) convicted of certain drug offenses (730 ILCS 5/5-9-1.1(b) (West 2008)) or (3) convicted of certain weapon offenses (730 ILCS 5/5-9-1.10 (West 2008)). Defendant points out that first-degree murder is not among the offenses for which the fee may be assessed. The State concedes that it was error to assess the fee. Defendant and the State are correct that the Trauma Center Fund fee is not statutorily authorized. Accordingly, we vacate the Trauma Center Fund fee.

¶ 25 C. Imposition of Mandatory Fines

¶ 26 Finally, the State asks that the matter be remanded for the imposition of numerous mandatory fines that the trial court failed to impose. The imposition of a fine is a judicial act. *People v. Isaacson*, 409 Ill. App. 3d 1079, 1085 (2011). In *Isaacson*, the trial court failed to determine the proper amount to be assessed for a mandatory fine. *Id.* at 1086. The reviewing court remanded the cause for the determination to be made by the trial court. *Id.* We agree with the State and remand for this purpose.

¶ 27 Defendant asks that, on remand, she been given monetary credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)), which provides the following:

“Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine.”

A defendant may apply for the credit for the first time on appeal. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). The record reflects that defendant was in custody from the offense date, November

8, 2009, through the sentencing date, November 9, 2011. Accordingly, on remand the proper credit should be awarded.

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we vacate the Trauma Center Fund fee and we remand the cause for imposition of the mandatory fines and award of the proper credit. In all other aspects, the judgment of the circuit court of Kane County is affirmed.

¶ 30 Affirmed in part and vacated in part; cause remanded.